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THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XXIV.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXIV.

*EXECUTORS AND ADMINIS-
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EXTRADITION AND FUGITIVE
OFFENDERS.*

*FACTORIES AND SHOPS.
FAMILY ARRANGEMENTS.
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In this Volume English Cases reported up to 1st July, 1925, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

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FIRST FRUITS.

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FISH.

See FISHERIES.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	...	...	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	...	...	...	...	...	Eng.
A. Jur. Rep.	...	...	Australian Jurist Reports	...	...	...	...	...	Aus.
A. L. T.	...	...	Australian Law Times	...	...	...	...	...	Aus.
A. R.	...	...	Ontario Appeals	...	...	...	...	...	Can.
Act.	...	...	Acton's Reports, Prize Causes, 2 vols., 1809—1841	...	...	...	...	...	Eng.
Ad. & El.	...	...	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	...	...	...	...	...	Eng.
Adam	...	...	Adam's Justiciary Reports (Scotland), 1893—(current)	...	...	...	...	...	Scot.
Add.	...	...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	...	...	...	...	...	Eng.
Agra	...	...	Agra High Court	...	...	...	...	...	Ind.
Agra F. B.	...	...	Agra High Court, Full Bench	...	...	...	...	...	Ind.
Alc. & N.	...	...	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	...	...	...	...	...	Ir.
Alc. Reg. Cas.	...	...	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	...	...	...	...	...	Ir.
Aleyn	...	...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	...	...	...	...	...	Eng.
All.	...	...	New Brunswick Reports (Allen)	...	...	...	...	...	Can.
Alta. L. R.	...	...	Alberta Law Reports	...	...	...	...	...	Can.
Amb.	...	...	Ambler's Reports, Chancery, 1 vol., 1716—1783	...	...	...	...	...	Eng.
And.	...	...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	...	...	...	...	...	Eng.
Andr.	...	...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	...	...	...	...	...	Eng.
Anst.	...	...	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	...	...	...	...	...	Eng.
App. Cas.	...	...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	...	...	...	...	...	Eng.
App. Ct. Rep.	...	...	Appeal Court Reports	...	...	...	...	...	N.Z.
App. D.	...	...	South African Law Reports, Appellate Division	...	...	...	...	...	S. Af.
Architects' L. R.	...	...	Architects' Law Reports, 4 vols., 1904—1909	...	...	...	...	...	Eng.
Argus L. R.	...	...	Argus Law Reports	...	...	...	...	...	Aus.
Arkley	...	...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	...	...	...	...	...	Scot.
Arm. M. & O.	...	...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	...	...	...	...	...	Ir.
Arn.	...	...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	...	...	...	...	...	Eng.
Arn. & H.	...	...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	...	...	...	...	...	Eng.
Ashb.	...	...	Ashburner's Principles of Equity, 1902	...	...	...	...	...	Eng.
Asp. M. L. C.	...	...	Aspinall's Maritime Law Cases, 1870—(current)	...	...	...	...	...	Eng.
Atk.	...	...	Atkyns' Reports, Chancery, 3 vols., 1736—1754	...	...	...	...	...	Eng.
Ayl. Pan.	...	...	Ayliffe's New Pandect of Roman Civil Law	...	...	...	...	...	Eng.
Ayl. Par.	...	...	Ayliffe's Parergon Juris Canonici Anglicani	...	...	...	...	...	Eng.
B.	...	...	Barber's Gold Law	...	...	...	...	...	S. Af.
B. & Ad.	...	...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	...	...	...	...	...	Eng.
B. & Ald.	...	...	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	...	...	...	...	...	Eng.
B. & C.	...	...	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	...	...	...	...	...	Eng.
B. & C. R. (preceded by date)	...	...	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	...	...	...	...	...	Eng.
B. & S.	...	...	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	...	...	...	...	...	Eng.
B. C. R.	...	...	British Columbia Reports	...	...	...	...	...	Can.
B. Dig.	...	...	Bose's Digest	...	...	...	...	...	Ind.
B. L. R.	...	...	Bengal Law Reports	...	...	...	...	...	Ind.
B. L. R. A. C.	...	...	Bengal Law Reports, Appeal Cases	...	...	...	...	...	Ind.
B. L. R. P. C.	...	...	Bengal Law Reports, Privy Council	...	...	...	...	...	Ind.
B. L. R. Sup. Vol.	...	...	Bengal Law Reports, Supp. Vol.	...	...	...	...	...	Ind.
B. W. C. C.	...	...	Butterworths' Workmen's Compensation Cases, 1907—(current)	...	...	...	...	...	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

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Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin.	Clark and Finnely's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas. ...	...	Clark and Scully's Drainage Cases	Can.
Clay. ...	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick. ...	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ...	...	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent. ...	...	Coke's Entries	Eng.
Co. Inst. ...	...	Coke's Institutes	Eng.
Co. L. J. ...	...	Colonial Law Journal	N.Z.
Co. Litt. ...	...	Coke on Littleton (1 Inst.)	Eng.
Co. Rep. ...	...	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch. ...	...	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll. ...	...	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid. ...	...	Collectanea Juridica, 2 vols.	Eng.
Colles ...	...	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt. ...	...	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com. ...	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas. ...	...	Commercial Cases, 1895—(current)	Eng.
Com. Dig. ...	...	Comyns' Digest	Eng.
Comb. ...	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. ...	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig. ...	...	Congdon's Digest	Can.
Const ...	...	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al. ...	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas. ...	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G. ...	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas. ...	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough.	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. temp. Cott.	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor. ...	...	Coryton's Reports	Ind.
Corb. & D. ...	...	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud.	...	Correspondances Judiciaires	Can.
Couper ...	...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	Scot.
Cout. ...	...	Coutlees' Unreported Cases	Can.
Cout. Dig. ...	...	Coutlees' Digest	Can.
Cowp. ...	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk. ...	...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C. ...	...	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas. ...	...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H. ...	...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J. ...	...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ...	...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph. ...	...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	Eng.
Cr. App. Rep. ...	...	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R. ...	...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D. ...	...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas.	...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car. ...	...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz. ...	...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac. ...	...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig. ...	...	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn. ...	...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt. ...	...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D.	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.

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Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	Scot.
Dan.	...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	Eng.
Dan. & Ll.	...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	Eng.
Dav. & Mer.	...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	...	Eng.
Dav. Ir.	...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—	...	-
Dav. Pat. Cas.	...	...	Davies' Patent Cases, 1 vol., 1785—1816	...	Eng.
Day	...	...	Day's Election Cases, 1 vol., 1892—1893	...	Eng.
Dea. & Sw.	...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	...	Eng.
Deac.	...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	...	Eng.
Deac. & Ch.	...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	...	Eng.
Dears. & B.	...	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	...	Eng.
Dears. C. C.	...	...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856	...	Eng.
Deas & And.	...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	...	Scot.
De G.	...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	...	Eng.
De G. & J.	...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	...	Eng.
De G. & Sm.	...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	...	Eng.
De G. F. & J.	...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	...	Eng.
De G. J. & Sm.	...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	...	Eng.
De G. M. & G.	...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	...	Eng.
Delane	...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	...	Eng.
Den.	...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852	...	Eng.
Dick.	...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798	...	Eng.
Dirl.	...	...	Dirlerton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	...	Scot.
Dods.	...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822	...	Eng.
Donnelly	...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	...	Eng.
Doug. El. Cas.	...	...	Douglas' Election Cases, 4 vols., 1771—1776	...	Eng.
Doug. K. B.	...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	...	Eng.
Dow	...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818	...	Eng.
Dow & Cl.	...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	...	Eng.
Dow. & L.	...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	...	Eng.
Dow. & Ry. K. B.	...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	...	Eng.
Dow. & Ry. M. C.	...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	...	Eng.
Dow. & Ry. N. P.	...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	...	Eng.
Dowl.	...	...	Dowling's Practice Reports, 9 vols., 1830—1841	...	Eng.
Dowl. N. S.	...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	...	Eng.
Dr. & Wal.	...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	...	Ir.
Dr. & War.	...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	...	Ir.
Dra.	...	...	Draper's King's Bench Reports	...	Can.
Drew.	...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859	...	Eng.
Drew. & Sm.	...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	...	Eng.
Drinkwater	...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	...	Eng.
Drury <i>temp.</i> Nap.	...	...	Drury's Reports <i>temp.</i> Napier, Chancery (Ireland), 1 vol., 1858—1859	...	Ir.
Drury <i>temp.</i> Sug.	...	...	Drury's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1841—1844	...	Ir.
Dugd. Orig.	...	...	Dugdale's Origines Juridicales	...	Eng.
Dunl. (Ct. of Sess.)	...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	...	Scot.
Dunning	...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754	...	Eng.
Durie	...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	...	Scot.
Dyer	...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581	...	Eng.
E. & A.	...	...	Upper Canada Error and Appeal	...	Can.
E. & B.	...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	...	Eng.
E. & E.	...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	...	Eng.
E. B. & E.	...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	...	Eng.
E. D. C.	...	...	Reports of the Eastern Districts Court (Cape) from 1880	...	S. Af.
E. D. L.	...	...	South African Law Reports, Eastern Districts Local Division	...	S. Af.
E. L. R.	...	...	Eastern Law Reporter	...	Can.
E. R. (or Eng. Rep.)	...	...	English Reports	...	Eng.
E. R.	...	...	Ontario Election Reports	...	Can.
Eag. & Y.	...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	...	Eng.

xx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	...	Eng.
East, P. C.	...	...	East's Pleas of the Crown	...	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	...	Can.
F. (Ct. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	...	S. Af.
F. & F.	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	...	Eng.
F. N. D.	...	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1811	...	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	...	Eng.
Fortes. Rep.	...	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	...	Eng.
Fost.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	...	Can.
G. I. Dig.	...	...	General Index Digest	...	...	Can.
G. W. L.	...	...	South African Law Reports, Griqualand West Local Division	...	...	S. Af.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 3 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	...	Eng.
Glanv. El. Cas.	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	...	Eng.
Glascoc	...	...	Glascoc's Reports (Ireland), 1 vol., 1831—1832	...	...	Ir.

Godb. ...	...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb. ...	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow ...	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr. ...	...	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases ...	...	Griffin's Patent Cases, 1884—1887	Eng.
Gwill. ...	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H. ...	...	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C. ...	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N. ...	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw. ...	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W. ...	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date) ...	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C. ...	...	Reports of the High Court of Griqualand West	S. Af.
H. E. C. ...	...	Hodgin's Election Reports	Can.
H. L. Cas. ...	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm. ...	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con. ...	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc. ...	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes ...	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot
Hale, C. L. ...	...	Hale's Common Law	Eng
Hale, P. C. ...	...	Hale's Pleas of the Crown, 2 vols.	Eng.
Han. ...	...	New Brunswick Reports (Hannay)	Can.
Har. & Ruth. ...	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W. ...	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc. ...	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard. ...	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Harc. ...	...	Harc's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C. ...	...	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay ...	...	Hay's Reports	Ind.
Hay & Marr. ...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes ...	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo. ...	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M. ...	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het. ...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob. ...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg. ...	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog. ...	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1831	Ir.
Holt, Adm. ...	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq. ...	...	W. Holt's Equity Reports, 2 vols., 1845	Eng.
Holt, K. B. ...	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P. ...	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess. ...	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R. ...	...	Hong Kong Reports	Hong Kong
Hop. & Colt. ...	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph. ...	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ...	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp. ...	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C. ...	...	Howard's Chancery Practice	Ir.
How. C. S. ...	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ...	...	Howard's Equity Exchequer	Ir.
How. P. L. ...	...	Howard on the Popery Laws	Ir.
Hud. & B. ...	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ...	...	Hudson on Building Contracts, 2 vols.	Eng.
Hume ...	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut. ...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl. ...	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde ...	...	Hyde's Reports	Ind.
I. C. L. R. ...	...	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R. ...	...	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. E. R. ...	...	Irish Equity Reports, 13 vols., 1838—1851	Ir.

xxii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	...	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	...	...	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	...	...	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	...	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	...	Ind.
I. L. R. (Vol.) Pat.	...	Indian Law Reports, Patna	...	...	...	Ind.
I. L. R. (Vol.) Ran.	...	Indian Law Reports, Rangoon	...	...	...	Ind.
I. L. T. ...	...	Irish Law Times, 1867—(current)	...	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> , [1894] 1 I. R.)	...	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	...	Eng.
J. R.	...	Jurist Reports	...	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	...	Can.

xxiv REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	...	Legal Reporter	...	...	...	...	...	Ir.
Legge	...	...	Legge's Reports	...	...	...	...	...	Aus.
Leon.	...	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	...	...	...	...	Eng.
Lev.	...	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	...	...	...	...	Eng.
Lew. C. C.	...	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	Eng.
Ley	...	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	Eng.
Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	...	...	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	...	...	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	...	...	...	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	...	...	...	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	...	...	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	...	...	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	...	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	Eng.
M. C. R.	...	...	Montreal Condensed Reports	...	...	...	...	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	...	...	...	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	...	...	...	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	...	...	...	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	...	...	...	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	...	...	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	...	...	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	...	...	...	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	...	...	...	Scot.
Macl. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	...	...	...	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	...	...	...	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	...	...	...	Eng.
Mad.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	...	...	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	...	...	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	...	...	...	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	...	...	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	...	...	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	...	...	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	...	...	...	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	...	...	...	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	...	...	...	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	...	...	...	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports	...	...	...	...	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	...	...	...	Eng.

Men. ...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer. ...	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw. ...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep. ...	Modern Reports, 12 vols., 1669—1755	Eng.
Mol. ...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont. ...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A. ...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date) ...	Northern Ireland Law Reports, 1925—(current) (<i>e.g.</i> , [1925] N.)	Ir.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.) ...	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.) ...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ...	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.) ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ...	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ...	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.) ...	New Brunswick Reports (Trueman)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. P. D. ...	South African Law Reports, Natal Provincial Division	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (Coch.) ...	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.) ...	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James) ...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.) ...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ...	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts. ...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.) ...	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.) ...	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S. ...	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. ...	New South Wales Weekly Notes	Aus.
N. W. ...	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ...	North-West Territories Reports	Can.
N. Z. Jur. ...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law ...	New Zealand Jurist Mining Law	N.Z.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	...	New Zealand Jurist, New Series	...	...	...	N.Z.
N. Z. L. R. ...	...	New Zealand Law Reports, 1883—(current)	...	...	...	N.Z.
N. Z. L. R. C. A. ...	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	...	...	...	N.Z.
Nels. ...	...	Nelson's Reports, Chancery, 1 vol., 1625—1693	...	...	...	Eng.
Nev. & M. K. B. ...	...	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	...	...	...	Eng.
Nev. & M. M. C. ...	...	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	...	...	...	Eng.
Nev. & P. K. B. ...	...	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	...	...	...	Eng.
Nev. & P. M. C. ...	...	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837	...	...	...	Eng.
New Mag. Cas. ...	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	...	...	...	Eng.
New Pract. Cas. ...	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	...	...	...	Eng.
New Rep. ...	...	New Reports, 6 vols., 1862—1865	...	...	...	Eng.
New Sess. Cas. ...	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	...	...	...	Eng.
Nfld. L. R. ...	...	Newfoundland Reports	...	...	...	Nfld.
Nolan ...	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	...	...	...	Eng.
Notes of Cases ...	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	...	...	...	Eng.
Noy ...	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	...	...	...	Eng.
O. B. & F. ...	...	Ollivier Bell and Fitzgerald's Reports	...	...	...	N.Z.
O. B. S. P. ...	...	Old Bailey Session Papers	...	...	...	Eng.
O. Bridg. ...	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	...	...	...	Eng.
O. F. S. ...	...	Reports of the High Court of the Orange Free State, 1879—1883	...	...	...	S. Af.
O. L. R. ...	...	Ontario Law Reports	...	...	...	Can.
O'M. & H. ...	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	...	...	...	Eng.
O. P. D. ...	...	South African Law Reports, Orange Free State Provincial Division	...	...	...	S. Af.
O. R. ...	...	Ontario Reports	...	...	...	Can.
O. R. ...	...	Official Reports of the South African Republic, 1894—1899	...	...	...	S. Af.
O. R. C. ...	...	Reports of the High Court of the Orange River Colony	...	...	...	S. Af.
O. S. ...	...	Upper Canada Queen's Bench, Old Series	...	...	...	Can.
O. W. N. ...	...	Ontario Weekly Notes	...	...	...	Can.
O. W. R. ...	...	Ontario Weekly Reporter	...	...	...	Can.
Old. ...	...	Nova Scotia Reports (Oldrights)	...	...	...	Can.
Ont. Dig. ...	...	Digest of Ontario Case Law, 4 vols., 1823—1900	...	...	...	Can.
Owen ...	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	...	...	...	Eng.
P. (preceded by date) ...	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.)	...	...	...	Eng.
P. & B. ...	...	New Brunswick Reports (Pugsley and Burbidge)	...	...	...	Can.
P. & T. ...	...	New Brunswick Law Reports (Pugsley and Trueman)	...	...	...	Can.
P. Cas. ...	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	...	...	...	Eng. & Col.
P. D. ...	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	...	...	...	Eng.
P. E. I. ...	...	Prince Edward Island Reports	...	...	...	Can.
P. R. ...	...	Ontario Practice	...	...	...	Can.
P. Wms. ...	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	...	...	...	Eng.
Palm. ...	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	...	...	...	Eng.
Park. ...	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	...	...	...	Eng.
Pat. App. ...	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	...	...	...	Scot.
Pater. App. ...	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	...	...	...	Scot.
Peake ...	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	...	...	...	Eng.
Peake, Add. Cas. ...	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	...	...	...	Eng.
Peck. ...	...	Peckwell's Election Cases, 2 vols., 1803—1806	...	...	...	Eng.
Pelham ...	...	Pelham (S. A.) Reports	...	...	...	Aus.
Per. & Dav. ...	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	...	...	...	Eng.
Per. & Kn. ...	...	Perry and Knapp's Election Cases, 1 vol., 1833	...	...	...	Eng.
Per. C. S. ...	...	Perrault's Conseil Supérieur	...	...	...	Can.
Per. P. ...	...	Perrault's Prévosté de Quebec, 1726—1756	...	...	...	Can.
Ph. ...	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	...	...	...	Eng.
Phil. El. Cas. ...	...	Philipps' Election Cases, 1 vol., 1780	...	...	...	Eng.
Phillim. ...	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	...	...	...	Eng.
Phillim. Eccl. Jud. ...	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	...	...	...	Eng.
Phip. ...	...	Phipson's Digest of Natal Reports, 1858—1859	...	...	...	S. Af.
Pig. & R. ...	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	...	...	...	Eng.
Pitc. ...	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	...	...	...	Scot.
Plowd. ...	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	...	...	...	Eng.
Poll. ...	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	...	...	...	Eng.
Poph. ...	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	...	...	...	Eng.
Pow. R. & D. ...	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	...	...	...	Eng.

Pratt	...	...	Pratt's Supplement to Bott's Poor Laws, 1833	...	...	Eng.
Prec. Ch.	...	...	Precedents in Chancery, fol., 1 vol., 1689—1722	...	...	Eng.
Price	...	...	Price's Reports, Exchequer, 13 vols., 1814—1824	...	...	Eng.
Price	...	...	Price's Mining Commissioners' Cases	...	...	Can.
Pug.	...	...	New Brunswick Reports (Pugsley)	...	...	Can.
Py. R.	...	...	Pykes' Lower Canada Reports	...	...	Can.
Q. B.	...	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	...	...	Eng.
Q. B. (preceded by date)	...	...	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	...	...	Eng.
Q. B. D.	...	...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	...	Eng.
Q. J. P.	...	...	Queensland Justice of Peace Reports	...	...	Aus.
Q. L. J.	...	...	Queensland Law Journal and Reports, 11 vols., 1879—1901	...	...	Aus.
Q. L. R.	...	...	Quebec Law Reports	...	...	Can.
Q. L. R. (Beor)	...	...	Queensland Law Reports by Beor, 1876—1878	...	...	Aus.
Q. P. R.	...	...	Quebec Practice Reports	...	...	Can.
Q. R. (Vol.) K. B. or Q. B.	...	...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	...	...	Can.
Q. R. (Vol.) S. C.	...	...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	...	...	Can.
Q. S. C. R.	...	...	Queensland Supreme Court Reports, 5 vols., 1860—1881	...	...	Aus.
Q. S. R.	...	...	Queensland State Reports	...	...	Aus.
Q. W. N.	...	...	Weekly Notes, Queensland	...	...	Aus.
R.	...	...	The Reports, 15 vols., 1893—1895	...	...	Eng.
R.	...	...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	...	S. Af.
R. (Ct. of Sess.)	...	...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	...	...	Scot.
R. A. C.	...	...	Ramsay, Appeal Cases	...	...	Can.
R. & C.	...	...	Nova Scotia Reports (Russell & Chesley)	...	...	Can.
R. & G.	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	Can.
R. C.	...	...	La Revue Critique de Législation et de Jurisprudence de Canada	...	...	Can.
R. de J.	...	...	Revue de Jurisprudence	...	...	Can.
R. de L.	...	...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	...	...	Can.
R. E. D.	...	...	New South Wales, Reserved and Equity Decisions	...	...	Aus.
R. E. D.	...	...	Ritchie's Equity Decisions (Russell)	...	...	Can.
R. J. R. Q.	...	...	Quebec Revised Reports	...	...	Can.
R. L. N. S.	...	...	Revue Légale, New Series, 1895—(current)	...	...	Can.
R. L. O. S.	...	...	Revue Légale, Old Series, 21 vols., 1869—1892	...	...	Can.
R. P. C.	...	...	Reports of Patent Cases, 1881—(current)	...	...	Eng.
R. R.	...	...	Revised Reports	...	...	Eng.
Rast.	...	...	Rastell's Entries	...	...	Eng.
Rayn.	...	...	Rayner's Tithe Cases, 3 vols., 1575—1782	...	...	Eng.
Real Prop. Cas.	...	...	Real Property Cases, 2 vols., 1843—1847	...	...	Eng.
Rep. Ch.	...	...	Reports in Chancery, fol., 3 vols., 1615—1710	...	...	Eng.
Rep. in C. of A.	...	...	Reports in Courts of Appeal	...	...	N.Z.
Res. & Eq. Jud.	...	...	New South Wales Reserved and Equity Judgments	...	...	Aus.
Reserv. Cas.	...	...	Reserved Cases	...	...	Ir.
Rick. & M.	...	...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	...	...	Eng.
Rick. & S.	...	...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	...	...	Eng.
Ridg. L. & S.	...	...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	...	...	Ir.
Ridg. Parl. Rep.	...	...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	...	...	Ir.
Ridg. temp. H.	...	...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	...	...	Eng.
Ritch. Eq. Rep.	...	...	Ritchie's Equity Reports	...	...	Can.
Rob. Eccl.	...	...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	...	...	Eng.
Rob. L. & W.	...	...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	...	...	Eng.
Robert. App.	...	...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	...	...	Scot.
Robin. App.	...	...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	...	...	Scot.
Roll. Abr.	...	...	Rolle's Abridgment of the Common Law, fol., 2 vols.	...	...	Eng.
Roll. Rep.	...	...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	...	...	Eng.
Rom.	...	...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	...	...	Eng.
Roscoe's B. C.	...	...	Roscoe, Digest of Building Cases	...	...	Eng.
Rose	...	...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	...	...	Eng.
Ross, L. C.	...	...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	...	...	Eng.
Rowe	...	...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	...	...	Eng.
Rul. Cas.	...	...	Campbell's Ruling Cases, 25 vols.	...	...	Eng.
Russ.	...	...	Russell's Reports, Chancery, 5 vols., 1824—1829	...	...	Eng.
Russ. & M.	...	...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	...	...	Eng.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R. ...	Russell's Election Reports	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M. ...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S. ...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J. ...	South African Law Journal	S. Af.
S. A. L. R. ...	South Australian Law Reports	Aus.
S. A. L. R. ...	South African Law Reports	S. Af.
S. A. R. ...	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R. ...	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.)	Aus.
S. C. ...	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R. ...	Canada, Supreme Court Reports	Can.
S. L. T. ...	Scots Law Times, 1893 (current)	Scot.
S. Q. R. ...	Queensland State Reports	Aus.
S. R. ...	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C. ...	Stuart's Lower Canada Reports	Can.
S. R. N. S. W. ...	New South Wales, State Reports	Aus.
S. R. Q. ...	Queensland Reports, Supreme Court	Aus.
S. V. A. R. ...	Stuart's Vice-Admiralty Reports	Can.
S. W. A. ...	South-West Africa Law Reports	S.-W. Af.
Saint ...	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk. ...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R. ...	Saskatchewan Law Reports	Can.
Sau. & Sc. ...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A. ...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B. ...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C. ...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M. ...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav. ...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say. ...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur. ...	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R. ...	Scottish Law Reporter, 1865—(current)	Scot.
Sc. R. R. ...	Scots Revised Reports	Scot.
Sch. & Lef. ...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott ...	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R. ...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sea. & Sm. ...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1850—1860	Eng.
Sel. Cas. Ch. ...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P. ...	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B. ...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem. ...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.) ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & MacI. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig. ...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances	Eng.
Show. ...	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas. ...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid. ...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S. ...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin. ...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat. ...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1684—1685 ...	Ir.
Sm. & G. ...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ...	...	Smith's Leading Cases, 2 vols. ...	Eng.
Smith, Reg. Cas. ...	...	C. L. Smith's Registration Cases, 1895—(current) ...	Eng.
Smythe ...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ...	Ir.
Sol. Jo. ...	...	Solicitors' Journal, 1856—(current) ...	Eng.
Spence ...	...	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ...	...	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.) ...	Aus.
Stair Rep. ...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ...	...	Starkie's Reports, Nisi Prius, 3 vols., 1811—1823 ...	Eng.
State Tr. ...	...	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ...	...	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ...	...	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	...	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ...	...	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—	
Stuart ...	...	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ...	...	Swabey's Report, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	Eng.
T. H. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ...	...	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ...	...	Reports of the Supreme Court of the Transvaal, 1910—(current) ...	S. Af.
T. P. D. ...	...	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	Eng.
T. S. ...	...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ...	...	Tasmanian Law Reports ...	Aus.
Taunt. ...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ...	...	Tax Cases, 1875—(current) ...	Eng.
Tay. ...	...	Taylor's King's Bench Reports ...	Can.
Temp. Wood ...	...	Manitoba Reports <i>temp.</i> Wood ...	Can.
Term Rep. ...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ...	...	Territories Law Reports ...	Can.
Thom. ...	...	Nova Scotia Reports (Thomson) ...	Can.
Toth. ...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr. ...	...	Townsend, Modern State Trials ...	Eng.
Trem. P. C. ...	...	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
Trist. ...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tru. ...	...	New Brunswick Reports (Trueman) ...	Can.
Tudor, L. C. Merc. Law. ...	...	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop. ...	...	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
U. C. Jur. ...	...	Upper Canada Jurist ...	Can.
U. C. L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current) ...	Can.

xxx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) (<i>e.g.</i> , [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West <i>temp.</i> Hard.	...	West's Reports <i>temp.</i> Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.

Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex.	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830..	Eng.
Y. B.	...	Year Books ...	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series) ...	Eng.
Y. B. (Sel. Soc.)...	...	Year Books (Selden Society) ...	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ..	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ..	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv.—xxxi., *ante*.)

A.-G.					for Attorney-General.
Act.					„ Actiengesellschaft.
Admlty.					„ Admiralty.
Affd.					„ Affirmed.
Affg.					„ Affirming.
Akt.					„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.					„ Anonymous.
Apld.					„ Applied.
Appet.					„ Applicant.
Appln.					„ Application.
Appln.					„ Application to Register a Trade Mark.
Applt.					„ Appellant.
Apprvd.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	„ Article.
Ass. Tax Case	.	.	.	.	„ Assessed Tax Case.
Assce.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	„ Association.
B. C.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	„ Doubted.
Deft.	.	.	.	.	„ Defendant.

Distd.	for Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
<i>Ex p.</i>	„ <i>Ex parte</i> .
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Extd.	„ Extended.
Extrix.	„ Executrix.
<i>Fi. fa.</i>	„ <i>Fieri facias</i> .
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insce.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	„ Lord Justice.
L.JJ.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.
Ord.	„ Order.
Overd.	„ Overruled.

ABBREVIATIONS.

XXXV

P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ Quære.
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
Sci. fa.	.	.	.	.	.	„ Scire facias.
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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<i>Administration of Convict's Property</i>	CRIMINAL LAW.	<i>Interpretation of Wills</i>	WILLS.
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<i>Appointment of Trustees</i>	SETTLEMENTS; TRUSTS AND TRUSTEES.	<i>Limitation, Statutes of</i>	LIMITATION OF ACTIONS.
<i>Bona vacantia</i>	CONSTITUTIONAL LAW; DESCENT.	<i>Mortmain</i>	CHARITIES; CORPORATIONS; REAL PROPERTY.
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<i>Capital and Income</i>	REAL PROPERTY; RENTCHARGES AND ANNUITIES; SETTLEMENTS; WILLS.	<i>Perpetuities</i>	PERPETUITIES.
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<i>Construction of Wills, generally</i>	WILLS.	<i>Powers</i>	POWERS.
<i>Conversion</i>	EQUITY.	<i>Probate Duty</i>	ESTATE AND OTHER DEATH DUTIES.
<i>Curtesy, Estate by</i>	COPYHOLDS; REAL PROPERTY.	<i>Public Trustee</i>	TRUSTS AND TRUSTEES.
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<i>Descent of Real Estate</i>	DESCENT; REAL PROPERTY.	<i>Revocation and Revival of Will</i>	WILLS.
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<i>Dower</i>	REAL PROPERTY.	<i>Settlements</i>	SETTLEMENTS.
<i>Escheat</i>	CROWN PRACTICE; DESCENT; REAL PROPERTY.	<i>Succession Duty</i>	ESTATE AND OTHER DEATH DUTIES.
<i>Estate Duty</i>	ESTATE AND OTHER DEATH DUTIES.	<i>Tenant for Life, Statutory Powers of</i>	REAL PROPERTY; SETTLEMENTS.
<i>Estates and Interests in Real Estate, generally</i>	REAL PROPERTY.	<i>Testamentary Capacity</i>	WILLS.
<i>Executory Devise</i>	REAL PROPERTY; TRUSTS AND TRUSTEES; WILLS.	<i>Testamentary Dispositions</i>	WILLS.
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<i>Freebench</i>	COPYHOLDS. GIFTS.	<i>Trusts and Trustees</i>	TRUSTS AND TRUSTEES.
<i>Income and Capital</i>	REAL PROPERTY; RENTCHARGES AND ANNUITIES; SETTLEMENTS; WILLS.	<i>Uses and Trusts</i>	REAL PROPERTY; TRUSTS AND TRUSTEES.
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Part V.—Powers and Rights of Representative.

SECT. 1.—TO CARRY ON TESTATOR'S BUSINESS.

SUB-SECT. 1.—POWERS OF REPRESENTATIVE.

A. *In General.*

5971. General rule—No power to carry on testator's business.]—The exors. cannot trade with the effects of testator. So where testator leaves goods, & exor. trades, he is answerable for the value of the goods (LORD HARDWICKE, C.).—*BEARPACKER v. BEARPACKER* (1742), 2 Coop. temp. Cott. 534; 47 E. R. 1291, L. C.

5972. ——— Except for winding up business.]—An exor. cannot carry on the trade of his testator, except for the purpose of winding it up, but he may, & in some cases, is bound to, complete contracts entered into by his testator. *Semble*: when part of testator's property is invested on mtge., the exor. is justified in making such further advances as may be absolutely necessary to secure the first advance. It would be dangerous to lay down any rule which would prevent the exor. from exercising a *bond fide* discretion in such case, or even charge him with a *devastavit* in case the result should disappoint his expectations. In case of loss, however, the *onus* lies on him of showing that he exercised due caution.

Testatrix had advanced money on mtge. of a ship. At her death it was under repair, & the shipbuilders refusing to part with it until payment, the exor., without due consideration, borrowed money & paid off the lien. He afterwards mortgaged the ship to secure the loan he had contracted. The ship produced less than the sub-mtge.:—*Held*: the exor.'s negligence incapacitated him from charging the estate with the advances, & his mtgee., having notice, was not in a better condition.—*COLLINSON v. LISTER* (1855), 20 Beav. 356; 24 L. J. Ch. 762; 26 L. T. O. S. 9; 1 Jur. N. S. 835; 52 E. R. 639; *affd.*, 7 De G. M. & G. 634, L. JJ.

— Unless authorised by will.]—See Sub-sect. 1, B., *post*.

5973. To complete contracts—Entered into by testator.]—Testator having contracted to build a wooden gallery, died before any of the work was done. His exors. completed it after his death:—*Held*: they were entitled to sue for work, labour, & materials, found by them as exors., for the sum to be recovered would be assets.—*MARSHALL v. BROADHURST* (1831), 1 Cr. & J. 403; 1 Tyr. 348; 9 L. J. O. S. Ex. 105; 148 E. R. 1480.

Annotations:—*Reid*. *Edwards v. Grace* (1836), 2 M. & W. 190; *Siboni v. Kirkman* (1836), 1 M. & W. 418; *Corner v. Shew* (1838), 3 M. & W. 350; *Werner v. Humphreys* (1841), 3 Scott, N. R. 226; *Collinson v. Lister* (1855), 20 Beav. 356; *Taylor v. Caldwell* (1863), 3 B. & S. 826.

PART V. SECT. 1, SUB-SECT. 1.—A.

5972 i. General rule—No power to carry on testator's business—Except for winding up business.]—Administrators are *prima facie* bound to realise within a year of the death of intestate, but the ct. here will be more liberal in dealing with reasons for not realising than the English cts.—*Re KEENAN'S ESTATE* (1899), 20 N. S. W. L. R. (B.) 10.

5972 ii. ———.]—Where no express power was given to carry on deceased's business an order sanctioning the carrying on by the personal

representatives was refused:—exors. had a discretionary power either to sell the chattel property with a lease of the premises, or to sell the business as a going concern with a lease until the date fixed for distribution, & an agreement for sale, subject to the approval of the beneficiaries.—*Re BRAIN* (1904), 25 C. L. T. 44; 9 O. L. R. 1; 4 O. W. R. 263.—CAN.

PART V. SECT. 1, SUB-SECT. 1.—B.

5978 i. Under will—Sufficiency of direction—Direction must be distinct & positive.]—Testator bequeathed to his grandson D. his farm implements,

5974. ———.]—*COLLINSON v. LISTER*, No. 5972, *ante*.

5975. To borrow—By mortgage of testator's real estate.]—*M'NEILLIE v. ACTON*, No. 5983, *post*.

———.]—*See, further*, Sect. 2, sub-sect. 3, B. (b), *post*.

5976. To allow third party to carry on business in own name—Liability of party trading to account to representative.]—If exors., who are by testator's will to carry on his trade for the benefit of his family, suffer a person to carry on the trade in his own name, such person may bring actions in his own name, for goods sold by him, though afterwards accountable to the exors.—*WILKES v. LISTER* (1806), 6 Esp. 78, N. P.

5977. ——— For benefit of party trading—Whether breach of trust.]—*PORTLOCK v. GARDNER*, No. 6931, *post*.

B. *Acquisition of Powers.*

5978. Under will—Sufficiency of direction—Direction must be distinct & positive.]—Testator who was carrying on the business of a brewer, in partnership with two other persons, made his will, & thereby gave all his real & personal estate to his son K. & three other persons, upon trust to raise an annuity & portions, & subject thereto, testator directed that the trustees should permit the son during his life, to receive the annual produce & income of testator's real & personal estate for his own use. Testator also appointed his four trustees & his wife his exors. & extrix. On bill filed after a great lapse of time, & after the death of all the trustees & exors., against the personal representatives of deceased exors.:—*Held*: plffs. were entitled to an account & inquiry as to all the property which testator possessed at his death, & what had become thereof, & what steps the exors. took for the purpose of recovering or receiving any part of the property which without their wilful default they might have received.

To authorise exors. to carry on or to permit to be carried on a trade, the property of testator which they hold in trust, there ought to be the most distinct & positive authority & direction given by the will for that purpose.—*KIRKMAN v. BOOTH* (1848), 11 Beav. 273; 18 L. J. Ch. 25; L. T. O. S. 482; 13 Jur. 525; 50 E. R. 821.

Annotations:—*Reid*. *Re Chancellor, Chancellor v. Brown* (1884), 53 L. J. Ch. 443. *Mentd.* *Re Crowther, Midgley v. Crowther* (1895), 43 W. R. 571.

5979. ———.]—A gift & devise by one of the partners in a cotton mill of all his property, estate & effects to trustees, upon trust, to lay out &

etc., but by codicil provided that until D. attained majority, the exors. should manage the farm, & expend the net revenue arising therefrom in the improvement & cultivation of the land, without accounting. D. applied, through his next friend, to have an annual allowance made to him for his support & education:—*Held*: testator having directed the surplus revenue to be used in the improvement of the farm, that disposition could not be legally interfered with & the money diverted to another purpose.—*Re WADDELL, LYNCH v. WADDELL* (1902), 35 N. S. R. 435.—CAN.

Secl. 1.—To carry on testator's business: Sub-sect. 1, B.; sub-sect. 2, A., B. & C.]

invest two-third parts thereof upon real or good personal security, or to transfer same, & allow it to remain in the concern, of which he was one of the co-partners, in the names of his trustees, & alter, vary, change & transpose same as they should think fit, & stand possessed of same, upon trust, for the two sons of testator, with certain powers of advancement out of their respective shares:—*Held*: to authorise the exors. to continue the moneys of testator in the trade, but not to trade with the moneys by becoming partners in the firm.

An exor. not proving the will until after his co-exors. had improperly invested testator's assets cannot justify taking no step in respect of, or interfering with these for a considerable period.—*TRAVIS v. MILNE, MILNE v. MILNE* (1851), 9 Hare, 141; 20 L. J. Ch. 665; 68 E. R. 449.

Annotations:—*Reid*. *Flockton v. Bunning* (1868), 8 Ch. App. 323, n. *Mentd.* *Stainton v. Carron Co.* (1854), 18 Beav. 146; *Brett v. Beckwith* (1856), 26 L. J. Ch. 130; *Yeatman v. Yeatman* (1877), 7 Ch. D. 210; *Bevingfield v. Baxter* (1886), 12 App. Cas. 167; *Meldrum v. Scorer* (1887), 56 L. T. 471; *Alcoy & Gandia Ry. & Harbour Co. v. Greenhill* (1897), 76 L. T. 542.

5980. ——— Power to postpone sale & conversion.—Testator gave all his real & personal estate to trustees, upon trusts for sale & conversion, & to pay the income to his widow during widowhood, & then upon trust for his children. Power was given to postpone the sale of the real & personal estate so long as the trustees might think fit, with a direction that during postponement the rents, profits & income should be paid to the same persons as would be entitled to the income after sale & conversion. Testator, who was a wholesale provision merchant, died in Feb. 1878, & the trustees carried on the business down to Dec. 31, 1879:—*Held*: the power to postpone the sale & conversion of real & personal estate implied a power to carry on the business for a reasonable time with a view to selling it as a going concern.—*Re CHANCELLOR, CHANCELLOR v. BROWN* (1884), 26 Ch. D. 42; 53 L. J. Ch. 443; 51 L. T. 33; 32 W. R. 465, C. A.

Annotations:—*Consd.* *Re Crowther, Midgley v. Crowther*, [1895] 2 Ch. 56. *Follid.* *Re Smith, Arnold v. Smith*, [1896] 1 Ch. 171. *Consd.* *Stanier v. Hodgkinson* (1903), 73 L. J. Ch. 179; *Re Elford, Elford v. Elford*, [1910] 1 Ch. 814. *Reid.* *Rovills v. Bebb* (1900), 82 L. T. 633. *Mentd.* *Re Godden, Teague v. Fox* (1892), 41 W. R. 282.

5981. ————Testator devised & bequeathed his real & personal estate, which included his business, upon trusts for sale & conversion, the proceeds to be invested & to be held upon trust for his wife for life, & afterwards for his children. The will contained a power to postpone the sale, with the usual direction that the income until sale should be paid to the same persons & in the same manner as the income of the trust estate. The trustees carried on testator's business for

twenty-two years, not with a view to a sale, but for the benefit of the widow, to whom the whole of the profits were paid as income:—*Held*: (1) the absolute discretion given to the trustees to postpone the sale involved a power to carry on the business during the period of postponement; (2) the trustees were justified in carrying on the business as they had done; (3) the whole of the profits of the business had been properly paid to the tenant for life.—*Re CROWTHER, MIDGLEY v. CROWTHER*, [1895] 2 Ch. 56; 64 L. J. Ch. 537; 72 L. T. 762; W. R. 571; 11 T. L. R. 380; 13 R. 496.

Annotations:—*As to* (1) *Consd.* *Re Smith, Arnold v. Smith*, [1896] 1 Ch. 171. *Stanier v. Hodgkinson* (1903), 73 L. J. Ch. 179. *As to* (3) *Consd.* *Stanier v. Hodgkinson* (1903), 73 L. J. Ch. 179. *Follid.* *Re Elford, Elford v. Elford*, [1910] 1 Ch. 814.

5982. ————A power to postpone the sale of all or any part of a residue devised & bequeathed on trust to sell, & particularly to sell his business of a pawnbroker with all convenient speed, held not to give power to carry on the business for an indefinite time.

The ct., under the circumstances, authorised the trustees to carry on one of testator's two businesses of a pawnbroker for two years.—*Re SMITH, ARNOLD v. SMITH*, [1896] 1 Ch. 171; 65 L. J. Ch. 269; 74 L. T. 14.

Annotation:—*Reid.* *Re Wragg, Wragg v. Palmer* 121 L. T. 78.

5983. ——— Effect of direction—Power to employ more property than employed at testator's death.—A direction in a will that testator's trade shall be carried on, does not of itself authorise the employment in the trade of more of testator's property than was employed in it at his decease, nor does such a direction, coupled with a direction that testator's debts shall be paid, authorise a mtge. of his real estate, not employed at his death in the trade, for the purpose of carrying it on. Therefore, where the husband of an extrix., under such a will, borrowed money from a person in whom the legal estate of part of testator's real estate was vested under a satisfied mtge., stating that the advance was required to carry on testator's business, & deposited the deeds with the lender, on an agreement that the legal estate still subsisting in him should be a security for the advance:—*Held*: the security was invalid against the persons beneficially interested under the will. *Qu.*: whether if the will had authorised the mtge. it could have been created without a deed acknowledged by the extrix.—*M'NEILLIE v. ACTON* (1853), 4 De G. M. & G. 744; 2 Eq. Rep. 21; 23 L. J. Ch. 11; 22 L. T. O. S. 111; 17 Jur. 1041; 43 E. R. 699, L. J.J.

Annotations:—*Reid.* *Ashworth v. Outram* (1877), 5 Ch. D. 923; *Fraser v. Murdoch* (1881), 6 App. Cas. 855. *Mentd.* *Lovell v. Newton* (1878), 4 C. P. D. 7; *Eccl. Comrs. v. Pinney*, [1899] 2 Ch. 729.

5984. ——— Power of administrator to carry on business on executor renouncing.—

5983 i. ——— Effect of direction—Power to employ more property than employed at testator's death.—In the absence of express provision in a will, an authorisation to carry on a business only extends to the employment for that purpose of assets actually embarked in the business at testator's death.—*BRETT v. HAMILTON* (1900), 21 N. S. W. L. R. 84; 16 N. S. W. W. N. 206.—**AUS.**

5983 ii. ————Testator's directions to his exors. to continue to carry on business with his surviving partners, does not authorise the exors. to embark any new capital in the

business.—*SMITH v. SMITH* (1867), 13 Gr. 81.—**CAN.**

5983 iii. ————A direction to carry on a business did not justify spending money of the estate upon a building which was not part of the business.—*Re J. H.'s ESTATE* (1911), 20 O. W. R. 474; 3 O. W. N. 283; 25 O. L. R. 132.—**CAN.**

a. ——— business on dissolution of partnership.—Testator in partnership with another, directed as to his share in the firm that it should be carried on by his wife for

the benefit of herself & children:—*Held*: the will did not authorise the wife to carry on the business after a dissolution of the partnership.—*SWAN v. SEAL* (1881), 10 V. L. R. 57.—**AUS.**

b. ——— Power to change nature of business.—Testator directed his trustees to realise the business owned & carried on by him, or, alternatively, to continue the business if they considered it desirable. The trustees, after carrying on the business for some years, proposed to form it into a private limited liability co., with the same capital & under the same

Testator empowered the exors. or exor. acting under his will to carry on his business, if they should see fit. The exors. renounced probate:—*Held*: the administratrix could not carry on the business under the power.—**LAMBERT v. RENDLE** (1863), 3 New Rep. 247.

Annotation:—**Consd. Lambert v. Lambert** (1872), 27 L. T. 59.

5985. ——— **For what period business to be carried on.**—*Re CAMERON, NIXON v. CAMERON*, No. 5990, *post*.

5986. **By order of court**—*In administration suit.*—**TINKLER v. HINDMARSH**, No. 6008, *post*.

5987. ——— **Where infants interested**—*Intestacy.*—*In a suit instituted for the administration of the estate of intestate trader by beneficiaries, where there are infants interested, the ct. has no jurisdiction to authorise the administrator to carry on the trade of intestate.*—**LAND v. LAND** (1874), 43 L. J. Ch. 311.

5988. ——— *In granting administration to the personal estate & effects of deceased intestate, the ct. will not direct or control or suggest anything with regard to the administration of the property beyond granting administration in due course of law.*

Where the ct. was asked to make an order that the widow of deceased intestate, who had taken a grant of administration to her husband's estate, should be at liberty to carry on the business formerly conducted by deceased for the support of herself & the children of the marriage, & that she might be excused from giving sureties to the administration bond, the first part of the application was refused, but, as it was considered to be a case in which the widow ought to have a free hand, under the special circumstances it was ordered that she might give her own bond without sureties.—*In the Goods of CORY*, [1903] P. 62; 72 L. J. P. 24; 88 L. T. 566.

SUB-SECT. 2.—RIGHTS OF REPRESENTATIVE.

A. In General.

To allowance—*Where no express stipulation.*—*See Sect. 6, post.*

5989. **To assets of business**—*Free from trusts in favour of testator's creditors.*—*The extrix. of a trader, who was also his residuary legatee, continued after his death to carry on his business ostensibly as her own:—Held: the assets of the business in the hands of the extrix. were not impressed with any trust in favour of the testator's creditors, & consequently on her second marriage, such of those assets as remained in specie, as well as the property into which the rest had been con-*

control as before:—Held: the trustees' proposal did not amount to a realisation of the old business, or to the starting of a new business, but was in substance a continuation of the old business; & it was within the powers conferred upon them by the will.—**MACKECHNIE'S TRUSTEES v. MACADAM**, [1912] S. C. 1059.—**SCOT.**

5987 i. *By order of court*—*Where infants interested*—*Intestacy.*—*The Ct. of Ch. has jurisdiction in a case of intestacy to direct a trade to be carried on for the benefit of minors.*—**PERRY v. PERRY** (1869), 17 W. R. 815.—**IR.**

5987 ii. ——— *Trustee Act, 1908, s. 98, enables the ct. to empower the administrator of an intestate estate to carry on the business of deceased during the minority of some of the persons entitled.*—*Re BENSON* (1915), 34 N. Z. L. R. 639.—**N.Z.**

PART V. SECT. 1, SUB-SECT. 2.—A.

a. **To assets of business**—*Under partnership agreement.*—*Where a deed of partnership provided for the continuance of the partnership after the*

verted, passed to her second husband.—*Re FIELDS, Ex p. ANDREWS* (1876), 4 Ch. D. 509; 46 L. J. Bcy. 23; 36 L. T. 38; 25 W. R. 382.

5990. **To use of business premises**—*Free of rent.*—*Testator, after giving legacies & annuities, proceeded to say: "My exors. may realise such part of my estate as they think right & in their judgment to pay the aforementioned legacies." He then directed his business to be carried on until his son attained the age of thirty, but did not dispose of the profits, nor did his will contain any further disposition of his real or personal estate, except a gift of a particular house. Testator carried on his business in a freehold mill which was his own property:—Held: (1) so long as testator's business was continued for the purposes & under the directions of the will, the exors. were entitled to the free use & occupation of the business premises, & of the fixed plant & machinery therein without paying any rent for the same; (2) the descended real estate could not be affected by the direction to carry on testator's business any further or otherwise than such carrying on might be necessary for payment of the legacies & annuities given by the will, & as soon as they were provided for, the direction to carry on the business became inoperative, & ceased to be binding either on the heir-at-law or the next of kin. & any surplus profits which had arisen since testator's decease, after providing for the legacies & annuities, must be apportioned between the heir-at-law & the next of kin according to the values of the real & personal estate employed in the business.*—*Re CAMERON, NIXON v. CAMERON* (1884), 26 Ch. D. 19; 53 L. J. Ch. 1139; 50 L. T. 339; 32 W. R. 834, C. A.

5991. **To use of plant & machinery**—*Free of rent.*—*Re CAMERON, NIXON v. CAMERON*, No. 5990, *ante*.

B. To Indemnity.

See Sect. 7, sub-sect. 3, post.

C. Partner or Clerk Appointed Executor.

5992. **Right to continue own business**—*In competition with testator's business.*—*(1) There is no equity to prevent a surviving partner or clerk who is appointed exor. from continuing the same trade, & a purchaser of testator's goodwill must take subject to the chance of obtaining the customers of the old establishment.*

(2) Pltf., a feme covert, was from the death of her father in 1839, entitled to maintenance out of his estate & to a share of the residue in 1854, when her youngest brother attained twenty-five. In 1843, the exors. in breach of trust & without her previous knowledge, invested the residue in railway securities & a considerable loss occurred. Pltf. soon after the investment heard of it &

death of one of the partners & authorised such partner if so disposed to draw out of the business annually the whole of the profits accruing to him for the year, it is the duties of the exors. of such partner, after his death, to exercise the powers which deceased partner might have exercised while alive, & to draw out of the partnership the profits accruing annually to deceased partner's estate, in order thus to be able to give effect as far as possible to the provisions of the will of deceased partner.—**TORBET v. ATTWELL'S EXECUTORS** (1879), Buch. 195.—**S. AF.**

Sect. 1.—To carry on testator's business: Sub-sects. 2, 3 & 4.]

complained of it in 1850, but took no proceedings until 1855, after the death of her uncle, an exor., from whom she had expectations & whom she was unwilling to displease:—*Held*: she was not bound by laches or concurrence.—*DAVIES v. HODGSON* (1858), 25 Beav. 177; 27 L. J. Ch. 449; 31 L. T. O. S. 49; 4 Jur. N. S. 252; 6 W. R. 355; 53 E. R. 604.

Annotations:—Generally, Mentd. Re Hill, Hill v. Hill (1881), 50 L. J. Ch. 551; *Slade v. Chaine*, [1908] 1 Ch. 522.

Goodwill & restraint of trade.]—See, generally, TRADE & TRADE UNIONS.

SUB-SECT. 3.—LIABILITIES OF REPRESENTATIVE.

5993. Liability of executors—For money received by co-executor.]—*CRISP v. SPRANGER & WESTWOOD* (1667), Nels. 109; 21 E. R. 802, L. C.

5994. — For debts incurred by co-executors—Evidence of partnership.]—Testator, by his will, directed that his business should be carried on by his exors., of whom H. was one, & that in case of dispute, the decision of H. should be final. H. proved the will, & from time to time went to the place where the business was carried on in the name of the exors. It did not appear, however, that he took any active part:—*Held*: there was evidence for the jury of his partnership in the business, & of his liability to the business debts.—*HARE v. HILTON* (1819), 14 L. T. O. S. 251.

5995. — On negotiable instrument—Paid for partnership debt.]—*WIGHTMAN v. TOWNROE*, No. 6787, *post*.

5996. — Accepted in representative capacity.]—Exors. carried on testator's trade in that character, & in the ordinary course of the business accepted a bill of exchange describing themselves in it simply as exors. of testator:—*Held*: neither the above circumstances, nor the form of the acceptance, relieved the estate of one of the exors., who died in the lifetime of the other, from the ordinary equitable liability upon the bill.—*LIVERPOOL BOROUGH BANK v. WALKER* (1859), 4 De G. & J. 24; 45 E. R. 10, L. JJ.

Annotations:—Consd. Kendall v. Hamilton (1878), 3 C. P. D. 403; *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177.

5997. — Given in respect of debt of testator.]—Where an exor. had continued testator's business in pursuance of the will, & had in so doing, & according to the ordinary course of business pursued by testator, given a promissory note for goods supplied to testator himself:—*Held*: the exor. could not obtain in a creditor's suit for the administration of testator's estate an injunction to restrain the creditor to whom the promissory note had been given from proceeding upon it at law, although there might have been an understanding that the exor. was not to be personally liable, & the creditor was to look only to testator's assets for payment, & although the money produced by the exor.'s trading had been paid into ct. under an order in the suit. Such relief, if to be obtained, must be sought in a distinct suit.—*LUCAS v. WILLIAMS* (No. 1) (1862), 4 De G. F. & J. 436; 10 W. R. 606; 45 E. R. 1253, L. JJ.

Right to indemnity.]—See No. 6399, post.

5998. — For debts incurred in trading—When acting *bona fide*.]—Exors. who were directed by the will to call in testator's personal estate with all convenient speed, continued his trade for some years after his death, & ultimately a considerable loss was sustained. But the ct. refused to charge them with the loss, as they had acted *bona fide*, & according to the best of their judgment.—*GARRETT v. NOBLE* (1834), 6 Sim. 504; 3 L. J. Ch. 159; 58 E. R. 683.

Annotation:—Reid. Bullock v. Wheatley (1844), 1 Coll. 130.

5999. — —.]—An exor. of a trader carrying on the trade after his death, though not avowedly in the character of exor., is nevertheless personally liable for all the debts contracted in the trade after testator's death, whether he is entitled or not, to be wholly, or to any extent, indemnified by testator's personal estate, & whether testator's estate is sufficient or insufficient for that purpose. Neither does the propriety of the exor.'s conduct, as between himself & those beneficially interested in testator's personal estate, give the creditors of the trade, becoming so after the death of testator, the rights of creditors of testator; it being immaterial, as far as they are concerned, whether testator, if he had a partner, was bound by a covenant with him that testator's exor. should continue the trade in partnership with the surviving partners.

The exor. of a deceased shareholder in a joint stock banking co. held not liable to make good out of his testator's assets, debts contracted by the co. subsequently to testator's death, though the shares were registered in the exor.'s name, & he received the dividends in his character of exor., the debts due at his death having been subsequently discharged by the co.—*LABOUCHERE v. TUPPER* (1857), 11 Moo. P. C. C. 198; 29 L. T. O. S. 357; 5 W. R. 797; 14 E. R. 670, P. C.

Annotation:—Reid. Strickland v. Symons (1884), 26 Ch. D. 245.

6000. — —.]—*Re JOHNSON, SHEARMAN v. ROBINSON*, No. 6022, *post*.

6001. — For failure to perform duty—What amounts to wilful default.]—Testator gave his interest in the business & the stipulated ordinary capital to his sons E., G., & W., who was a minor, & he directed his exors. to carry on the business, in conjunction with his two sons, until W. attained twenty-one, & he empowered them to sell his share in the brewery during his minority. He charged his freehold & other property with the payment of his surplus capital, & directed mtges. of his real estate for securing his legacies:—*Held*: there was no reason for thinking that the surplus capital could, if at all, have been realised, without putting an end to the business, which the exors. could not do without breach of their duty; though the exors. had not properly performed their duty, still, as it had not been satisfactorily made out that there ever were partnership assets, out of which the legacies could have been recovered or secured, the exors. ought not to be charged with wilful default.

But, assuming that it was not the duty of the exors. to stop the business, for the purpose of realising the legacies, till W. attained twenty-one, & that there was not at that time property for that purpose, still the exors. might have so conducted themselves in the management of the business in the interval, & have so been parties to loss of the property as to have subjected themselves to personal liability to the legatees. . . . I am of opinion that the charge against them cannot be

supported upon that ground (LORD COTTENHAM, C.).—*ROWLEY v. ADAMS* (1849), 2 H. L. Cas. 725; 9 E. R. 1267, H. L.

Annotation.—*Reid. Paddon v. Richardson* (1855), 7 De G. M. & G. 563.

— **To be adjudicated bankrupt.**]—*See* BANKRUPTCY, Vo. IV., p. 34, Nos. 288–290.

6002. Liability of administratrix—For debts incurred in trading.]—The administratrix of intestate, a dealer in builder's materials, carried on intestate's trade, & bought cement for the purposes of the trade. On Apr. 15, 1886, a receiver & manager was appointed in an administration action brought by the infant child of intestate. On Apr. 22 the vendors recovered judgment against the administratrix for the price of the cement, but judgment was not signed till May 18, on which day the cement remaining in specie was sold along with other effects under an order in the administration action. Execution was never issued by the vendors of the cement, but they applied in the administration action to have the proceeds of its sale applied in payment of their debt. The judge refused this relief but declared them entitled to a lien on the beneficial interest of the administratrix in intestate's estate:—*Held*: the cement, as between the vendors & the administratrix, was the property of the administratrix, she being a debtor to them for the price, & as between the administratrix & the estate the cement belonged to the estate subject to the right of the administratrix to be indemnified for the price if she was not a debtor to the estate, the vendors could not have any higher claim than hers, & were not entitled to anything more than the order gave them. *Qu.*: whether the order was right in declaring them entitled to a lien.

A trader dies & his personal representative carries on his business. Whether the representative carries it on with or without authority, a person with whom he contracts a debt has no remedy against the assets, though an exor., if he has carried on the business in accordance with his duty, has a right to be indemnified out of them (COTTON, L.J.).—*Re EVANS, EVANS v. EVANS* (1887), 34 Ch. D. 597; 56 L. T. 768; 35 W. R. 586, C. A.

Annotations.—*Consd. Jennings v. Mather*, [1901] 1 K. B. 108. *Reid. Re Gorton, Dowse v. Gorton* (1889), 40 Ch. D. 536; *Re Reynolds, Ex p. White*, [1915] 2 K. B. 186.

In respect of contracts & torts.]—*See* Part VI., Sects. 1, 2, *post*.

To account.]—*See* Part VI., Sect. 6, *post*.

Execution against representative.]—*See* Part VII., Sect. 1, sub-sect. 10; Sect. 2, sub-sect. 10, *post*.

Rights of creditors.]—*See* Sub-sect. 6, *post*.

SUB-SECT. 4.—LIABILITY OF TESTATOR'S ESTATE.

6003. For debts contracted in trading—Whether limited to part employed in trade.]—*HANKEY v. HAMMOCK* (1786), 3 Madd. 148, n.; Buck, 210; 56 E. R. 464.

Annotations.—*N.F. Ex p. Garland* (1804), 10 Ves. 110. *Distd. Re Hodson, Ex p. Richardson* (1818), 3 Madd. 138. *Expld. M'Neillie v. Acton* (1853), 4 De G. M. & G.

Reid. Owen v. Delamere (1872), L. R. 15 Eq. 134; *Re Mellor, Ex p. Manchester Bank* (1879), 12 Ch. D. 917.

6004. ———.]—Under a bkpcy. of an exor. & trustee, directed by the will to carry on a trade, & a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund not liable.—*Re BALLMAN, Ex p. GARLAND* (1804), 10 Ves. 110; 1 Smith, K. B. 220; 32 E. R. 786, L. C.

Annotations.—*Consd. Re Hodson, Ex p. Richardson* (1818), Buck, 202. *Follid. Thompson v. Andrews* (1832), 1 My. & K. 116. *Apld. Ex p. Butterfield* (1847), De G. 570. *Apprvd. Labouchere v. Tupper* (1857), 11 Moo. P. C. C. 198. *Distd. Re Beater, Ex p. Edmonds* (1862), 4 De G. F. & J. 488. *Consd. Owen v. Delamere* (1872), L. R. 15 Eq. 134; *Fairland v. Percy* (1875), L. R. 3 P. & D. 217; *Re Beale, Ex p. Corbridge* (1876), 4 Ch. D. 246; *Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548. *Apld. Fraser v. Murdoch* (1881), 6 App. Cas. 855. *Consd. Strickland v. Symons* (1884), 26 Ch. D. 245. *Reid. Re Sudell, Ex p. Myers* (1833), 2 Deac. & Ch. 251; *Thompson v. Derham, Thompson v. Goodman* (1842), 1 Hare, 358; *M'Neillie v. Acton* (1853), 4 De G. M. & G. 744; *Re Mellor, Ex p. Manchester Bank* (1879), 12 Ch. D. 917; *Re Blundell, Blundell v. Blundell* (1890), 44 Ch. D. 1; *Re Millard, Ex p. Yates* (1895), 72 L. T. 823.

6005. ———.]—Testator disposed of his property by his will, & directed a trade in which he was concerned to be carried on after his death:—*Held*: only testator's capital in the trade was liable to the creditors of the trade, who became such after testator's death, & they had no further claim upon his assets.—*Re HODSON, Ex p. RICHARDSON* (1818), 3 Madd. 138; Buck, 202; 56 E. R. 461; *affd.* (1819), Buck, 421, L. C.

Annotations.—*Apprvd. Labouchere v. Tupper* (1857), 11 Moo. P. C. C. 198. *Consd. Owen v. Delamere* (1872), L. R. 15 Eq. 134; *Re Mellor, Ex p. Butcher* (1880), 13 Ch. D. 465; *Fraser v. Murdoch* (1881), 6 App. Cas. 855. *Reid. Thompson v. Derham, Thompson v. Goodman* (1842), 1 Hare, 358.

6006. ———.]—Where testator directs his trade to be carried on after his death, that part of his property only will be liable, in case of bkpcy., which he has directed to be embarked in the trade.—*THOMPSON v. ANDREWS* (1832), 1 My. & K. 116; 2 L. J. Ch. 46; 39 E. R. 625.

Annotation.—*Reid. Thompson v. Derham, Thompson v. Goodman* (1842), 1 Hare, 358.

6007. ———.]—Testator directed his widow to carry on his business, until his youngest child should attain twenty-one; & for that purpose, gave her the entire use, disposal & management of the capital, stock & effects which should be in, due & owing or belonging to him, in his trade, at the time of his decease; & he authorised his exors. to augment the capital employed therein; the exors. renounced, & the widow took out administration:—*Held*: the specified property of testator only was liable to the debts contracted by the widow in carrying on the trade.—*CUTBUSH v. CUTBUSH* (1839), 1 Beav. 184; 8 L. J. Ch. 175; 3 Jur. 142; 48 E. R. 919.

Annotations.—*Apld. Fraser v. Murdoch* (1881), 6 App. Cas. 855. *Reid. Thompson v. Derham, Thompson v. Goodman* (1842), 1 Hare, 358; *Owen v. Delamere* (1872), L. R. 15 Eq. 134; *Fairlamb v. Percy* (1875), 39 J. P. 632.

6008. ——— Liability of funds in court—Trading authorised by court.]—In an administration suit, the ct. authorised the legal personal representative to carry on newspapers which formed part of the assets, & a stationer for that purpose furnished paper on credit:—*Held*: he was entitled to be paid out of the fund in ct. forming part of testator's

PART V. SECT. 1, SUB-SECT. 4.

6003 l. For debts contracted in trading
Whether limited to part employed in

trade.]—An exor. carrying on the trade of testator under a testamentary trust is liable personally to the trade creditors & is entitled as a trader to use the

trade assets of testator.—*JETHABHAI v. CHOTALAL* (1909), 1 L. R. 34 Bom. 209.—IND.

Sect. 1.—To carry on testator's business : Sub-sects. 4, 5, & 6.]

estate, though such estate was insufficient to pay testator's debts.—*TINKLER v. HINDMARSH* (1840), 2 Beav. 348 ; 48 E. R. 1215.

Annotation :—*Reid*. *Land v. Land* (1874), 43 L. J. Ch. 311

6009. — Business carried on in executor's name.]—If an exor., in pursuance of the directions contained in testator's will, carries on testator's business, & in so doing contracts debts, the fact that he has carried on the business in his own name & that testator's assets employed in it are ostensibly the exor.'s own property, will not entitle a judgment creditor of the exor. to take in execution testator's assets. Lapse of time & an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the exor., & entitle his judgment creditor to take them in execution. But, when the possession & the time which has elapsed are in accordance with the trusts of the will, no such inference can arise. An exor. six years after the death of testator, surrendered a lease belonging to testator, & took a renewed lease, including additional property, & at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, & the mtgee. did not know that the borrower was an exor., or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. An action was afterwards brought to administer testator's estate,

a consent order was made for the sale of the leasehold property, without prejudice to any right, the mtgee. giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the exor. out of the proceeds of sale :—*Held* : (1) the lease was in equity part of testator's estate, & the equity of the estate being prior to the equity of the mtgee. must prevail against it ; (2) the equitable mtgee. was not injured by the order to give up the indenture of lease, & did not thereby acquire any claim upon the proceeds of the sale.—*Re MORGAN, PILGREM v. PILGREM* (1881), 18 Ch. D. 93 ; 50 L. J. Ch. 834 ; 45 L. T. 183 ; 30 W. R. 223, C. A.

Annotations :—*As to* (1) *Reid*. *Re Gorton, Dowse v. Gorton* (1889), 60 L. T. 305 ; *Graham v. Drummond*, [1896] 1 Ch. 968 ; *Jennings v. Mather*, [1901] 1 K. B. 108.

Execution against representative for debts incurred in carrying on business.]—*See* Part VII., Sect. 2, sub-sect. 10, *post*.

SUB-SECT. 5.—RIGHTS OF BENEFICIARIES.

6010. To profits or interest—Rate of interest—Business carried on without authority.]—*BURDEN v. BURDEN* (1813), cited 1 Jac. & W. 134.

6011. — — — — —.]—(1) Where trust property is employed in trade without authority, the *cestuis que trust* must elect to take either the profits for the whole period, or interest for the whole period. Circumstances may arise to entitle them

to take profits for one, & interest for another part of the period ; but a notice of dissolution of partnership, published for a particular purpose & not accompanied by a settlement of accounts, or a transfer of the property, is not sufficient. *Qu.* : whether embarking the fund in a new trade, or at a different place would be sufficient.

(2) Interest to be computed at 5 per cent. when the property has been employed in trade.—*HEATHCOTE v. HULME* (1819), 1 Jac. & W. 122 ; 37 E. R. 322.

Annotations :—*As to* (1) *Reid*. *Docker v. Somes* (1834), 2 My. & K. 655 ; *Wightwick v. Lord* (1857), 6 H. L. Cas. 217 ; *Vyse v. Foster* (1872), 8 Ch. App. 315, n. *As to* (2) *Reid*. *Agabeg v. Hartwell* (1835) 4 L. J. Ch. 190.

6012. To profits—In what proportion.]—Pltf. married one of the daughters of testator ; on testator's death, the partnership between him & deft. was dissolved. Deft., who was the exor., continued to carry on the business with the same capital :—*Held* : testator's trade having been carried on after his death with his capital, pltf. & his wife were with testator's other children entitled to the profits in proportion to the shares they were respectively entitled to in testator's personal estate.—*HILL v. BURNHAM* (1805), cited 15 Ves. 220, L. C.

Annotation :—*Reid*. *Crawshay v. Collins* (1826), 2 Russ. 325.

6013. — — — — —.]—*Re CAMERON, NIXON v. CAMERON*, No. 5990, *ante*.

6014. — As between tenant for life & remaindermen.]—*Re CROWTHER, MIDDLEY v. CROWTHER*, No. 5981, *ante*.

6015. To interest—Profits retained in business—As additional capital.]—Testator authorised his exors. to enter into a partnership with his brother, on such terms as they should think fit, & leave his capital therein. The exors. did so, & the articles of partnership stipulated that interest at 5 per cent. should be paid on testator's capital, & that part of the exor.'s profits should be left in the concern as additional capital :—*Held* : the tenant for life was entitled to the interest, but the share of the profits retained as additional capital must, as between the tenant for life & remainderman, be considered as capital & not income.—*STROUD v. GWYER* (1860), 28 Beav. 130 ; 2 L. T. 400 ; 6 Jur. N. S. 719 ; 51 E. R. 315.

Annotations :—*Consd.* *Re Hill, Hill v. Hill* (1881), 50 L. J. Ch. 551. *Reid*. *Vyse v. Foster* (1872), 8 Ch. App. 309 ; *Chillingworth v. Chambers*, [1896] 1 Ch. 685 ; *Re Appleby, Walker v. Lever, Re Appleby, Walker v. Nisbet* (1902), 51 W. R. 153 ; *Slade v. Chaine*, [1908] 1 Ch. 522 ; *Re Hoyles, Row v. Jagg* (No. 2), [1912] 1 Ch. 67.

To prove in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 249, 444, 464, 465, Nos. 2 ; 4016, 4187 *et seq.*

SUB-SECT. 6.—RIGHTS OF CREDITORS.

6016. Of testator—Right to priority—No assent by such creditors to carrying on business.]—Testator, who died in 1905, & who was carrying on a business at the time of his death, empowered his exors. to continue to carry on same. They did so for three years, & incurred considerable debts. A

banking co. were their creditors in connection with the business, & that co., suing on behalf of themselves & other creditors of testator, brought an action for administration of testator's estate. Judgment was given in 1908 for the usual accounts & inquiries, & also for inquiries as to the creditors whose debts had been incurred by the carrying on of the business, as to the amount of testator's assets properly employed by the exors. in carrying on the business, & as to the amount of such assets available for payment of testator's debts. Certain creditors of testator who came in under the judgment stated that they had not assented to the exors. carrying on the business, & claimed to be paid out of testator's assets in priority to any right of indemnity of the exors., & to any right of the creditors of the exors. by way of subrogation; & they applied to have the certificate of the master which found the contrary, varied in this respect:—*Held*: the exors. as such were not entitled to do as they had done, seeing that there were creditors to a substantial amount remaining unpaid; & apart from any creditors of testator who were in a special position by reason of their having assented to the exors. carrying on testator's business, every other creditor was entitled to say that, as against him, the exors. could not justify the carrying on of testator's business for the period that they did; therefore, that whatever right of indemnity the exors. might have against the beneficiaries, they could not have any such right as against the creditors except upon the terms of making good to testator's estate the amount which they had in their hands available for payment of his debts.—*Re EAST, LONDON COUNTY & WESTMINSTER BANKING CO., LTD. v. EAST* (1914), 111 L. T. 101; 58 Sol. Jo. 513, C. A.

6017. Of representative—Whether creditors of testator—Conduct of executor.]—LABOUCHERE v. TUPPER, No. 5999, *ante*.

6018. — Right to administration decree.]—Testator having directed his exors., at their discretion, either to wind up or to continue his business, that of a clothier, with power to apply the capital employed in the business in carrying it on, & to employ in such business any money, part of his general estate, the exors. elected to continue the business, but did not, as they said, & the contrary was not proved, employ more of the assets in carrying on the business than were so employed at testator's death. Upon bill by a person alleging himself to be a creditor of the business since the death, on behalf of himself & all the other creditors of testator, seeking administration of testator's estate which had been employed in the business, there being no suggestion of insolvency:—*Held*: the remedy of pltf. was not an administration decree in this ct., but an action at law.—*OWEN v. DELAMERE* (1872), L. R. 15 Eq. 134; 42 L. J. Ch. 232; 27 L. T. 647; 21 W. R. 218.

Annotations:—*Consd. Fairland v. Percy* (1875), L. R. 3 P. & D. 217; *Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548. *Reid. Strickland v. Symons* (1883), 22 Ch. D. 666.

6019. — Right to grant of administration—What conditions may be imposed.]—Testator by his will appointed A. & B. exors. & trustees, & directed them to allow his wife to receive the rents & profits of his estate, & to carry on his business

of a tailor & draper for the term of her natural life, if she should so long remain his widow. A. & B. declined the trusts & duly renounced probate, & administration, with the will annexed, was granted to the widow, who carried on the business down to the time of her death, in Jan. 1874. She did not marry again, & she died insolvent & intestate. With the exception of a policy of insurance for a small amount, the whole of testator's property was employed by the widow in carrying on the business, & while she did so C. supplied her with goods in the way of the trade of a tailor to the amount of £399. The debt remained unpaid at her decease, & C. held no security for any part of it. The ct., the parties interested under the will having been cited, & there being no opposition to the motion, decreed administration with the will annexed, of the unadministered effects of testator to C. as an equitable creditor of the estate, but required, as conditions to his obtaining the grant, that he should in the first place, as a legal creditor of the widow, take out administration to her estate, & also give justifying security.—*In the Goods of PERCY, FAIRLAND v. PERCY* (1875), L. R. 3 P. & D. 217; 44 L. J. P. & M. 11; 32 L. T. 405; 39 J. P. 632; 23 W. R. 597.

Annotation:—*Reid. Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548.

6020. — Right to retain amount of debt—Incurred by deceased administratrix—Out of sale of mortgaged property of testator.]—W., the owner & occupier of a public house, gave to H. & Co., brewers, a mtge. to secure £1,300, & also all sums which should at any time be owing to them from W., his executors, administrators, or assigns, on any account whatsoever. W. died, giving, by will, all his property to his wife, for life, without any directions as to carrying on his business. Letters of administration, with the will annexed, were granted to the widow. The widow carried on the business, & was supplied with beer by H. & Co., to whom she from time to time made payments which discharged the moneys due to them from W. at his decease other than the £1,300, but a balance of £138 was due from her to them at her decease for beer supplied. H. & Co. sold the property under a power of sale, & claimed to retain not only the £1,300 but the £138. The question was raised on summons in an action for the administration of W.'s estate:—*Held*: as the widow was assign of the public-house, the £138 was covered by the security, & H. & Co. were entitled to retain it.—*Re WATTS, SMITH v. WATTS* (1882), 22 Ch. D. 5; 52 L. J. Ch. 209; 48 L. T. 167; 31 W. R. 262, C. A.

Annotations:—*Mentd. Bird v. Wenn* (1886), 33 Ch. D. 215; *Ledbrook v. Passman* (1888), 57 L. J. Ch. 855; *Kinnaird v. Trollope* (1889), 42 Ch. D. 610; *Squire v. Pardoe* (1891), 56 L. T. 243; *Stone v. Lickorish*, [1891] 2 Ch. 363; *Bank v. Princess Royal Colliery Co.* (1900), 82 L. T. 559.

6021. — Right to representative's indemnity.]
Re BEATER, Ex p. EDMONDS, No. 6398, *post*.

6022. — —.]—Where a trader has by his will directed his exor. or trustee to carry on his trade & to employ a specific portion of the trust estate for the purpose, the rule is that, though the exor. or trustee is personally liable for debts incurred by him in carrying on the trade pursuant

default:—*Held*: creditors of goods supplied for the business after decree were not entitled to prove against the assets in priority to creditors of the deceased or otherwise.—*M'ALOON v. M'ALOON*, [1900] 1 L. R. 367.—*IR.*

6021 i. Of representative—Right of representative's indemnity.]—A person supplying goods to an exor. carrying on the business of testator in accordance with his will has no right against the estate, but has a right to be subrogated

to any right of indemnity which the exor. has against the estate in respect of the liability so incurred.—*Re BRAUN, BRAUN v. BRAUN* (1902), 23 C. L. T. 96; 14 Man. L. R. 346.—*CAN.*

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to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further; & consequently, the creditors of the trade are entitled to stand in the place of the exor. & trustee, & to claim the benefit of that right so as to obtain payment of their debts; but the rule does not apply where the exor. or trustee is in default to the specific trust estate devoted to the trade; in such a case, the defaulting exor. or trustee not being himself entitled to an indemnity except upon terms of making good his default, the creditors are in no better position, & are therefore not entitled to have their debt paid out of the specific assets unless the default is made good.—*Re JOHNSON, SHEARMAN v. ROBINSON* (1880), 15 Ch. D. 548; 49 L. J. Ch. 745; 43 L. T. 372; 29 W. R. 168.

Annotations:—*Consd. Strickland v. Symons* (1884), 26 Ch. D. 245; *Re Firmin, London & County Banking Co. v. Firmin* (1887), 57 L. T. 45; *Re Blundell, Blundell v. Blundell* (1890), 44 Ch. D. 1. **Distd.** *Re Kidd, Kidd v. Kidd* (1894), 70 L. T. 648. **Apld.** *Re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342. **Refd.** *Fraser v. Murdoch* (1881), 11 App. Cas. 855; *Re Dimmock, Dimmock v. Dimmock* (1885), 52 L. T. 494; *Re Millard, Ex p. Yates* (1895), 72 L. T. 823; *Re Shorey, Smith v. Shorey* (1898), 79 L. T. 349; *Jennings v. Mather*, [1901] 1 K. B. 108; *Re British Power Traction & Lighting Co., Halifax Joint Stock Banking Co. v. British Power Traction & Lighting Co.*, [1910] 2 Ch. 470.

6023. — — —.]—*Re EVANS, EVANS v. EVANS*, No. 6002, *ante*.

6024. — — —.]—Exors. & trustees, in pursuance of a power contained in a will, carried on the business of a licensed victualler after the death of testator, & incurred debts to trade creditors. An action was commenced for the administration of the estate of testator. The trade creditors took out a summons in the action asking for an order declaring that they were entitled to the trustees' right of indemnity against the estate so as to get payment out of the estate. The trustees had made default in rendering proper accounts, but not in payment of money. There was a sufficient fund in ct. to pay all the debts:—**Held:** in order to deprive the trustees of their indemnity, there must be a default in payment of money & not merely a default in the rendering of accounts, & as in this case there was no default in payment of money, the creditors were entitled to prove against the estate through the right of the trustees to indemnity, & there would be a declaration to that effect.—*Re KIDD, KIDD v. KIDD* (1894), 70 L. T. 648; 42 W. R. 571; 8 R. 261.

6025. — — — One co-executor a defaulter.]—Where testator's business is carried on after his death by his trustees under a power in the will, the right of the creditors of the business to be paid out of the trust estate in priority to the creditors of testator, by virtue of the trustees' right of indemnity in respect of the debts properly incurred by them in carrying on the business, is not precluded by the fact that one of the trustees has been found a defaulter.—*Re FRITH, NEWTON v. ROLFE*,

[1902] 1 Ch. 342; 71 L. J. Ch. 199; 86 L. T. 212.

Representative's indemnity generally.]

—See Sect. 7, sub-sect. 3, *post*.

In bankruptcy.]—See **BANKRUPTCY**, Vol. IV., pp. 249, 464, 465; Vol. V., p. 759, No. 6533.

SECT. 2.—TO ALIENATE.

See Administration of Estates Act, 1925 (c. 23), ss. 32, 33.

SUB-SECT. 1.—IN GENERAL.

6026. General rule—Absolute power over assets.]

—**Qu.:** whether a grant of *omnia bona sua* by an exor. passes the goods which he has as exor.—**ST. JOHN (LORD) & GRAYS (SIR JOHN) CASE** (1577), 4 Leon. 22; 74 E. R. 701.

6027. — — —.]—The general rule both of law & equity is clear, that an exor. may dispose of the assets of testator; that over them he has absolute power; & that they cannot be followed by testator's creditors. It would be monstrous if it were otherwise; for then no one would deal with an exor. He must sell, in order to effect the will; but who would buy if liable to be called to an account. It is also clear, that if at the time of alienation, the purchaser knows they are assets, this is no evidence of fraud; for all testator's debts may have been already satisfied; or if he knows that the debts are not all satisfied, must he look to the application of the money? No one would buy on such terms. There is one exception indeed, where a contrivance appears between the purchaser & executor to make a *devastavit*; but nothing of that sort appears here; for the alienation is by execution & a bill of sale. Testator died three years before this transaction; & if the exors. paid all demands, the assets belong to them. No demand was made by pltf. during all that time; & long before any demand was made, a fair creditor of their own sued out execution. As to fraud, there is none. It is stated, indeed, they knew the goods were the goods of testator; but that will not make a fraud, as it is not stated that they knew the debts were unpaid. It is true that the exors. might have disputed the seizing of the goods which he had as exor.; but they did not object. On the contrary, by being a party to the bill of sale they assented to it; & this bill of sale so assented to, is equal to a purchase; & is the same as an alienation by the exors. (**LORD MANSFIELD, C.J.**).—**WHALE v. BOOTH** (1784), 4 Term Rep. 625, n.; 4 Doug. K. B. 36; 100 E. R. 1211.

Annotations:—**Consd.** *Farr v. Newman* (1792), 4 Term Rep. 621; *Hill v. Simpson* (1802), 7 Ves. 152; *M'Leod v. Drummond* (1810), 17 Ves. 152. **Refd.** *Quick v. Staines* (1798), 1 Bos. & P. 293; *Ray v. Ray* (1815), Coop. G. 264; *Doe d. Woodhead v. Fallows* (1832), 2 Cr. & J. 481; *Fenwick v. Laycock* (1841), 2 Q. B. 108; *Graham v. Drummond*, [1896] 1 Ch. 968. **Mentd.** *Shirreff v. Wilks* (1800), 1 East, 48.

PART V. SECT. 2, SUB-SECT. 1.

6028 1. General rule—Absolute power over assets.]—The power of an exor. to dispose of any property is subject to any restriction imposed by the will appointing him. Where there is no such restriction, the power to dispose

is not dependent on the permission of the ct., & the ct. has no jurisdiction in the matter.—*In the Goods of NUNDO MULICK* (1896), 1 L. R. 23 Calc. 908.—**IND.**

e. — Exempt property.]—An administrator has no authority to

dispose of property covered by Exemptions Act, R. S. C. c. 47, s. 5, but a sale thereof which has been made by the administrator honestly & in good faith & is beneficial, may be confirmed by the ct.—*Re KOLBE ESTATE, STANDARD TRUSTS Co. v. KOLBE*, [1918] 3 W. R. 310; 11 Sask. L. R. 405.—**CAN.**

SUB-SECT. 2.—PERSONALTY.

A. Who may exercise Powers.

See, now, Administration of Estates Act, 1925 (c. 23), s. 8.

6028. Co-executor — Power to sell goods.]—Where the devise is, that two exors. shall sell, one alone cannot sell; so where the devise is to two exors. to sell: for it is a power with a trust, & not only an interest, but one of them may sell all the goods, for this is an entire interest in both without such a trust jointly. An exor. need not name himself exor. when he brings an action of his own possession. If a stranger take goods out of the possession of an exor., this exor. shall maintain a writ against him without naming himself exor., & without naming his co-exor., for the possession was in him alone.—ANON. (1355), Jenk. 43; 145 E. R. 33.

6029. — Power to grant term.]—If two exors. have a term & one grant all that belongs to him, the whole term thereby passes; *secus* of joint
—ANON. (1536), 1 Dyer, 23 b; 73 E. R. 49.

*Annotations:—*Apld. *Simpson v. Gutteridge* (1816), 1 Madd. 609. *Reid. Ex p. Holdsworth* (1841), 1 Mont. D. & De G. 475; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824.

6030. —.]—Each exor. has entire control over testator's personal estate; he may release, pay, or transfer without the other, & so of one administrator; though formerly questioned.—*JACOMB v. HARWOOD* (1751), 2 Ves. Sen. 265; 28 E. R. 172.

*Annotations:—**Reid. Farr v. Newman* (1792), 4 Term Rep. 621; *Devaynes v. Noble, Slesch's Case* (1816), 1 Mer. 539. *Mentd. Taner v. Ivie* (1752), Belt's Sup. 386; *Hoare v. Contencin* (1779), 1 Bro. C. C. 27; *Kendall v. Hamilton* (1878), 3 C. P. D. 403; *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177.

6031. — Power to assign lease.]—No objection to a title that an assignment of a term was executed by one exor. only, though the deed was prepared as an assignment by two exors.; one exor. being competent to assign.—*SIMPSON v. GUTTERIDGE* (1816), 1 Madd. 609; 56 E. R. 224.

*Annotations:—**Reid. Ex p. Holdsworth* (1841), 1 Mont. D. & De G. 475; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824. *Mentd. Dyke v. Rendall* (1852), 2 De G. M. & G. 209.

6032. — Acting under mistaken belief in authority.]—One of two exors., erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of testator's estate:—*Held*: the purchaser could not enforce a specific performance of the contract. *Qu.*: whether he could have done so if the exor. had been under no misapprehension.—*SNEESBY v. THORNE* (1855), 7 De G. M. & G. 399; 3 Eq. Rep. 849; 25 L. T. O. S. 250; 1 Jur. N. S. 1058; 3 W. R. 605; 44 E. R. 156, L. JJ.

*Annotations:—*Apld. *Naylor v. Goodall* (1877), 47 L. J. Ch. 53. *Reid. Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352.

6033. — Power to deposit securities.]—One of two exors., who was himself a residuary legatee, entered an account with a banker in his own name for executorial purposes, & the banker, with notice of the dispositions under the will, made advances to the exor. for payments connected

with the exorship., & securities were deposited for repayment of the advances. The co-exor. assented to the first advance, but upon a second advance being made to the acting exor. upon other securities, he withdrew his assent, & objected to the banker being repaid out of the trust property, on the ground that the money has been placed to the separate account of the acting exor. The advances were duly applied to the purposes of the administration. Upon an action being brought by the banker for a lien upon the second securities for repayment of his advances:—*Held*: the banker was justified in advancing money to the acting exor. for executorial purposes, & the assent of the co-exor. in the first instance was a further justification for placing confidence in the acting exor. & in making further advances to him. The repayment was therefore decreed with mtgee.'s costs.—*CHILD & CO. v. THORLEY* (1880), 16 Ch. D. 151; 29 W.

6034. — Power to pledge goods.]—*ATTENBOROUGH v. SOLOMON*, No. 6082, *post*.

6035. Co-administrator.]—*WILLAND v. FENN* (circa 1743), cited 2 Ves. Sen. at p. 267; 28 E. R. 173.

*Annotations:—**Consd. Jacomb v. Harwood* (1751), 2 Ves. Sen. 265; *Kent v. Pickering* (1837), 2 Keen, 1.

6036. —.]—*JACOMB v. HARWOOD*, No. 6030, *ante*.

6037. Infant executor.]—Infant exor. sold the goods of his testator at less undervalue than they were worth; & afterwards brought an action of detinue against the vendor upon it *in retardatione executionis testamenti*; this sale of the infant exor. was good; & should bind him notwithstanding his nonage (*per CUR.*).—*MANNING'S CASE* (1586), 3 Leon. 143; 74 E. R. 594.

6038. — Power to sell goods to pay debts.]—An infant exor., of the age of thirteen, or other person by his order, may sell goods to pay debts.—*CLERKE v. HOPKINS* (1591), Cro. Eliz. 254; 78 E. R. 509.

6039. Husband of executrix—Power to grant term.]—A man possessed of a term for years in right of his wife as extrix. of her former husband, has power to grant & convey same.—*THRUSTOUT d. LEVICK v. COPPIN* (1772), 3 Wils. 277; 2 Wm. Bl. 801; 95 E. R. 1054.

*Annotation:—**Reid. Pemberton v. Chapman* (1858), E. B. & E. 1056.

B. Extent of Powers.

(a) Power of

i. In General.

6040. General rule.]—*HOMESBY v. ASHTON* (1673), 3 Keb. 208; 84 E. R. 679.

6041. —.]—*WHALE v. BOOTH*, No. 6027, *ante*.

6042. To pay debts—Sale of leasehold property.]—*EWER v. CORBET*, No. 6093, *post*.

6043. —.]—*BURTING v. STONARD* (1723), 2 P. Wms. 150; 24 E. R. 677.

*Annotation:—**Reid. M'Leod v. Drummond* (1810), 17 Ves. 152.

PART V. SECT. 2, SUB-SECT. 2.—A.

Administrator — Power to sell leaseholds—For distribution to next of kin.]—An administrator, who has paid the funeral & testamentary expenses

& debts of intestate, has a power of sale over the leasehold property of intestate for the purpose of distribution among the next of kin.—*Re NORWOOD & BLAKE'S CONTRACT*, [1917] 1 I. R. 172.—IR.

PART V. SECT. 2, SUB-SECT. 2.—B. (a) i.

g. To pay debts.]—As to the right of an exor. to sell the assets of the estate, whether movable or immovable

Sect. 2.—To alienate: Sub-sect. 2, B. (a) i. & ii.]

6044. ——— **Though specifically bequeathed.]**

—Exor. or administrator where there are debts may sell testator's term specifically devised; & even in suspicious circumstances of fraud, after long possession by the purchaser, or the person under whom he takes, the ct. will not relieve.—**ANDREW v. WRIGLEY** (1792), 4 Bro. C. C. 125; 29 E. R. 812.

*Annotations:—***Reid.** *Hill v. Simpson* (1802), 7 Ves. 152; *M'Leod v. Drummond* (1810), 17 Ves. 152. **Mentd.** *Beckford v. Wade* (1805), 17 Ves. 87; *Chalmer v. Bradley* (1819), 1 Jac. & W. 51; *Graham v. Drummond* (1896), 12 T. L. R. 319.

6045. ——— **Of executor.]**—As to an exor. paying his own debt by a sale or pledge of his testator's estate; whether such a transaction can stand.—**SCOTT v. TYLER** (1788), 2 Bro. C. C. 431; 2 Dick. 712; 29 E. R. 241, L. C.

*Annotations:—***Reid.** *Hill v. Simpson* (1802), 7 Ves. 152; *M'Leod v. Drummond* (1810), 17 Ves. 152; *Wilson v. Moore* (1834), 1 My. & K. 337; *Vane v. Rigden* (1870), 5 Ch. App. 663; *Graham v. Drummond*, [1896] 1 Ch. 968; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824; *Re Kemnal & Still's Contract*, [1923] 1 Ch. 293. **Mentd.** *Pearce v. Loman* (1796), 3 Ves. 135; *Stackpole v. Beaumont* (1796), 3 Ves. 89; *Clarke v. Parker* (1812), 19 Ves. 1; *Lloyd v. Branton* (1817), 3 Mer. 108; *Morley v. Rennoldson*, *Morley v. Linkson* (1843), 2 Haro, 570; *Godfrey v. Hughes* (1847), 5 Notes of Cases, 499; *Newton v. Marsden* (1862), 2 John. & H. 356; *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510; *Re Nourse*, *Hampton v. Nourse*, [1899] 1 Ch. 63; *Re Whiting's Settlement*, *Whiting v. De Rutzen*, [1905] 1 Ch. 96; *Re Hewett*, *Eldridge v. Iles*, [1918] 1 Ch. 458.

6046. Under will—What amounts to power of sale.]—Devise of a cottage, etc., to the wife for life, remainder to P. for life if she survived the wife, & after the death of P., to be distributed as thereafter mentioned; “& as to all the rest, residue & remainder of my estate & effects, etc., unto my wife,” for life, remainder to P. “if she shall be then living”; “but if she shall be then dead, then my will & mind is, that the whole shall be sold & the money arising therefrom shall be equally divided between, etc.”; “& as to all the rest, residue & remainder of my estate & effects, etc., to my wife,” who was appointed residuary legatee & sole extrix. P. died in the lifetime of the wife of the deviser:—**Held**: the wife did not, as extrix., derive a power of sale under the first residuary clause, & the second residuary clause operated only upon such property of the deviser as was not previously disposed of.—**ALLUM v. FRYER** (1842), 3 Q. B. 442; 11 L. J. Q. B. 313; 7 Jur. 13; 114 E. R. 576.

6047. ——— **Discretion of trustees—Where several offers of purchase.]**—A. & B. were trustees under a will for sale of a valuable outfitting business & the stock in trade. C. was the only *cestui que trust in esse*. Two offers were made of nearly equal value, one by D. & E., persons who had been in the employ of testatrix; the other by F. A. & B. considered the former offer to be the more advantageous, on account of the assistance which would be afforded to them by D. & E. in getting in the outstanding debts, which were considerable. C. was in favour of F. There was some conflict in the evidence as to what discussion

took place between A. & B. & C. Ultimately the offer of D. & E. was accepted. On a bill filed by C. against A. & B. alleging that F. would have made a higher offer if the negotiations had been continued, & charging the trustees with the consequent loss to the estate:—**Held**: the trustees could not, under the circumstances, be made liable, & they ought to be allowed the usual trustees' costs of the suit.—**SELBY v. BOWIE** (1863), 2 New Rep. 2; 8 L. T. 372; 9 Jur. N. S. 425; 11 W. R. 606, L. JJ.

6048. ——— **Sale to co-executor—Validity.]**—

Where testator gives an absolute discretion to his exors. to postpone the sale & conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited co. Nor will they be liable in the absence of *mala fides* for loss arising to the estate from the non-conversion.

Testator gave all his real & personal property, including a business, to his exors. on trust to sell & pay the income to his wife for life, & after her death to pltf., but with full discretion to his exors. to postpone the sale of his estate. He directed that until the sale the net income should be applied in the same way as the income of the proceeds of the sale was to be applied. Shortly after the death of testator one of the exors. purchased the business at a valuation:—**Held**: the sale must be set aside, & the exor. must account for the profits made since the sale without salary, but with just allowances; & the amount of the profits must be treated as capital, & the widow was only entitled to the income of it.—**Re NORRINGTON**, **BRINDLEY v. PARTRIDGE** (1879), 13 Ch. D. 654; 44 J. P. 474; 28 W. R. 711, C. A.

*Annotations:—***Reid.** *Re Crowther*, *Midgley v. Crowther* (1895), 64 L. J. Ch. 537; *Re Irwin*, *Barton v. Irwin* (1895), 39 Sol. Jo. 233.

6049. Effect of administration action—By creditor of testator.]—A bill filed by a creditor of deceased testator, for the administration of the estate under the direction of the ct., does not of itself suspend or control the exor.'s right to dispose of the property & make a good title. The cts. of common law take judicial notice of this principle of equity; & evidence to show a contrary practice is not admissible.—**NEEVES v. BURRAGE** (1849), 14 Q. B. 504; 19 L. J. Q. B. 68; 14 L. T. O. S. 394; 14 Jur. 177; 117 E. R. 196.

*Annotation:—***Reid.** *Price v. Price* (1887), 35 Ch. D. 297.

Sale of stock in public funds.]—See **BANKERS**, Vol. III., pp. 123, 124.

6050. Sale of shares.]—P., owner of a share in a co., died in 1859 intestate, & in June, 1859, administration to her estate was granted to A., her sole next of kin. A. died in Nov. 1859, intestate, & without having dealt with the share, leaving S. his sole next of kin, & administration to his estate was granted to his widow, E. In Feb. 1860, E. passed the residuary account of P.'s estate showing no debts. In Nov. 1860, E. described as “administratrix of A. administrator of P.” executed a transfer of the shares, which was passed by the

for the purpose of paying the debts of deceased, there can be no doubt. He cannot sell anything specially bequeathed so long as there are other assets to meet the debts, but even land or other things specially bequeathed may be sold if the sale is necessary for the payment of debts.—**Re BROWN** (1895), 7 S. C. 239.—S. AF.

6046 i. Under will—What amounts to power of sale.]—Testator bequeathed to his wife the proceeds of one-half of all lands, cattle, & other effects, & the other half left in the hands of his extrix. & exors. to pay debts, etc.:—**Held**: the exors. took a power of sale, & not the fee.—**MOORE v. POWER** (1858), 8 C. P. 109.—CAN.

h. By order of court—Sale in lieu of carrying on business.]—The ct. may authorise exors. and trustees to sell certain businesses forming portion of the trust estate, together with the whole assets used in connection therewith, to a limited co., & accept the greater portion of the purchase money in the form of fully paid up shares,

co. In 1865 S. died intestate without having dealt with the share. In July, 1883, administration *de bonis non* of P.'s estate was granted to pltf., one of the next of kin of S., who brought an action against the co., claiming the value of the share or damages for their having allowed it to be wrongly transferred:—*Held*: as on the passing of the residuary account of P. the share belonged to the estate of A., any damages recovered would belong to the estate of A., & be held by pltf. as trustee for that estate; & as that estate had already received the purchase money of the share, the action could not be sustained.—**CLARK v. SOUTH METROPOLITAN GAS CO.** (1885), 53 L. T. 646, C. A.

6051. Time for sale—Whether court will accelerate time—At instance of residuary legatee.]—Testatrix, after giving certain specific chattels, bequeathed her residuary estate to R. in trust to sell all the estate, except the leasehold house in which she had carried on business. She declared it to be her will & mind that R. should employ W., then in her service, to carry on & conduct the business until the expiration of the lease, allowing him a reasonable salary. After the expiration of the lease testatrix directed R. to sell the business, goodwill, etc. Testatrix then gave certain pecuniary legacies, & bequeathed the residue to S.:—*Held*: S. was not entitled to have an immediate sale.—**Re GRAYDON'S ESTATE, SAUNDERS v. ROTHERHAM** (1802), 3 Giff. 556; 7 L. T. 185; 9 Jur. N. S. 66; 10 W. R. 505; 66 E. R. 529.

6052. Covenants for title—On sale of leaseholds.]—Under a contract for the assignment of a term, whether from the original lessee, or a mesne assignee, the purchaser must covenant for indemnity against payment of rent & performance of covenants; though he cannot have a covenant for the title from the assignor; as being an exor.—**STAINES v. MORRIS** (1812), 1 Ves. & B. 8; 35 E. R. 4, L. C.

Annotations:—**Refd.** Wilkins v. Fry (1816), 1 Mer. 214; Steward v. Wolveridge (1832), 9 Bing. 60.

6053. ———.]—(1) Exors. sell by auction, in nine lots, sundry houses which testator, during his life, held by lease under the Crown, & of which they, after his death, obtained a new lease, subject to one entire rent of £243; the printed particulars mention that the sale is by exors., & that the nine lots are all held under one lease, & at one entire reserved rent. Decreed, upon a bill filed by the vendors, & an answer, submitting to perform the contract upon an indemnity being given, that the purchaser of one lot, with respect to which the particulars stated that the apportioned rent for it was £52, was entitled to have an indemnity from the exors. against his liability for the whole reserved rent, & the breach of any of the covenants in the original lease.

(2) I know not that any authority has hitherto established that exors. are not bound, when they come forward as vendors, to make as good a title as other vendors (**LEACH, V.-C.**).—**WEST v. WILD** (1824), 3 L. J. O. S. Ch. 15.

ii. Who may purchase.

6054. Executor himself.]—Where an exor. appears to have made 5 per cent. on the assets in

his hands, or where he has by the non-application of assets done damages to the estate of the amount of 5 per cent., in either case he shall be charged with interest at that rate, & therefore where he permits debts carrying interest at 5 per cent. to run on when he had in his hands a fund to pay them, he shall *ea ratione* pay interest at that rate. But where it appears only that the exor. retained the assets for his own purposes he shall answer interest at 4 per cent. An exor. shall not be permitted either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, & shall account for the utmost extent of advantage made by him of the subject so purchased.—**HALL v. HALLET** (1784), 1 Cox, Eq. Cas. 134; 29 E. R. 1096, L. C.

Annotations:—**Refd.** *Re Postlethwaite, Postlethwaite v. Rickman* (1888), 59 L. T. 58. **Mentd.** *Raphael v. Boehm* (1805), 11 Ves. 92; *Simpson v. Lamb* (1857), 7 E. & B. 84; *Nant-y-glo & Blaenau Ironworks Co. v. Grave* (1878), 12 Ch. D. 738; *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162.

6055. Co-executor—Sale to partners of testator—Resale to co-executor.]—Sale of testator's share in a partnership trade, & the property belonging to it, by his exors., to his partners, for the purpose of being re-sold to one of his exors., set aside, & his estate held entitled to his aliquot proportion of the subsequent profits, as if the partnership had continued.—**COOK v. COLLINGRIDGE** (1823), Jac. 607; 1 L. J. O. S. Ch. 74; 37 E. R. 979, L. C.

Annotations:—**Refd.** *Crawshay v. Collins* (1826), 2 Russ. 325; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *Portlock v. Gardner* (1842), 6 Jur. 795; *Wedderburn v. Wedderburn* (1856), 22 Beav. 84; *Davies v. Hodgson* (1858), 25 Beav. 177; *McDonald v. Richardson, Richardson v. Morten* (1864), 10 L. T. 166; *De Cordova v. De Cordova* (1879), 4 App. Cas. 692. **Mentd.** *Cookson v. Cookson* (1837), 8 Sim. 529; *Willetts v. Blanford* (1842), 1 Hare, 253; *Travis v. Milne, Milne v. Milne* (1851), 9 Hare, 141; *Cooper v. Hood* (1858), 26 Beav. 293; *Mellersh v. Keen* (1859), 27 Beav. 236; *Smith v. Everett* (1859), 27 Beav. 446; *Parsons v. Hayward* (1862), 31 Beav. 199; *Johnson v. Helleley* (1864), 2 De G. J. & Sm. 446; *Vyse v. Foster* (1874), L. R. 7 H. L. 318; *Wilkes v. Saunton* (1877), 7 Ch. D. 188; *Re Norrington, Brindley v. Partridge* (1879), 13 Ch. D. 654; *Walker v. Mottram* (1881), 19 Ch. D. 355; *Pearson v. Pearson* (1884), 27 Ch. D. 145; *Trego v. Hunt*, [1896] A. C. 7.

6056. ———.]—Re NORRINGTON, BRINDLEY v. PARTRIDGE, No. 6048, *ante*.

6057. ——— Who has not proved—No unfair advantage.]—Held: a sale is not to be avoided merely because when entered upon the purchaser has the power to become trustee of the property purchased, as, for instance, by proving the will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, & in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld.—**CLARK v. CLARK** (1884), 11 App. Cas. 733; 53 L. J. P. C. 99; 51 L. T. 750, P. C.

Annotation:—**Appld.** *Re Boles & British Land Co.'s Contract*, [1902] 1 Ch. 244.

6058. ———.]—A., B. & C. were exors., & C. trustees of testator, who had property in Jamaica. A. proved the will in Jamaica, & B. & C. in England. Before the estate was wound up & accounts settled A. purchased from B. & C.

¹ lieu of carrying on the business as directed by the will.—**Re CRAGO, CRAGO v. CRAGO** (1908), 8 S. R. N. S. W. 69.—**AUS.**

k. Goodwill of business.]—The goodwill of a professional business may be sold by the representative, & the contract enforced, where the price has

been agreed upon, or there are other means of fixing its value.—**CHRISTIE (ADMINISTRATRIX) v. CLARKE** (1866), 16 C. P. 544, 27 U. C. R. 21.—**CAN.**

Sect. 2.—To alienate: Sub-sect. 2, B. (a) ii., (b) & (c).]

a business carried on by testator in Jamaica:—*Held*: the sale to A., being of itself part of the process of realising the estate, could not be justified as a sale to an exor. who had assented to a bequest, & must be set aside at the instance of the beneficiaries.—*Re HARVEY, HARVEY v. LAMBERT* (1888), 58 L. T. 449.

Annotation:—*Reid. Re Postlethwaite, Postlethwaite v. Rickman* (1888), 59 L. T. 58.

6059. Partner of testator—No unfair advantage.]

—(1) Testator by his will directed his exors. to convert into money all his residuary estate, & apply it as therein mentioned. The will contained a proviso that, notwithstanding this direction, they might permit his share in a firm of which he was a partner to remain in the business for a term of three years, or even of seven years, if good reason for it was shown. A valuation was made shortly before his death of the partnership property, & his share was estimated at a certain sum. After his death the administratrix, with the will annexed, sold his share, taken at the above valuation, to the surviving partners, part of that sum to be secured to her by bond, & payable in four years, with 5 per cent. interest in the meantime, & the other part to be placed at her disposal. The next of kin having failed a bill against the partners for an account of deceased partner's share, & of the profits of the partnership, etc., the partners put in a plea of purchase from the administratrix, without notice, of the share of testator:—*Held*: valid.

(2) The legal personal representatives of a deceased partner may sell his share in the business to the surviving partners, if they do it fairly, without being liable to have the sale upset. They may even employ the surviving partners as bankers, taking deposits of money at interest even, without subjecting them to an account of profits. The cts., however, will look at their transactions with close attention; & if there has been great inequality in respect of the knowledge they have, & advantage has been so far taken of that inequality as to lead to very unequal & unfair results, that will not be permitted; but, then, there must be some sufficient evidence of it, & it is not to be inferred merely from the relation between the parties.—*CHAMBERS v. HOWELL* (1847), 11 Beav. 6; 11 L. T. O. S. 509; 12 Jur. 905; 50 E. R. 718.

6060. Brother & partner of administrator—Sale at undervalue.]—Sale by an administrator to his brother & co-partner set aside, it appearing to the ct., from the evidence, that the sale was made at an undervalue so gross that it ought to be deemed fraudulent & void.—*RICE v. GORDON* (1848), 11 Beav. 265; 50 E. R. 818.

Annotation:—*Mentd. Evans v. Bremridge* (1855), 2 K. & J. 174.

6061. Son of administratrix—No proof of sale at undervalue.]—Sale by administratrix of intestate's property to her own son under an open

contract & for undervalue, set aside. The mere fact of this agreement being made with the son of the administratrix would have been sufficient to vitiate the sale, irrespective of the improvidence of the contract which imposed no conditions on the intending purchaser, & of the undervalue.—*JOHN v. JONES* (1876), 34 L. T. 570.

(b) Power to Assign and Grant Underleases.

Power to assign lease or underlet—Without consent of lessor—Where covenant not to assign.]—*See LANDLORD & TENANT.*

6062. — With option of purchase.]—In dealing with the leaseholds of a testator or intestate, an exor. or administrator may grant an underlease, if necessary for the due administration of the property, but cannot give an option of purchase at a future time. An administrator granted an underlease of a leasehold estate of his intestate, with an option of purchase to the underlessee within seven years at a fixed price:—*Held*: the option of purchase was *ultra vires*, & could not be supported against the next of kin, although it appeared from the evidence to be advantageous to the estate.—*OCEANIC STEAM NAVIGATION CO. v. SUTHERBERRY* (1880), 16 Ch. D. 236; 50 L. J. Ch. 308; 43 L. T. 743; 45 J. P. 238; 29 W. R. 113, C. A.

Annotations:—*Consd. Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824; *Re Kennal & Still's Contract*, [1923] 1 Ch. 293. *Reid. Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611; *Re Judd & Poland & Skelcher's Contract*, [1906] 1 Ch. 684; *Hewson v. Shelley* (1913), 82 L. J. Ch. 551. *Mentd. New Windsor Corp'n. v. Stovell* (1884), 27 Ch. D. 665.

6063. Power to assign leaseholds—As security for debt of executor.]—An exor. assigns over a mortgaged term of his testator to A. as a satisfaction of a debt due to A. from the exor., this is a good alienation, & A. shall have the benefit of it against the daughters of testator, who were creditors under a marriage settlement.—*NUGENT v. GIFFORD* (1738), West temp. Hard. 494; 1 Atk. 463; 26 E. R. 294, L. C.

Annotations:—*Apld. Mead v. Orrery* (1747), 3 Atk. 235. *Consd. Andrew v. Wrigley* (1792), 4 Bro. C. C. 125; *Hill v. Simpson* (1802), 7 Ves. 152. *Expld. M'Leod v. Drummond* (1810), 17 Ves. 152. *Consd. Wilson v. Moore* (1834), 1 My. & K. 337; *Graham v. Drummond*, [1896] 1 Ch. 968. *Reid. Ithell v. Beane* (1749), 1 Ves. Sen. 215; *Taner v. Ivie* (1752), Belt's Sup. 386; *Whale v. Booth* (1784), 4 Doug. K. B. 36; *Scott v. Tyler* (1788), 2 Bro. C. C. 431; *Farr v. Newman* (1792), 4 Term Rep. 621; *Dickenson v. Lockyer* (1798), 4 Ves. 36; *Keane v. Roberts* (1819), 4 Madd. 332.

6064. — —.]—*TAYLOR v. HAWKINS*, No. 6099, *post*.

Power to assign promissory note.]—*See BILLS OF EXCHANGE*, Vol. VI., p. 210, Nos. 1296–1298.

(c) Power to Mortgage or Pledge.

6065. Power to mortgage—Condition in will to raise capital by profits.]—A. by will, devised a chattel estate to his exors. that out of the profits his daughter should receive the interest of £2,000, & that the principal should be raised out of the

PART V. SECT. 2, SUB-SECT. 2.—
B. (b).

1. Power to grant underleases.]—Lessee of a term for years died intestate & his administratrix in 1806 subdemised at an increased rent, with a covenant to renew at the same rent as often as she could herself procure a renewal from her head landlord. Upon

the death of the administratrix, administration *de bonis non* was obtained by debt:—*Held*: the sublease of 1806 was a due administration of the assets, & the sub-lessee was entitled as against the administrator *de bonis non*, to a specific performance of the covenant for renewal.—*HACKETT v. M'NAMARA* (1836), L. & G. temp. Plunk. 283.—*IR.*

PART V. SECT. 2, SUB-SECT. 2.—
B. (c).

m. Power to mortgage—Administrator who has life interest.]—Testatrix gave certain leasehold property to her husband A. to dispose of in any way he might think best, for his own use during his lifetime, with remainder to B. The exor. named in the will having

surplus profits. The exor. mortgaged this estate for £1,800:—*Held*: the £2,000 & interest should be first raised.—*SAVAGE v. HUMBLE* (1703), 3 Bro. Parl. Cas. 5; 1 E. R. 1140, H. L.; *reversg.* S. C. *sub nom.* *HUMBLE v. BILL*, 2 Vern. 444.

Annotations:—*Consd.* Langley v. Oxford (1743), cited in 2 Hov. Supp. at p. 98. *Distd.* Mead v. Orrery (1745), 3 Atk. 235. *Consd.* Andrew v. Wrigley (1792), 4 Bro. C. C. 125; M'Leod v. Drummond (1810), 17 Ves. 152. *Refd.* Ewer v. Corbet (1723), 2 P. Wms. 148; Hill v. Simpson (1802), 7 Ves. 152.

6066. — As security for receivership of co-executor—*Absence of fraud.*—Three exors. joined in assigning a mtge. of their testator as a security for the receivership of one of them. As the act which was done in this case appeared to be the transaction of all the exors., & two not interested, & no colour or fraud, but a purchase for a valuable consideration, there were not sufficient grounds to set aside this assignment of a mtge. belonging to J., testator.

The first question depends upon this point, whether this was a good alienation of assets. . . . It must be admitted to be good in point of law, for unless exors. do it collusively it is good there, & neither creditors or legatees can call it back again (LORD HARDWICKE, C.).

Whoever takes anything from an exor. must do it always with notice of a will, & if this doctrine was to prevail of notice to an assignee of an exor. it would extend to any case of a will, & nobody would dare to purchase or take an assignment from an exor. (LORD HARDWICKE, C.).

I do not know any instance where an assignment has been made by an exor. for a valuable consideration, that this ct. have set it aside, unless some fraud appears between the exor. & the assignee (LORD HARDWICKE, C.).—*MEAD v. ORRERY* (LORD) (1745), 3 Atk. 235; 20 E. R. 937, L. C.

Annotations:—*Dbtd.* Bonney v. Ridgard (1784), 1 Cox, Eq. Cas. 145. *Consd.* Andrew v. Wrigley (1792), 4 Bro. C. C. 125; Hill v. Simpson (1802), 7 Ves. 152; M'Leod v. Drummond (1810), 17 Ves. 152; Wilson v. Moore (1834), 1 My. & K. 337. *Expld.* Graham v. Drummond, [1896] 1 Ch. 968. *Refd.* Taner v. Ivie (1752), Belt's Sup. 386; Whale v. Booth (1784), 4 Doug. K. B. 36; Farr v. Newman (1792), 4 Term Rep. 621; Keane v. Roberts (1819), 4 Madd. 332; Bellamy v. Sabine (1857), 1 De G. & J. 566. *Mentd.* Shirreff v. Wilks (1800), 1 East, 48; Ludgater v. Channell (1847), 15 Sim. 479.

6067. — To secure debts of executor—*Absence of fraud.*—Exors. may make a valid assignment of testator's property in respect of their own debts, or where they apply the consideration of it to their own purposes, if no fraud in the other party or reasonable ground of suspicion in the transaction.—*TANER v. IVIE* (1752), 2 Ves. Sen. 466; 28 E. R. 298, L. C.

Annotations:—*Refd.* M'Leod v. Drummond (1810), 17 Ves. 152. *Mentd.* Steeden v. Walden, [1910] 2 Ch. 393.

predeceased testatrix, administration was granted to A. who mtged. the leasehold in question to deft., showing title by means of a forged deed, & applied the mtge. money to his own purposes:—*Held*: under the will, A. had only power to dispose of his own life interest.—*ANDERSON v. NEALE* (1902), 2 S. R. N. S. W. 20; 19 W. N. 32.—*AUS.*

n. — To raise money to carry on testator's business.—Testator directed that his business should be on by his exors. & appointed wife & another who renounced. The premises, a freehold estate, were not devised to the exors.

& the title-deeds were deposited with his bankers by way of equitable mtge. His widow, who proved the will, continued carrying on his trade, & obtained from the bank further advances for the purpose of carrying on the business, on the security of the deeds, which remained throughout with the bank:—*Held*: the absence of a devise of the freehold premises to the exors. did not prevent their making a valid mtge., & as the freehold premises were assets employed by testator for the purpose of his business at the time of his death, the extrix. was impliedly authorised to mtge. them for the purpose of carrying on the business, & the deposit constituted a

valid security for all the advances.—*DEVITT v. KEARNEY* (1883), 13 L. R. Ir. 45.—*IR.*

exor. in the estate of a person who had been a member of a partnership applied for leave to join with the other members of the partnership in a mtge. of the partnership assets to enable the continuation of the business of the firm:—*Held*: inasmuch as the will did not authorise the course proposed, leave should not be granted save on condition that the legacies of such legatees as did not consent to the mtge. were secured to them.—*Ex p. DUNCAN'S*

6068. — — — — Gross negligence.]—Transfer by an exor., a clear misapplication of assets, immediately after the death, to secure a debt of the exor. & future advances, under circumstances of gross negligence, though not direct fraud, set aside by general legatees.—*HILL v. SIMPSON* (1802), 7 Ves. 152; 32 E. R. 63.

Annotations:—*Consd.* Haynes v. Forshaw (1853), 11 Hare, 93. *Refd.* Jacob v. Harwood (1751), 2 Ves. Sen. 265; Lowther v. Lowther (1806), 13 Ves. 95; M'Leod v. Drummond (1810), 17 Ves. 152; Wilson v. Moore (1834), 1 My. & K. 337; Fairlie v. Hartwell (1839), 3 Jur. 791. *Mentd.* Hiern v. Mill (1806), 13 Ves. 114; Gray v. Lewis (1869), L. R. 8 Eq. 526; Greenwell v. National Provincial Bank (1883), Cab. & El. 56.

6069. — — — —]—*RAIKES v. HALL* (circa 1839), cited in 1 De G. M. & G. at p. 646; 22 L. J. Ch. at p. 134; 42 E. R. 704.

Annotation:—*Consd.* Stroughill v. Anstey (1852), 1 De G. M. & G. 635.

6070. — — — —]—(1) The survivor of two exors., who had taken out administration to the other, filed a bill to set aside a mtge. of part of the assets made by deceased exor. as having been a breach of trust:—*Held*: his having taken out the administration did not disqualify him from maintaining the suit.

(2) It is not enough to impeach a mtge. of part of the assets, that it was made to secure a debt originally contracted on the personal security of the exor., & without reference to the assets.—*MILES v. DURNFORD, DURNFORD v. WOOD* (1852), 2 De G. M. & G. 641; 21 L. J. Ch. 667; 19 L. T. O. S. 369; 42 E. R. 1022, L. J. J.; *affg.* S. C. *sub nom.* *MILES v. DURNFORD, DURNFORD v. MILES*, 20 L. T. O. S. 41.

Annotation:—*As to* (1) *Consd.* Carter v. Sanders (1854), 2 Drew. 248.

6071. — — — —]—*COLLINSON v. LISTER*, No. 5972, *ante*.

6072. — — — —]—*RAIKES v. HALL* (circa 1839), cited in 1 De G. M. & G. at p. 646; 22 L. J. Ch. at p. 134; 42 E. R. 704.

Annotation:—*Consd.* Stroughill v. Anstey (1852), 1 De G. M. & G. 635.

6073. — With power of sale.]—An exor. or administrator may not only pledge or mtge. the assets, but may also give to the mtgee. of leaseholds a power of sale & to give valid receipts for the purchase money.—*RUSSELL v. PLAICE* (1854), 18 Beav. 21; 2 Eq. Rep. 1149; 23 L. J. Ch. 441; 22 L. T. O. S. 326; 18 Jur. 254; 2 W. R. 243; 52 E. R. 9.

Annotations—*Apld.* Vane v. Rigden (1870), 5 Ch. App. 663. *Folld.* Cruikshank v. Duffin (1872), L. R. 13 Eq. 555. *Consd.* Re Kennal & Still's Contract, [1923] 1 Ch. 293. *Refd.* Ricketts v. Lewis (1882), 20 Ch. D. 745.

6074. — — — —]—An exor. effected a mtge.

Sect. 2.—To alienate: Sub-sect. 2, B. (c).]

of leasehold property, for exorship. purposes, with a power of sale, to a building society, to secure the repayment of the money advanced as well as all fines, premiums, & interest on certain advanced shares in the society, taken by the exor. for the purpose of obtaining the loan:—*Held*: upon bill filed by the society against a purchaser under the power of sale, for specific performance, the exor. might legally effect a mtge. with power of sale & with the incidents of a building society mtge. on advanced shares.—*CRUIKSHANK v. DUFFIN* (1872), L. R. 13 Eq. 555; 41 L. J. Ch. 317; 26 L. T. 121; 30 J. P. 708; 20 W. R. 354.

Annotation:—*Apld.* *Thorne v. Thorne*, [1893] 3 Ch. 196.

6075. — To raise money for repairing leaseholds—No repairing covenant in leases.]—An administrator has no power to mortgage leaseholds of intestate under leases not containing repairing covenants, in order to raise money for repairing the property. Such a mtge. will be set aside as against a mtgee. who has notice of the purpose for which the money is raised.—*RICKETTS v. LEWIS* (1882), 20 Ch. D. 745; 51 L. J. Ch. 837; 46 L. T. 368; 30 W. R. 609.

6076. — To building society.]—*CRUIKSHANK v. DUFFIN*, No. 6074, *ante*.

6077. — —.]—A mtge. by an exor. to a building society upon the terms made by an advanced member is not necessarily invalid as against the beneficiaries. Such a mtge., although the estate & the beneficiaries are not to be thereby liable for fines & other special payments or provisions, may be a valid security for the principal moneys actually advanced, with interest at a reasonable rate.—*THORNE v. THORNE*, [1893] 3 Ch. 196; 63 L. J. Ch. 38; 69 L. T. 378; 42 W. R. 282; 8 R. 282.

6078. — Whether authorised by power of sale in will.]—(1) Testator by his will, after appointing three persons his exors., gave to them the residue of his personal estate & directed them or other the trustees to be appointed under the provisions contained in his will to stand possessed of his residuary personal estate, upon trust, at such time or times as to them should seem meet, to sell & convert into money all such part thereof as should not consist of money, & invest the produce in securities, & to stand possessed of the same, upon trust thereout to pay his funeral expenses & debts & certain large legacies which he specified, & to stand possessed of the residue for his two sons equally; & the will contained a clause which, according to the construction put on it by the ct., empowered the trustees to give receipts. Sixteen years after the death of testator, the then acting trustees of the will, who were not the exors., raised money upon a deposit of the title deeds of two leasehold houses, part of testator's residuary estate:—*Held*: inasmuch as the trusts of the will showed a conversion out & out of testator's property to be absolutely necessary,

the trustees were not authorised in raising money by mtge.

A power of sale out & out, & having an object beyond the raising of a particular charge, does not authorise a mtge.; but where the power is for raising a particular charge, & the estate is settled or devised subject to that charge, it may be proper to raise the money by mtge., & such a mtge. will be supported as a conditional sale.

(2) Where a trust is created by will for the payment of debts & legacies, a purchaser or mtgee. is not bound to see to the application of the money raised, the principle referable to such a case being that testator has shown his intention to be to entrust the trustees with the power of receiving & applying the money.

(3) Persons, however, who deal with trustees raising money at a considerable distance of time & without apparent reason for so doing, are under an obligation to inquire & see that no breach of trust is being committed.—*STROUGHILL v. ANSTEV* (1852), 1 De G. M. & G. 635; 22 L. J. Ch. 130; 19 L. T. O. S. 367; 16 Jur. 671; 42 E. R. 700, L. C.

Annotations:—*As to* (1) *Apld.* *Page v. Cooper* (1853), 20 L. T. O. S. 287. *Foll.* *Devaynes v. Robinson* (1857), 24 Beav. 86. *Apld.* *Re Dimmock, Dimmock v. Dimmock* (1885), 52 L. T. 494. *Reid.* *Wrigley v. Sykes* (1856), 21 Beav. 337. *As to* (2) *Consd.* *M'Neillie v. Acton* (1853), 4 De G. M. & G. 744. *Foll.* *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. *As to* (3) *Consd.* *Sabin v. Heape* (1859), 29 L. J. Ch. 79; *Re Tanqueray-Willaine & Landau* (1882), 20 Ch. D. 465; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101. *Generally, Mentd.* *Darke v. Williamson* (1858), 22 J. P. 705.

6079. — Assets not employed in business—Authority to increase capital of business.]—Testator, who died in 1866, devised & bequeathed all his real & personal estate upon trust for sale & conversion, & empowered his trustees to carry on his business for such time as they should see fit, & to employ in the business all the capital which might be invested therein at the time of his decease, & the profits thereof, & to increase or abridge the business & his capital therein, & generally to transact all matters & concerns respecting the business, & to do all acts relative thereto, in the same manner as if they were absolutely entitled to the same.

The personal estate of testator comprised nearly the whole of the capital of the business. His real estate consisted of the manufactory & buildings upon which the business was carried on, & for which he received a rent.

The trustees carried on the business after testator's death in partnership with other persons; but the firm ultimately became bkpt.

In 1869 one of the trustees advanced to his co-trustees £2,000, & the title deeds relating to the manufactory & premises were deposited with him for securing the repayment of the advance with interest. The money was applied for the purposes of the business. This transaction had not been disclosed.

In Jan. 1882, an action was commenced for the administration of testator's estate. In pursuance

EXECUTOR (1910), T. P. D. 886.—S. AF.

p. — *For what purposes.]—*Where an administrator executed a sub-mortgage of a mortgage of deceased's to secure the repayment of £200, & stated that he required the money partly for the purpose of paying

the debts of deceased & to pay one of the next of kin who was going abroad:—*Held*: the mortgage was made in the ordinary course of administration, & was a valid mortgage.—*Re O'DONNELL'S ESTATE*, [1905] 1 I. R. 406.—IR.

q. Power to pledge—To advance

interests of beneficiaries.]—Notwithstanding that most extensive powers & discretion may be conferred upon an exor., yet, unless there be express provision in the will, he cannot pledge the credit of the estate contingently or conditionally, by cautionary obligations, such as the indorsement of accommodation notes, under pretence

of an order made in that action, the business was sold in 1883.

In Sept. 1882, certain of the beneficiaries mortgaged all their respective shares under the will to secure the repayment to a banking co. of £4,600.

The banking co. applied by petition for leave to intervene in the action, & obtain payment of their debt. The question raised was, whether the trustees had power to make an equitable mtge. of real estate, which did not form part of the assets employed in the business, for the purposes of the business:—*Held*: power to employ other assets in the business was conferred upon the trustees by the authority to increase the capital of the business; as they could have sold the real estate & used the proceeds in the business, they were not wrong in using the property itself to assist in carrying on the business; & the mtge. of 1869 had priority over the mtge. of 1882.—*Re* DIMMOCK, *DIMMOCK v. DIMMOCK* (1885), 52 L. T. 494.

6080. Power to pledge—To secure debts of executor.]—SCOTT v. TYLER, No. 6045, *ante*.

6081. — Bonds of testator.]—Pledge by exors. of bonds to testator upon advances from time to time for several years. Decree dismissing a bill, not by creditors or legatees, but by co-exors., who had not previously acted.—*M'LEOD v. DRUMMOND* (1810), 17 Ves. 152; 34 E. R. 59, L. C.

Annotations:—*Consd.* Keane v. Roberts (1819), 4 Madd. 332; Wilson v. Moore (1834), 1 My. & K. 337; Haynes v. Forshaw (1853), 11 Hare, 93; Russell v. Plaike (1854), 18 Beav. 21; Barrow v. Griffith, Barrow v. Newman (1864), 11 Jur. N. S. 6. *Distd.* Re Cooper, Cooper v. Vesey (1882), 20 Ch. D. 611. *Reid.* Spackman v. Timbrell (1836), 8 Sim. 253; Brett v. Burdett (1864), 2 De G. J. & Sm. 244; *Re* Morgan, Pillgrem v. Pillgrem (1881), 18 Ch. D. 93; *Re* Ingham, Jones v. Ingham, [1893] 1 Ch. 352; *Graham v. Drummond*, [1896] 1 Ch. 968; *Re* Kennal & Still's Contract, [1923] 1 Ch. 293. *Mentd.* Kinderley v. Jervis (1856), 22 Beav. 1.

6082. — Part of residuary estate—After assent to trust dispositions.]—Testator by his will, after appointing two persons exors. & trustees & giving pecuniary legacies, gave his residuary estate to his trustees upon trust for sale & distribution as therein mentioned. Fourteen years after testator's death one of the exors., without the knowledge of his co-exor., pledged certain plate, forming part of testator's residuary estate, with a firm of pawnbrokers, who had no notice that he was not the absolute owner thereof, & misapplied the money so raised. All the debts & legacies, so far as was known, were paid, & the residuary account was passed, within one year of testator's death, but the residuary estate had not been completely distributed. On the death of the pledgor, the transaction was discovered, & an action was brought by the co-exor. & a new trustee against the pawnbrokers to recover the plate:—*Held*: the proper inference to be drawn from the facts was that at the date of the pledge the exors. had assented to the trust dispositions taking effect, & held the plate as trustees; therefore, deceased exor. had no power to pledge the plate, & the existing trustees were entitled to recover it.—*ATTENBOROUGH v. SOLOMON*, [1913] A. C. ; 82 L. J. Ch. 178; 107 L. T. 833; 29 T. L. R.

79; 57 Sol. Jo. 76, H. L.; *affg.* S. C. *sub nom.* SOLOMON v. ATTENBOROUGH, [1912] 1 Ch. 451, C. A.

Annotations:—*Apld.* Wise v. Whitburn, [1924] 1 Ch. 460. *Reid.* Hewson v. Shelley (1913), 82 L. J. Ch. 551; *Re* De Leeuw, Jakens v. Central Advance & Discount Corp., [1922] 2 Ch. 540.

6083. Power to bind future profits—To secure advances for management of estate.]—A plantation & estate in Barbadoes was devised to exors., in trust to manage & to apply the profits, in payment of the expenses of executing the trusts, including a commission, & in payment of several annuities; also to provide for the maintenance & education of certain persons, & to raise in aid of the personal estate, not specifically bequeathed, so much money as should be required to satisfy funeral expenses & debts, & the liens & charges on the real estate, until the debts & liens should be fully paid & satisfied, & subject thereto, upon certain ultimate trusts.

D., a West India merchant, carrying on business in Bristol & London, who had been in the habit of making advances, as consignee of testator's estate, continued, under a special agreement, but not in writing, to make similar advances to the only exor. who proved the will, & made such advances to clear the estate from the charges, & to satisfy legacies & annuities given by the will. The exor. having misappropriated a portion of the advances made to him by D., a suit was instituted for the administration of the estate in the Ct. of Ch. in Barbadoes, in which that ct. disallowed to D. all advances made by him, not proved to have been applied for the benefit of testator's estate:—*Held*: (1) the exor. had power under the will to bind the future profits of the estate, for advances made for the management of the estate, & had sufficiently exercised that power by the agreement with D.; (2) in the circumstances of the case, the consignee was not bound to see to the application of the advances made by him.—*DANIEL v. TROTMAN* (1863), 1 Moo. P. C. C. N. S. 123; 2 New Rep. 92; 8 L. T. 522; 9 Jur. N. S. 583; 11 W. R. 717; 15 E. R. 649, P. C.

Annotation:—*Generally.* *Mentd.* *Re* Harriott, *Ex p.* Pen-gelley (1863), 8 L. T. 854.

6084. Power to assign testator's effects—For benefit of creditor.]—An assignment by an exor. of testator's effects for the benefit of creditors, is valid as between the assignee & a judgment creditor.—*WOLVERHAMPTON & STAFFORDSHIRE BANKING CO. v. MARSTON* (1861), 7 H. & N. 148; 30 L. J. Ex. 402; 4 L. T. 524; 7 Jur. N. S. 1040; 9 W. R. 790; 158 E. R. 428.

6085. — — —.]—An extrix. assigned all the book debts of her testator, which formed the bulk of his property, together with all the books of account, to one of the creditors, to secure the payment of his debt; & gave him a power of attorney to collect the debts in her name. The estate proved insolvent:—*Held*: the assignment was valid.—*VANE (EARL) v. RIGDEN* (1870), 5 Ch. App. 663; 39 L. J. Ch. 797; 18 W. R. 1092, L. C. & L. JJ.

Annotations:—*Apld.* *Re* Kennal & Still's Contract, [1923] 1 Ch. 293. *Reid.* Cruikshank v. Duffin (1872), L. R. 13 Eq. 555; *Re* Jones, Peak v. Jones, [1914] 1 Ch. 742.

of establishing, or advancing the interests of beneficiaries.—*LIONAIS v. MOILSONS BANK* (1883), 10 S. C. R. 526.—CAN.

r. Power to borrow—To raise money to pay debts.]—Where money

is borrowed under Probate Act, R. S. (5th Series), c. 100, ss. 25, 35, for the purpose of paying debts, a liability is created against the estate in the same way as if the mtge. had been executed by deceased personally.—*BOARDMAN*

v. DENNAFORD (1891), 23 N. S. R. (11 R. & G.) 529.—CAN.

s. — — —.]—*Re* ELLIOT (1918), 41 O. L. R. 276; 13 O. W. N. 266; 40 D. L. R. 649.—CAN.

Sect. 2.—To alienate: Sub-sect. 2, B. (d) & C. (a) i. & ii.]

(d) Other Powers.

6086. Power to give mortgagee of leaseholds power to give receipts.]—RUSSELL v. PLAICE, No. 6073, ante.

C. Title of Alienee.

(a) Whether Title Impeachable.

See Court of Probate Act, 1857 (c. 77), ss. 78, 79; Administration of Estates Act, 1925 (c. 23), s. 27.

i. In General.

6087. General rule.]—MEAD v. ORRERY (LORD), No. 6066, ante.

6088. —.]—WHALE v. BOOTH, No. 6027, ante.

6089. Sale of property specifically bequeathed—Other property available for payment of debts.]—Lessee for years devised his term to his son, & further said, that his will was, that his wife should have the occupation & profits of the lease during the minority of his son, to the intent that with the profits she might educate his children, & see his last will performed, & he made her his extrix., & died; afterwards she proved the will, & sold the term to a creditor of her husband before all the debts were paid, having other goods in her hands sufficient to pay the debts & funeral expenses; she educated the issues after her husband's death until her own death; the son came to his full age, & entered into the premises, & his entry adjudged lawful.—**PARAMOUR v. YARDLEY (1579), 2 Plowd. 539; 75 E. R. 794.**

Annotations:—Mentd. Boroughe's Case (1596), 4 Co. Rep. 72 b; Gardiner v. Bredon (1597), 1 Co. Rep. 67 b; Roberts v. Roberts (1613), 2 Bulst. 123; Blamford v. Blamford (1615), 3 Bulst. 98; Thurman v. Cooper (1618), Poph. 138; Howard v. Norfolk (1681), 3 Cas. in Ch. 14; Hitchins v. Basset (1688), 1 Show. 537; Fisher v. Wigg (1699), 1 Ld. Raym. 622; Idle v. Cooke (1705), 2 Ld. Raym. 1144; Darbison v. Beaumont (1713), Fortes. Rep. 18; Young v. Holmes (1717), 1 Stra. 70; Ulrich v. Litchfield (1742), 2 Atk. 372; Doe d. Saye & Sele v. Guy (1802), 3 East, 120; Doe d. Hayes v. Sturges (1816), 7 Taunt. 217; Sherratt v. Bentley (1834), 2 My. & K. 149; Newlands v. Palmer (1849), 13 L. T. O. S. 116.

6090. Property obtained by fraud—In collusion with representative.]—SYDNAM v. COURTNEY (1598), Moore, K. B. 567; 72 E. R. 763.

6091. —.]—An administratrix, being indebted to an attorney for rent, executed to him a mtge. of leasehold property belonging to her intestate, which falsely recited that £300 was paid

as a consideration; the next of kin, not knowing the facts, were induced, by misrepresentation, to execute the mtge., & the jury at the trial found that the deed had not been fairly obtained:—*Held*: the mtgee. was not entitled to recover in ejectment against the next of kin, because of the fraud, nor against the administratrix, who was the widow of intestate, because the accounts of the estate had not been wound up.—**DOE d. WOODHEAD v. FALLOWS (1832), 2 Cr. & J. 481; 2 Tyr. 460; 1 L. J. Ex. 177; 149 E. R. 204.**

Sale by administrator—Subsequent discovery of will.]—See Part II., Sect. 15, sub-sect. 3, ante.

6092. Debts remaining unsatisfied—Agreement by testator to assign to another party.]—SMITH v. WATSON (1719), Bunb. 55; 145 E. R. 593.

Annotation:—Mentd. Gibson v. Holland (1865), L. R. 1 C. P. 1.

6093. —.]—One possessed of a term devises it to A., & makes B. his exor., & leaves some debts. If the exor. sells the term, the purchaser shall hold it against the devisee. *Secus* if sold at an undervalue, or if the purchaser knew there were no debts, or that the debts were or could be paid, without breaking in upon this specific legacy.

An exor., where there are debts, may sell a term (**JEKYLL, M.R.**).—**EWER v. CORBET (1723), 2 P. Wms. 148; 24 E. R. 676.**

Annotations:—Reid. Langley v. Oxford (1748), Amb. 795; Andrew v. Wrigley (1792), 4 Bro. C. C. 125 c; Dickenson v. Lockyer (1798), 4 Ves. 36; M'Leod v. Drummond (1810), 17 Ves. 152.

6094. —.]—Bkpt., who had obtained his certificate, being possessed of leasehold premises as exor. & residuary legatee, mortgaged them to secure a debt of his own, & afterwards assigned the equity of redemption for valuable consideration, the deed reciting, that the assignment was made for the purpose of paying the debts of testatrix. The assignee took an assignment of the mtge. The certificate being held in an action to have been fraudulently obtained, the lease was claimed by the assignees under the bkpcy.; but it was determined, they had no right against the assignee for valuable consideration.—**BEDFORD v. WOODHAM (1790), 4 Ves. 40, n.; 31 E. R. 23.**

6095. Sale at undervalue.]—EWER v. CORBET, No. 6093, ante.

6096. Purchaser with notice that no debts of testator outstanding.]—EWER v. CORBET, No. 6093, ante.

6097. —.]—Testator by his will appointed his wife sole trustee & extrix. thereof, & gave to her

PART V. SECT. 2, SUB-SECT. 2.—
B. (d).

t. Power to recover money advanced—For benefit of estate.]—A lessee of land, with the right to purchase, devised it to his son, if it could be paid for; & if not, that one half should be sold, & the purchase money paid for the other half, which he gave to his son, an infant. The exor. advanced out of his own moneys sufficient to pay the price of the land, & the lessors conveyed to the devisee. The personal estate being exhausted, the ct. directed a sale of the lot which testator desired should be sold, if it was for the benefit of the infant.—**LANNI v. JERMYN (1862), 9 Gr. 160.—CAN.**

a. Power to release mortgage.]—A foreign administrator cannot effectually

release a mtge. on land in this Province.—**Re THORPE (1868), 15 Gr. 76.—CAN.**

b. —.]—H. by his will appointed F. & W. exors. & trustees of his estate. F. for the purpose of securing a debt due him by the estate, executed a mtge. to W. W. died intestate, & F. five years subsequently having agreed to sell the mtged. premises to M., executed a statutory discharge of the mtge., which he expressed to do as sole surviving exor. & then conveyed the estate to M.:—*Held*: the act of F., in executing a discharge of his own mtge. had not the effect of releasing the land.—**BEATY v. SHAW (1887), 14 A. R. 600.—CAN.**

c. To grant leases.]—Under Devolution of Estates Act, an exor. of a deceased lessor can make a valid

renewal of a lease pursuant to the covenant of testator to renew.—**Re CANADIAN PACIFIC RY. CO. & NATIONAL CLUB (1893), 24 O. R. 205.—CAN.**

d. —.]—**KRATING v. KEATING (1835), L. & G. temp. Sugd. 133.—IR.**

e. —.]—An exor. has no power to lease property of testator.—**Ex p. PRINSLOO (1903), T. S. 17.—S. AF.**

f. —.]—An exor. has no power to lease property of testator.—**Ex p. AMON'S EXECUTOR (1906), T. S. 90.—S. AF.**

g. To lend assets.]—It is the rule that, however wide the power given to exors. by the will to lend assets, they cannot lend upon personal security, & if so lent, the ct. will, upon motion before hearing, make them bring in the money.—**MORRISSEY v. FOLEY (1821), 2 Mol. 346.—IR.**

all his estate upon trust for sale or conversion for the benefit of herself during life or widowhood, & declared it to be his wish that, unless circumstances otherwise required it, his leasehold estates should not be converted during the life or widowhood of his wife, & at her death or marriage he bequeathed a leasehold house to his son. Eighteen years after the death of testator the widow entered into a contract for sale of the leasehold house. Her solrs. informed the purchaser that there were no debts of testator remaining unpaid. No reason for selling was suggested. The purchaser objected to the title, unless the concurrence of the son was obtained, but this was refused:—*Held*: under the peculiar circumstances of the case, the purchaser having actual notice that there were no debts of testator remaining unpaid, & no reason being suggested for the sale, the title was not one which ought to be forced on a purchaser.

The will was dated in 1883 & testator died in 1884. That is immaterial, because even if it were twenty years there would be nothing to prevent the vendor making a title as extrix. . . . the rule as to freehold estates does not apply to an exor. selling leaseholds. Therefore the mere expiration of a certain period of time will not affect the power of the vendor as extrix. (KEKEWICH, J.).—*Re VERRELL'S CONTRACT*, [1903] 1 Ch. 65; 72 L. J. Ch. 44; 87 L. T. 521; 51 W. R. 73; 47 Sol. Jo. 71.

Annotation:—*Reid*. *Solomon v. Attenborough*, [1911] 2 Ch. 159.

6098. Property assigned for executor's own debt.—*NUGENT v. GIFFORD*, No. 6063, *ante*.

6099. — No evidence of collusion.—Leasehold estates, specifically bequeathed to an exor., were by him assigned as a security for his own debt. That assignment, no collusion appearing, was established against a creditor.—*TAYLOR v. HAWKINS* (1803), 8 Ves. 209; 32 E. R. 334.

Annotation:—*Consd.* *Graham v. Drummond*, [1896] 1 Ch. 968.

6100. Bequest of fund charged with payment of debts—No proof of payment of debts affecting legacy.—Testator bequeathed a sum in long annuities, to be applied first to the payment of his debts, & a certain portion of it, afterwards, to vest in trustees for his daughter. On his death, a bill in Ch. was exhibited against his exor. for an appropriation of the fund for the daughter's benefit; the exor. admitted assets, & a decree was obtained for the appropriation, within two years of the death of testator. It was not referred to a master in Ch. to ascertain whether there were any debts outstanding; nor did it appear whether or not this was the fact. The daughter's annuity being afterwards sold, the purchaser brought an action to recover back the deposit money, on the ground that no title could be made. On a case stating these facts:—*Held*: there was no sufficient title established; & at least in the absence of a master's report, it lay upon the vendor to show that there were no debts outstanding, which could affect the annuity.—*CURTIS v. BLOW* (1831), 2

B. & Ad. 426; 9 L. J. O. S. K. B. 260; 109 E. R. 1201.

Annotation:—*Mentd.* *Re Brogden*, *Billing v. Brogden* (1888), 38 Ch. D. 546.

6101. Sale by executor-legatee—Purchaser without notice of debts—Equitable assets.—The rule that a purchaser for value, of an asset of testator, from an exor. who is also residuary legatee, acquires a title free from the claims of unsatisfied creditors of testator, if the purchaser took without notice of the unsatisfied debts or of anything which made it improper for the exor. so to deal with the asset applies in the case of equitable as well as legal assets; provided that neither the exor. nor the ct. administering testator's estate still retain control over the asset.

In 1878, the registered holder of railway stocks covenanted to pay an annuity to the trustees of a settlement during the joint lives of himself & his wife & the life of the survivor. In 1882 he died having bequeathed all his property to his widow, & appointed her his extrix. The widow proved the will & by various deeds from 1886 to 1892 transferred the stocks to her bankers to secure a debt of her own. In Dec. 1892 the widow gave an equitable charge on the stocks to pltf. to secure advances made to her. Neither the bankers nor pltf. when taking their respective securities had knowledge or notice that any debt of testator remained unpaid, or that the widow was not entitled to deal with the stocks as she did, & pltf. before he had notice that there was any indebtedness of testator, gave notice of his charge to the bankers.

The bankers sold the stocks, & having retained the amount owing to them, paid the balance into ct.:—*Held*: pltf.'s charge on the balance had priority over the claims of the settlement trustees.—*GRAHAM v. DRUMMOND*, [1896] 1 Ch. 968; 65 L. J. Ch. 472; 74 L. T. 417; 44 W. R. 596; 12 T. L. R. 319.

Annotation:—*Distd.* *Bank of Bombay v. Suleman Somji* (1908), 99 L. T. 532.

Sale by co-executor.—*See* Sect. 2, sub-sect. 2, A., *ante*.

Sale by infant executor.—*See* Sect. 2, sub-sect. 2, A., *ante*.

ii. Breach of Trust or Devastavit committed by Representative.

6102. Alienee with notice.—*SYDNAM v. COURTNEY* (1598), Moore, K. B. 567; 72 E. R. 763.

6103. ——An exor. in trust for an infant residuary legatee renews a lease, part of testator's personal estate in his own name, & having mortgaged it, assigns the equity of redemption to a trustee to sell for payment of his own debts. The trustee sells to one who had notice of the infant's title. Purchase set aside.—*WALLEY v. WALLEY* (1687), 1 Vern. 484; 23 E. R. 609.

Annotations:—*Mentd.* *Brown v. Blount* (1830), 9 L. J. O. S. Ch. 74; *Peacock v. Burt* (1834), 4 L. J. Ch. 33; *Willats v. Busby* (1842), 5 Beav. 193; *Rowley v. Ginnever*, [1897] 2 Ch. 503.

PART V. SECT. 2, SUB-SECT. 2.—C. (a) 1.

60991. Property assigned for executor's own debt—No evidence of collusion—Debts remaining unsatisfied.—Where there is no fraud or collusion, an exor. may apply the assets of testator in

payment of his own debt, though in case of a deficiency of assets to pay debts or legacies, the alienee of the property (knowing that it belonged to the estate) may be liable in equity to creditors or legatees, or the next of kin.—*ALLINGHAM v. DANIEL* (1871), N. B. Dig. 376.—CAN.

h. Assignment of mortgage—Party not described as administratrix.—An assignment by an administratrix of a mtge., part of the assets of intestate, was held valid though not therein stated to be executed as administratrix.—*YARRINGTON v. LYON* (1866), 17 Gr. 308.—CAN.

Sect. 2.—To alienate: Sub-sect. 2, C. (a) ii. & iii.,

6104. —.]—A. purchased a leasehold estate of an exor. having notice a debt of testator's was unpaid, & out of the purchase money had an allowance of a debt of £200 due to him from testator, & a debt of £550 due to him from exor.; the remainder being £150 was paid in money. This sale not good against an unsatisfied creditor.—*CRANE v. DRAKE* (1708), 2 Vern. 616; 1 Eq. Cas. Abr. 240; 23 E. R. 1004, L. C.

Annotations:—*Distd.* *Nugent v. Gifford* (1738), 1 Atk. 464. *Refd.* *Mead v. Orrery* (1745), 3 Atk. 235; *Whale v. Booth* (1784), 4 Doug. K. B. 36; *Scott v. Tyler* (1788), 2 Bro. C. C. 431; *Andrew v. Wrigley* (1792), 4 Bro. C. C. 125; *Hill v. Simpson* (1802), 7 Ves. 152; *M'Leod v. Drummond* (1810), 17 Ves. 152; *Wilson v. Moore* (1834), 1 My. & K. 337. *Mentd.* *Dickenson v. Lockyer* (1798), 4 Ves. 36.

6105. —.]—Merchants, who, by the direction of an exor., their commercial correspondent, applied a fund, which they knew to be part of testator's assets, in satisfaction of advances made by them, in the course of trade, to relieve the embarrassments of their correspondent, were held to be responsible for the fund so applied, to general pecuniary legatees under the will of testator.—*WILSON v. MOORE* (1834), 1 My. & K. 337; 39 E. R. 709, L. C.

Annotations:—*Consd.* *Collinson v. Lister* (1855), 20 Beav. 356; *Child v. Thorley* (1880), 10 Ch. D. 151. *Mentd.* *Fairlie v. Hartwell* (1839), 3 Jur. 791; *Fyler v. Fyler* (1841), 3 Beav. 550; *Pannell v. Hurley* (1845), 2 Coll. 241; *Bank of Bengal v. Fagan* (1849), 5 Moo. Ind. App. 27; *Rolfe v. Gregory* (1863), 9 L. T. 250; *Gray v. Lewis* (1869), L. R. 8 Eq. 526; *Macbryde v. Eykyn* (1871), 24 L. T. 461; *Piercy v. Fynney* (1871), L. R. 12 Eq. 69; *Foxton v. Manchester & Liverpool District Banking Co.* (1881), 44 L. T. 406; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Cowper v. Stoneham* (1893), 68 L. T. 18; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Mara v. Browne* (1895), 73 L. T. 638.

6106. —.]—A person, purchasing from an administratrix, under an agreement to pay when he is able, participates in a *devastavit*. Such person must pay interest at 5 per cent. Question as to contribution to the costs between such person & the administratrix.

Where a purchaser participates in the breach of duty or *devastavit* of an exor. or administrator the sale is invalid (*LORD LYNDHURST, C.*).—*LAWRENCE v. BOWLE* (1846), 1 Coop. temp. Cott. 241; 47 E. R. 838, L. C.

6107. —.]—*STROUGHILL v. ANSTEY*, No. 6078, *ante*.

6108. —.]—Where an exor. parts with any portion of the assets of testator, under such circumstances as that the purchaser must be reasonably taken to know that they were sold, not for the benefit of the estate, but for exor.'s own benefit, the result is, that the purchaser holds the assets as if he were himself in respect of these assets the exor.—*WALKER v. TAYLOR* (1861), 4 L. T. 845; 8 Jur. N. S. 681, H. L.

6109. —.]—A., B., & C., as the only next of kin with D., the administrator, of their intestate father, signed a memorandum in 1872, authorising D. to borrow, upon mtge. or otherwise as he might deem best, upon the security of certain house property, held by intestate under an agreement for a lease to be granted on completion of repairs, such money as D. required for carrying out these matters, & to charge their respective shares with the interest. A lease of the houses was soon afterwards granted to D. as the sole legal personal representative of intestate, which,

deposited by with E. In 1870 the accounts showing a balance due to D., were settled between A., B., C., & D., & D. then told A., B. & C. that he had not borrowed any money upon the security of their shares under the memorandum of 1872. In 1877 D., who had previously mortgaged his share of the house property to E., executed a further mtge. to him of the entirety, reciting the authority of 1872. No notice was given by E. to A., B., & C., that he held any charge upon their shares under the memorandum:—*Held*: in the absence of any notice by E. to A., B., & C., of a charge to him of their shares by D. under the authority of 1872, the mtge. of 1877, after that authority had been withdrawn by the settlement of accounts, did not affect their shares, & they were entitled to an assignment from E. of their shares of the property comprised in the lease, which had been mortgaged by D.—*JONES v. STÖHWASSER* (1881), 16 Ch. D. 577; 50 L. J. Ch. 625; 44 L. T. 333; 29 W. R. 497.

6110. Breach of trust apparent on face of assignment—Effect of lapse of time.]—*BONNEY v. RIDGARD*, No. 6119, *post*.

6111. Alienee without notice.]—(1) The produce of a specific legacy misapplied by A., an administrator, being traced into *post obit* securities given by B. to C.:—*Held*: the *cestui que trust* was entitled to a charge on the securities.

(2) A specific legacy of £6,000 Consols, bequeathed to pltf., was unnecessarily & improperly sold out by the administrator, A., with the aid of B., & the produce carried partly to the banking account of A., & the remainder to that of B. A series of shuffling of cheques & transfer of moneys took place, but £2,908 was traced to B. About this time B. laid out moneys in the purchase of a *post obit* security, & though the trust moneys could not be distinctly traced into the securities, yet the ct. held from the suspicious character of the transactions, that such was the just inference, so far as to throw on the other side the onus of disproving it, & this not having been done, the ct. held that pltf. had a charge on the securities for the £2,908 & interest.

(3) In addition to this, B. had sold & transferred the securities to C. in consideration of a debt then owing. C. had notice that the money by which the securities had been obtained had been derived from A., though she had no notice of the breach of trust:—*Held*: C. could not set up an adverse title as against A., & *a fortiori*, she could not do so as against the pltf.'s (A.'s *cestuis que trust*).—*HARFORD v. LLOYD* (1855), 20 Beav. 310; 52 E. R. 622.

6112. —.]—*Re MORGAN, PILGREM v. PILGREM*, No. 6009, *ante*.

6113. Assignment for valuable consideration.]—Testatrix having directed that a leasehold should be sold, & the money divided among five persons, the administrator, alleging that he had become entitled to it by an arrangement with the legatees, assigned it over for valuable consideration:—*Held*: at his death, it remained assets unadministered, & the purchaser must be directed to convey it to the administratrix *de bonis non*, though the persons beneficially interested were not all parties to the suit.—*CUBBIDGE v. BOATWRIGHT* (1826), 1 Russ. 549; 38 E. R. 212.

—*Mentd.* *Skeffington v. Whitehurst* (1837-8),

6114. Sale by representative of executor committing breach of trust.]—Testatrix by her will appointed her husband B. sole trustee & exor., & gave two legacies of £3,000 each to her nephews W. & R. absolutely, subject to prior life interests. By a codicil testatrix stated that she did not wish her nephews to have a vested interest unless they attained the age of twenty-one years, & she gave the legacies & the residue of her estate to the two nephews on their attaining twenty-one years, & if only one attained twenty-one she gave him both legacies & the residue absolutely. If both died under twenty-one the legacies & residue were to go to her statutory next of kin of the whole blood as if she had died unmarried. Testatrix died on Nov. 9, 1899. B. out of the legacy of £3,000 to R. or out of the residue, purchased a leasehold house for £2,100 although there was no power in the will authorising him to do so, & spent £100 of the trust estate in improving the house. By his will, dated July 31, 1900, he appointed the vendors his exors. & trustees, & he died on Dec. 21, 1901. Vendors on Oct. 29, 1902, agreed to sell the house for £2,600, but the purchaser objected that as the purchase was made in breach of trust, the beneficiaries under the will had a right to affirm the purchase & elect to keep the house:—*Held*: (1) the legal personal representatives of the trustee were entitled to realise the investment improperly made by their testator, & it was their duty to do so to ascertain the liability; (2) the purchaser was not entitled to insist on one of the beneficiaries joining in the conveyance.—*Re JENKINS & RANDALL (H. E.) & CO.'S CONTRACT*, [1903] 2 Ch. 362; 72 L. J. Ch. 693; 88 L. T. 628.

iii. Lapse of Time between Death and Date of Alienation.

6115. Sale of leaseholds.]—Where testator charges his general estate with legacies, & the exor. & residuary legatee sells a leasehold, & no demands in respect of the charges created by the will are made for twenty years, the ct. will presume that the legacies are satisfied, nor are releases from the legatees necessary to make a good title to the leasehold.

Even without them [the releases] I should have held that where an exor., twenty years after the death of testator, sells a leasehold, charged by the will with legacies, & no demand has, during all that time been made upon it, there was evidence that the charges had been paid (*LEACH, V.-C.*).—*MONTRESOR v. WILLIAMS* (1823), 1 L. J. O. S. Ch. 151.

6116. —.]—The rule intimated in *Re Tanqueray-Willaume & Landau*, No. 6188, *post*, that where an exor. is selling real estate, after twenty years have elapsed from testator's decease, a presumption arises that the debts have been paid, & the purchaser is therefore put upon inquiry, does not in general apply to the case of an exor. selling leaseholds of testator. Testator bequeathed leaseholds to his extrix. upon trust to pay an annuity, & bequeathed his residuary estate to the extrix. Shortly before twenty years had elapsed from testator's decease the extrix. contracted to sell the leaseholds at a price to be ascertained by a named person. Shortly after the

twenty years had elapsed the price was ascertained. It was not shown that there were debts of testator remaining unsatisfied, nor did it appear that the extrix. had been in possession of the leaseholds as legatee:—*Held*: the purchaser was not entitled to require the concurrence of the annuitant in the assignment of the leaseholds.—*Re WISTLER* (1887), 35 Ch. D. 561; 56 L. J. Ch. 827; 57 L. T. 77; 51 J. P. 820; 35 W. R. 662.

Annotations:—*Fold.* *Re Venn & Furze's Contract*, [1894] 2 Ch. 101. *Dist.* *Re Verrell's Contract*, [1903] 1 Ch. 65; *Solomon v. Attenborough*, [1912] 1 Ch. 451.

6117. —.]—(1) Where an exor. sells leaseholds, part of testator's estate, he must be presumed to be acting in the discharge of the duties imposed on him as exor., unless there is something in the transaction which shows the contrary. Neither the lapse of more than twenty-six years between the death of testator & the sale by the exor., nor the fact that the conveyance does not purport to be executed by him as exor. is sufficient to raise the presumption that he was acting otherwise than as such.

(2) The rule intimated in *Re Tanqueray-Willaume & Landau*, No. 6188, *post*, that where an exor. is selling real estate of testator, vested in him subject to a charge of debts, & twenty years have elapsed from the death of testator, a purchaser is put upon inquiry as to whether there are debts remaining unpaid—does not apply in the case of an exor. selling leaseholds.—*Re VENN & FURZE'S CONTRACT*, [1894] 2 Ch. 101; 63 L. J. Ch. 303; 70 L. T. 312; 42 W. R. 440; 38 Sol. Jo. 273; 8 R. 220.

Annotations:—*As to* (1) *Consd.* *Re Henson*, *Chester v. Henson*, [1908] 2 Ch. 356. *Reid.* *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596; *Re Wells & Hopkinson's Contract* (1916), 114 L. T. 940. *As to* (2) *Dist.* *Re Verrell's Contract*, [1903] 1 Ch. 65; *Solomon v. Attenborough*, [1912] 1 Ch. 451.

6118. —.]—*Re VERRELL'S CONTRACT*, No. 6097, *ante*.

Sale of land.]—*See* Sub-sect. 3, B. (a), *post*.

(b) *Whether Alienee bound to make Inquiries.*

6119. As to application of purchase-money.]—

(1) A purchaser of leasehold premises from an exor. need not, in general, see to the application of the purchase money, nor need there be any recital in such an assignment of the purpose for which it is sold,

(2) If on the face of the assignment it appears to have been made in satisfaction of the private debt of the exor., such a sale is fraudulent against the persons interested in the premises under the will, & a ct. of equity will relieve against it.

(3) Such a claim will be barred by a great length of time having run against the parties seeking relief.—*BONNEY v. RIDGARD* (1784), 1 Cox, Eq. Cas. 145; 29 E. R. 1101.

Annotations:—*As to* (1) *Consd.* *M'Leod v. Drummond* (1810), 17 Ves. 152; *Wilson v. Moore* (1834), 1 My. & K. 337. *Reid.* *Shaw v. Borrer* (1836), 1 Keen, 559. *As to* (2) *Consd.* *Hill v. Simpson* (1802), 7 Ves. 152. *As to* (3) *Consd.* *Andrew v. Wrigley* (1792), 4 Bro. C. C. 125; *Beckford v. Wade* (1805), 17 Ves. 87. *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474. *Reid.* *Gregory v. Gregory* (1815), Coop. G. 201; *Chalmer v. Bradley* (1819), 1 Jac. & W. 51; *Soar v. Ashwell*, [1893] 2 Q. B. 390. *Generally.* *Mentd.* *Cholmondeley v. Clinton* (1821), 4 Bl. 1; *Clegg v. Edmondson* (1857), 29 L. T. O. S. 131.

Sect. 2.—To alienate: Sub-sect. 2, C. (b); sub-sect. 3, A. & B. (a) i.]

6120. —.]—DANIEL v. TROTMAN, No. 6083, ante.

6121. As to payment of debts—Sale many years after death.]—Re VENN & FURZE'S CONTRACT, No. 6117, ante.

SUB-SECT. 3.—REAL ESTATE.

A. Who may exercise Powers.

See, now, Administration of Estates Act, 1925 (c. 23), ss. 2, 8.

6122. Where power given to executors—Co-executors.]—ANON. (1355), No. 6028, ante.

6123. — — — Refusal of co-executors to act.]—Land devised to several exors. in fee, to the intent that they should dispose of it, may be sold by any of them if the others refuse to execute the authority.—BONIFAUT v. GREENFIELD (1587), Cro. Eliz. 80; 1 Leon. 60; 78 E. R. 340; *sub nom.* BONEFANT v. GREINFELD, Godb. 77.

Annotations:—Mentd. Mansell v. Mansell (1757), Wilm. 36; Townson v. Tickell (1819), 3 B. & Ald. 31.

6124. — — — Sale of copyholds.]—A power in a will in the following form, viz., "I direct that A., B. & C., the exors. of this my will, or the survivors or survivor of them, or the exors. or administrators of such survivor, shall sell my copyhold messuages":—*Held*: within 21 Hen. 8, c. 4, to authorise a sale by A. & B. on C. refusing to act, that Act extending to copyholds.—PEPPER-CORN v. WAYMAN (1852), 5 De G. & Sm. 230; 21 L. J. Ch. 827; 16 Jur. 794; 64 E. R. 1094, L. JJ.

6125. — — —.]—A demise in ejectment by two out of three co-exors. is good.

The legal effect of a demise by two out of three co-exors. is that each demises his own separate interest, but then each co-exor. has the entire interest, so that pltf. gets the whole estate (*per Cur.*).—DOE d. STACE v. WHEELER (1846), 15 M. & W. 623; 16 L. J. Ex. 312; 7 L. T. O. S. 231; 153 E. R. 999.

6126. — — — Land Transfer Act, 1897 (c. 65).]—The expression "personal representatives," as used in the first four sects. of above Act, means those who are named as exors. in a will, whether they have actually obtained a grant of probate or not. Therefore in the case of testator who has died after the commencement of the Act, the concurrence of all his exors. whether or not they have proved the will, is necessary to effect a valid con-

veyance of his real estate.—*Re PAWLEY & LONDON & PROVINCIAL BANK*, [1900] 1 Ch. 58; 69 L. J. Ch. 6; 81 L. T. 507; 48 W. R. 107; 44 Sol. Jo. 25.

Annotation:—Reid. Hewson v. Shelley, [1913] 2 Ch. 384.

See, now, Conveyancing Act, 1911 (c. 37), s. 12 (1); Administration of Estates Act, 1925 (c. 23), s. 2 (2).

6127. — Executors of executors.]—ANON. (undated), Keil. 107; 72 E. R. 273.

6128. — — — Joint power—Death of co-executor.]—ANON. (1564), Moore, K. B. 61; 72 E. R. 441.

Annotation:—Consd. Cole v. Wade (1807), 16 Ves. 27.

6129. — Administrator.]—A. devises that his exors. shall sell his land. Neither the ordinary nor the administrators can sell it.—ANON. (1490), Jenk. 187; 145 E. R. 126.

6130. — — —.]—Real estate was devised to A. in trust to sell, with power to the trustees to give discharges. A. was to pay the debts & hold the surplus on certain trusts, & he was appointed sole exor. A. having renounced & disclaimed:—*Held*: the heir-at-law, who had taken out administration, could sell the estate & give valid receipts.—AUSTIN v. MARTIN (1861), 29 Beav. 523; 4 L. T. 817; 7 Jur. N. S. 871; 9 W. R. 674; 54 E. R. 730.

6131. — — —.]—An administrator with the will annexed has no such implied power to sell testator's real estate as an exor. has, the exor. being a nominee of testator to pay his debts, the administrator being only an officer of the Probate Ct. Nor is such power given to the administrator by Law of Property Amendment Act, 1859 (c. 35), s. 16.—*Re CLAY & TETLEY* (1880), 16 Ch. D. 3; 50 L. J. Ch. 164; 43 L. T. 402; 29 W. R. 5, C. A.

6132. — Infant executor.]—On a sale of real estate by exors. where one of them is an infant, the ct. will make an order appointing a person to convey on behalf of the infant exor. But the ct. will not make an order as to prospective sales.—*Re LEWIS'S TRUSTS* (1910), 55 Sol. Jo. 140.

6133. — Whether heir must join in sale.]—Devise that exors. shall sell lands, etc., they do not sell. Decreed that the heir shall join in the sale for payment of debts.—AMBY v. GOWER (1655), 1 Rep. Ch. 168; 21 E. R. 540.

6134. When power not given to executors—Mere direction for sale—Whether heir must join in sale.]—CARVILL v. CARVILL (1684), 2 Rep. Ch. 301; 21 E. R. 685.

Annotation:—Mentd. Ashburnham v. Bradshaw (1740), West temp. Hard. 505.

PART V. SECT. 2, SUB-SECT. 3.—A.

61271. Where power given to executors—Executors of executors.]—The original testator, being seised of real estate died in 1895. Probate of his will was granted to his wife, the sole extrix. & she died in 1901:—*Held*: the exors. of the sole extrix., to whom probate had been granted, had power to sell the real estate of the original testator.—*Ex p.* MANNING (1905), 5 S. R. N. S. W. 453.—AUS.

1. Husband—As administrator of wife.]—Land was conveyed in 1874 to a husband & wife who were married in 1864:—*Held*: the husband could as

administrator of the wife, & in his own right, make a valid conveyance of the whole of the land, although there were no debts of the wife to pay.—*Re WILSON & TORONTO INCANDESCENT ELECTRIC LIGHT CO.* (1891), 20 O. R. 397.—CAN.

m. Residuary devisee & executors.]—Where testator held certain lands as a trustee, to secure a debt due him, & devised the residue of his property to his exors. except such parts thereof as might at his decease be vested in him upon any trusts or by way of mtge., & then, by a subsequent devise, all the residue of his estate, real & personal, to J., whom he also appointed

one of his exors., & his heirs absolutely: *Held*: J. & the exors. could by their deed pass all the legal & equitable interest in the trust estate sold.—*Re CHARLES* (1872), 4 Ch. Ch. 19.—CAN.

n. Surviving executors.]—Where there is under a will an implied power in the exors. & trustees to sell property, a conveyance executed by the surviving trustees & exors., in whom the title is vested, & the widow of testator, give a good title to the property in question, & it is not necessary that the beneficiaries under the will, other than the widow, should join in the conveyance.—FENETY v. JOHNSTON (1909), 4 N. B. R. (4 Tru.) 216.—CAN.

B. Extent of Powers.**(a) Power of Sale.****i. In General.**

6185. Real estate vested in representative—General rule—Same power as over personal estate.]—The power of an exor. over the real estate of his testator is, since Land Transfer Act, 1897 (c. 65), enlarged, & he has now the same power in dealing with it as he previously had in dealing with the personal estate.—*Re CAVENDISH & ARNOLD'S CONTRACT* (1912), 56 Sol. Jo. 468.

Annotations:—Consd. Re Wicksted's Trust, [1921] 2 Ch. 184; Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

PART V. SECT. 2, SUB-SECT. 3.—
B. (a) i.

o. By executor—Sale not necessary—For payment of debts.]—W. died in India, by his will appointed D. as his exor. & after payment of debts bequeathed sundry legacies. He had realty in Tasmania but no personalty, & owed certain debts which his personalty in India was sufficient to pay. The attorney in Tasmania for the exor. made an advantageous contract for sale of the realty & applied for directions as to his power of sale:—*Held*: the exor. had no power of sale either for purposes of division or payment of debts.—*Re WALKER* (1916), 12 Tas. L. R. 9.—**AUS.**

Re MOORE & LANGMUIR, 21 C. L. T. 562.—**CAN.**

q. — For payment of debts—Not charged on realty.]—Lands were devised to trustees to carry out the will of testator, who reserved six lots, which he desired should be sold for payment of debts, not charged on lands:—*Held*: the trustees had a right to sell the whole of such property for payment of debts left unpaid by the personal estate, & the lots specially appointed to be sold for that purpose.—*DUFF v. MEWBURN* (1859), 7 Gr. 73.—**CAN.**

r. — —.]—An exor. is not justified in selling any property specifically bequeathed, unless the sale is necessary for payment of the debts of the estate.—*VAN DER LITH'S ESTATE v. CONRADIE* (1903), 20 S. C. 241.—**S. AF.**

s. — For payment of legacies—Charged on realty.]—The power of selling the real estate for the payment of legacies is applicable to those cases, where it has been expressly made chargeable with them, or can be so gathered from the will.—*Re MCKAY'S ESTATE* (1861), 5 N. S. R. (1 Old.) 131.—**CAN.**

t. — Whether co-executors must sign conveyance—In presence of each other.]—Exors. empowered under a will to sell lands, are not bound to sign the deed in presence of each other.—*LITTLE v. AIKMAN* (1869), 28 U. C. R. 337.—**CAN.**

u. — Who are necessary parties to conveyance—Child of testator.]—Testator directed that when X. property was sold, the interest should be used to maintain his children, & to the support of his wife, so long as she remained his widow; & named certain persons exors. of his will:—*Held*: the exors. had full power to sell & convey the lands in fee, & a child of testator, born after the making of the will, was not a necessary party to the conveyance.—*GLOVER v. WILSON* (1870), 17 Gr. 111.—**CAN.**

b. — No interest conveyed to them—Whether executors can maintain ejectment.]—A devise that exors. should sell lands, investing them with a

power to sell, but conveying to them no interest, will not enable them to maintain ejectment.—*WILLIAMS v. MYERS* (1871), 8 N. S. R. 157.—**CAN.**

c. — After renunciation—Whether power can be exercised.]—Where a power of sale is given to exors. *qua* exors., & not by name, they cannot, after they have once renounced, execute such power.—*TRAYERS v. GUSTIN* (1873), 20 Gr. 106.—**CAN.**

d. — With consent—Of widow of testator.]—J. devised to H., his wife, all his real estate in L. during her life, for the support of herself & family, & in case H. should think proper to sell his estate, it should be the duty of his exors. to sell the same with her consent. He then nominated P. exor. of his will, "with full power & authority to act in the same":—*Held*: the proper construction to be placed on the will was, that a life estate was given to H. with a power of sale to P. during her lifetime with her consent, & unless & until the consent of the widow was given the power of sale did not exist, & the exor. had no duty to perform in relation to the land.—*JOHNSON v. KRAMER* (1884), 8 O. R. 193.—**CAN.**

e. — Of residuary legatee.]—Under a will making provision for the wife & sister of testator to be secured on the estate, & giving the residue both real & personal to his three children in equal shares, the exors. have no power to sell the real estate without the consent of the residuary legatee, there being no express power to sell conferred & no debts necessitating a sale.—*CARRUTHERS v. CARRUTHERS* (1911), 21 Man. L. R. 781; 1 W. W. R. 231.—**CAN.**

f. — Mode of sale—Indiscretion of trustees.]—Exors. were directed to sell a farm "for the best price that could be obtained":—*Held*: the power to sell involved a power to secure part of the price by means of a mtge. on the property sold, the manner of sale being left to the discretion of the trustees.—*Re GRAHAM'S CONTRACT* (1889), 17 O. R. 570.—**CAN.**

g. — Non-registration of caution—Validity of sale.]—Testatrix devised all her real & personal property to two exors. with full power in their discretion to sell her property, & to pay the income to the husband during lifetime, & after his death to sell the property & divide the same equally between her children. One of the exors. renounced probate, which was granted to her husband, the other exor., who, some years after, without having registered a caution, contracted to sell certain of the lands to pay debts:—*Held*: he had power to make a valid sale.—*Re HEWITT v. JERMYN* (1898), 29 O. R. 383.—**CAN.**

h. — —.]—*BYER v. GROVE* (1901), 22 C. L. T. 28; 2 O. L. R. 754.—**CAN.**

k. — Sale after thirty-seven years'

6186. — Power to sell land apart from minerals—Trustee Act, 1893 (c. 53), s. 44.]—*Re CAVENDISH & ARNOLD'S CONTRACT* (1912), 56 Sol. Jo. 468.

Annotations:—H.F. Re Wicksted's Trust, [1921] 2 Ch. 184. Apprd. Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

6187. — —.]—An exor. is within Trustee Act, 1893 (c. 53), s. 44 (1), as amended by Trustee Act, 1893, Amendment Act, 1894 (c. 10), which requires the sanction of the ct. to a sale, by a "trustee or other person" authorised to sell land, of the land without the minerals or of the minerals separately from the residue of the land.—

*delay—Whether valid.]—*Testator, who died in the year 1847, possessed of a leasehold held for a long term of years, by his will directed his debts to be paid, & subject thereto, left his property to his exors. in trust for payment of annuities. There was no specific bequest of the term, & no disposition of the ultimate residue. The exors. after the lapse of thirty-seven years set up the leasehold premises for sale by auction. No necessity for the sale was disclosed. The purchaser having objected that the exors.' right to sell after such a lapse of time was not shown:—*Held*: the objection was valid, & should be allowed.—*Re MORRIS* (1889), 23 L. R. Ir. 333.—**IR.**

l. — Not restricted to sale for cash.]—An exor.'s power of sale of realty is not restricted to a sale for cash.—*MALONE v. TITLES REGISTRAR*, [1919] V. L. R. 370.—**AUS.**

m. — Necessity for notice of sale.]—A notice to sell land by exors., by virtue of a licence from the Governor & Council, must be given thirty days, exclusive of the day of sale, both by posting up notices & by publication in the newspaper; but it is not necessary to prove that the notices posted up, continued up till the day of sale.—*DOE d. PIKE v. TIERNEY* (1831), N. B. Dig. 378.—**CAN.**

n. — Validity of Governor-in-Council's order for sale.]—When J., the owner of real estate, died insolvent, having appointed four exors. of his last will, & two of the exors. took out probate, & obtained an order from the Governor-in-Council for the sale of the land, under which the land was sold to C.:—*Held*: though the other two exors. had not renounced, & the two who acted under the order had not given the security required by statute, yet the order could not be impugned by this ct.—*CHISHOLM v. McDONALD* (1856), 2 Thom. 367.—**CAN.**

aa. — Conditional on testator's widow being maintained.]—Testator devised all his real & personal estate to his wife for life; with remainders over to his daughter & son; with liberty to the daughter & her husband to occupy the land, provided they supplied his widow with a comfortable support & maintenance out of the same during her life, & if they did not do so to her satisfaction, the exors. should have power to sell or lease the land:—*Held*: the duty of supplying the widow with maintenance was conditioned upon the parties occupying the land; & a sale effected by the exors. in default of their supplying the widow with such support, although not occupying the land, was declared void.—*DOUGHERTY v. CARSON* (1858), 7 Gr. 31.—**CAN.**

bb. — Legal estate not in executors.]—Testator directed that when his lands were sold the money remaining was to be divided in the manner therein stated. There was no other residuary clause. Testator named two exors.,

Sect. 2.—To alienate: Sub-sect. 3, B. (a) i. & (b).]

Re WICKSTED'S TRUSTS, [1921] 2 Ch. 184; 90 L. J. Ch. 377; 125 L. T. 856; 65 Sol. Jo. 513.

Annotation:—N.F. Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

6138. ———.]—Legal personal representatives, in whom under Land Transfer Act, 1897 (c. 65), the freeholds of a deceased person are vested have power to sell the surface & minerals of his lands separately without obtaining the sanction of the ct. under Trustee Act, 1893 (c. 53), s. 44.—*Re CHAPLIN & STAFFORDSHIRE POTTERIES WATERWORKS CO.'S CONTRACT*, [1922] 2 Ch. 824; 92 L. J. Ch. 34; 128 L. T. 186; 38 T. L. R. 857; 67 Sol. Jo. 46, C. A.

Annotation:—Reid. Re Kemnal & Still's Contract, [1923] 1 Ch. 293.

adding: "in them I repose full confidence that they will act fair & consistent":—*Held*: all the lands were to be sold; & the exors. had power to sell them, although they had not the legal estate.—*WOODSIDE v. LOGAN* (1868), 15 Gr. 145.—CAN.

Whether implied power of sale in will.—*HENRY v. SIMPSON* (1872), 19 Gr. 522.—CAN.

r. ———.]—An exor. held to have been vested with an implied power to sell certain of testator's real property, & a proposed sale thereof approved.—*Re BOISSEAU ESTATE, Re MANITOBA TRUSTEE ACT*, [1918] 3 W. W. R. 668.—CAN.

s. ———.]—*CARLISLE v. COOKE*, [1905] 1 I. R. 269.—IR.

t. ———.]—*Express power of sale.*—After giving the whole of her estate to H. & his wife & their three children, testatrix directed, that the real estate should be sold & equally divided, & appointed H. & his daughter exors.:—*Held*: the exors. had an express power of sale.—*Re ROBERTS & BROOKS* (1905), 25 C. L. T. 400; 6 O. W. R. 49; 10 O. L. R. 395.—CAN.

a. ———.]—*Whether legatees can compel executor to sell.*—J. applied to the judge of probate for a licence to sell the real estate devised to himself, & covered by an assignment, for the purpose of paying the legatees the balance due to them:—*Held*: it was not competent to the judge of probate to make the order applied for, the exor. having power to sell under the terms of the will, & it being open to the legatees in case of his refusal, to compel him by suit in equity to do so.—*Re RUNCIMAN'S ESTATE* (1905), 38 N. S. R. 89.—CAN.

b. ———.]—*Whether concurrence of beneficiaries necessary.*—W., by his will, made in 1861, appointed his wife & two other persons exors. He died in the same year. His wife died in Sept. 1917; one of the other exors. survived her. W. willed & bequeathed to his wife during his natural life the whole of his real & personal property, including his farm. The will then provided that, if it should be unsuitable for his wife to live on the farm "she may if she deems it to be for her greater convenience with the advice & management of my exors. dispose of the whole or part of the farm." The farm, at the date of the death of the wife, remained unsold:—*Held*: the exors. had power to convey the farm, without the concurrence of the beneficiaries.—*Re WAUGH, Re SCOTT & SCOTT* (1918), 42 O. L. R. 87; 13 O. W. N. 416.—CAN.

c. ———.]—M., as administrator of his father, put up a farm for sale by auction, & S. became the pur-

chaser. S. required the concurrence of the next of kin of intestate, unless M. could show that he was selling to pay debts of intestate:—*Held*: the vendor could not make this title without the concurrence of the next of kin.—*Re HIGGINS & STEPHENSON'S CONTRACT*, [1906] 1 I. R. 656; 40 I. L. T. 158.—IR.

d. ———.]—*Delay in application for confirmation of sale.*—A sale by an extrix. of land belonging to the estate was confirmed, although the sale had been made some time ago, the appln. for confirmation not having been the personal fault of the extrix.—*Re HANNA ESTATE*, [1921] 1 W. W. R. 1090; 61 D. L. R. 430.—CAN.

e. ———.]—*Subject to usual rules of equity.*—*BEHARILALJI BHAGWAT-PRASADJI v. BAI RAJABI* (1898), 1 I. L. R. 23 Bom. 342.—IND.

f. ———.]—*Married woman executrix.*—A married woman may by virtue of Administration Act, 1879, convey without such consent real estate vested in her as extrix.—*Re CARMODY & HUMPHREY'S CONTRACT, CARMODY v. HUMPHREY* (1902), 22 N. Z. L. R. 127.—N.Z.

g. ———.]—*Public trustee.*—Certain land was devised by a wife to her husband in trust for her children, but the Public Trustee was appointed the exor. of the will, & he completed his duties as exor. The husband then died, & by his will the Public Trustee was appointed exor. of his estate:—*Held*: the Public Trustee had no power to sell the land which had been devised by the wife to her husband in trust for her children.—*Re DEVEREUX'S WILLS* (1906), 26 N. Z. L. R. 242.—N.Z.

h. ———.]—*Necessity for sale by public auction.*—Sales of immovable property by exors. whether to pay debts or not, & whether minors are interested or not, should as a general rule be by public auction.—*Ex p. ECKARD* (1902), T. S. 169.—S. AF.

k. ———.]—*By administrator—Whether order of court necessary.*—Under 26 Vict. No. 20, an administrator is entitled, in order to pay the debts to sell intestate's realty without an order of the ct. or the consent of the next of kin.—*UNION BANK OF AUSTRALIA v. GREEN* (1901), 1 S. R. N. S. W. 191.—AUS.

l. ———.]—An administrator can sell lands held by intestate by way of mtge. without an order of the ct.—*Re MACKENZIE BOWMAN* (1903), 3 S. R. N. S. W. 502.—AUS.

m. ———.]—Where a married woman, who was possessed of real estate, died intestate & the Curator of Intestate Estates obtained the usual order to "collect, manage & administer"

— *Death of deceased before 1898.*—See Part III., Sect. 2, ante.

Real estate not vested in representative—Copyholds.—See COPYHOLDS, Vol. XIII., p. 135, Nos. 1687–1689.

— *Death of deceased before 1898.*—See Part III., Sect. 2, ante.

Where settled land vested in special personal representatives.—See Administration of Estates Act, 1925 (c. 23), s. 24.

ii. Who may purchase.

6139. Co-executor—Who has renounced.—ANON. (1536), Ben. 15; 1 And. 27; Keil. 207; 123 E. R. 12.

6140. ———.]—A. by will, directed his real & personal estate to be sold, the produce to be

her estate:—*Held*: the Curator had a general power of sale for the purposes of distribution without obtaining a special order for sale.—*SHARPE v. NICHOLS* (1906), 2 Tas. L. R. 40.—AUS.

n. ———.]—*Re NEILSON* (1908), 8 W. L. R. 400.—CAN.

o. ———.]—*Sale not for payment of debts.*—Under Devolution of Estates Act, where the persons beneficially interested are both adults & infants, & the former object, & there is no necessity for a sale to pay debts, the administrator has no power to sell the real estate.—*Re MALLANDINE*, 10 C. L. T. Occ. N. 226.—CAN.

p. ———.]—An administrator has no power, under Administration Act, 1879, to sell real estate after all debts & dues owing by the estate have been paid.—*WILLIAMS v. PUBLIC TRUSTEE* (1885), 4 N. Z. L. R. C. A. 1.—N.Z.

qa. ———.]—*Power of administrator with will annexed.*—*STUART v. BALDWIN* (1877), 41 U. C. R. 446.—CAN.

bb. ———.]—*Held*: the legacy in the will set out in the report of this case, as well as the debts of testator, were a charge on his real estate, & the administrator with the will annexed had power to sell the real estate, no question being raised as to the personal estate being insufficient to satisfy the debts & legacies.—*Re EATON ESTATE* (1878), 7 P. R. 396.—CAN.

cc. ———.]—*For purpose of realising commission due to Administrator-General.*—A sale by the Administrator-General of some immovable property of deceased, for the purpose of realising the commission due to him under the Act, is a valid sale in the course of administration & it takes precedence over a prior sale effected by the heir of deceased.—*ALWAR CHETTY v. CHIDAMBARA MUDALI* (1914), 1 I. L. R. 38 Mad. 1134.—IND.

dd. ———.]—*Guardian of infant.*—A petition was presented by a person domiciled in the province of Alberta, Canada, as guardian & administrator in law of his pupil son who resided with him, for authority to complete a title in the pupil's name to certain heritage in Scotland, & for authority to sell the same. The ct., on production of evidence that petitioner had been duly appointed guardian & administrator-in-law according to the law of Alberta, & that he was a person of substantial means, granted the prayer of the petition.—*Re M'FADGEEAN*, [1917] S. C. 112.—SCOT.

PART V. SECT. 2, SUB-SECT. 3.—B. (a) ii.

ee. Executor—For his own benefit.—A person appointed an exor. of a

invested in the public funds in the names of trustees, for his son & daughter, & two others. Directions were given as to succession in cases of death without issue, & if all the legatees should die under age, & without issue, the property was to go over to B., C., D., & E. & their heirs; "which four persons A. appointed as his exors., to see that everything was duly performed according to his will"; he also appointed F. & G. as exors. He also requested F. & G. to act as guardians, in conjunction with B., C., D., & E., for the care of the persons & property of the legatees. The will was duly attested, but there was an unattested codicil, that if either of the exors. should refuse to accept the trust & act as exor., the bequest of property to every such person was totally annulled. Testator died, & the will was proved by B. C. & D. only, E., F., & G. having renounced. Part of the real estate having been put up to sale in four lots, was purchased by G. who afterwards refusing to complete his purchase, a suit was instituted in Chancery. That ct. decreed that the codicil was not to be considered as part of the will with reference to the real estate, but that the rest of the will ought to be established, & the trusts performed, & upon reference to the master, it was found that the contract of purchase entered into by G. was for the benefit of the legatees, who were infants. Lot 1 was then conveyed by lease & appointment & re-lease from B., C., D., E., F., & G. to T. in consideration of £2,000. Lot 2, by lease & appointment, & release, from B., C. & D. to T. for £2,300 (T. declaring by another deed, that the consideration-money, mentioned in the two first deeds belonged to G.; that the name of T. was only used as a trustee, & that T. stood seised of the premises in trust for G.); Lot 3, by lease & appointment, & re-lease, from B., C., & D. to G. to the use of G. for £4,000. Lot 4, by lease & appointment, & re-lease, from B., C., D., E., F., & G., to the use of G. for £360:—*Held*: by these conveyances the legal estate in Lots 1 & 2 was well vested in T., & the legal estates in Lots 3 & 4 in G.—*MACKINTOSH v. BARBER* (1822), 1 Bing. 50; 7 Moore, C. P. 315; 130 E. R. 21.

will cannot make a legal bargain with his co-exor. respecting testator's property for his own benefit.—*CLARK v. CLARK* (1882), 8 V. L. R. 303.—*AUS.*

b. — — —.]—Where an exor., with the concurrence of his co-exor., purchased a portion of a trust estate at auction:—*Held*: they were thereby disentitled to commission.—*Re GREER'S WILL* (1911), 11 S. R. N. S. W. 21; 28 N. S. W. W. N. 17.—*AUS.*

c. — — —.]—Where one of two exors., empowered to sell, with the concurrence of the widow & the eldest son of testator, aged eighteen or nineteen years, purchased part of testator's property, the ct. refused to set aside the transaction, the master having found that at the time the sale was concluded it was beneficial to the infants.—*McKNIGHT v. McKNIGHT* (1866), 12 Gr. 363.—*CAN.*

d. — — —.]—Exors. may purchase estate assets from their co-exors. provided they do so openly, *bond fide*, & for a fair value.—*LOUW v. HOFMEYER* (1869), Buch. 290.—*S. AF.*

e. — — —.]—Where exors. purchase the property of the estate under their administration, the court will make searching inquiry into the circumstances, & it must be shown that the purchase was *bond fide*.—*NEL v.*

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LOUW (1877), Buch. 133.—*S. AF.*

f. — — —.]—The ct. will as a rule confirm a sale of estate property to an exor. if he purchased in an open & *bond fide* manner, *e.g.* at public auction.—*Re HOUGH ESTATE* (1919), C. P. D. 160.—*S. AF.*

g. — — —.]—Leave to sell immovable property of an estate to one of the exors. dative of the estate refused where the proposed sale was by private treaty & there appeared no reason why the property should not be put up for public competition.—*Ex p. COOPER* (1920), C. P. D. 419.—*S. AF.*

h. *Administrator — For his own benefit.*—Under no circumstances can an administrator be allowed to purchase for his own benefit the lands of intestate.—*LAMONT v. LAMONT* (1859), 7 Gr. 258.—*CAN.*

k. — — —.]—*McLEOD v. GILLIES* (1868), 7 N. S. R. 257.—*CAN.*

l. — — —.]—Pltf., as administrator to M., sold certain lands at public auction to H., giving him a deed therefor, & on the same day H. reconveyed the same lands to pltf. There was no evidence to show that pltf. did not act in good faith & for the benefit of the estate. Pltf. brought ejectment against defts., who were brothers of M. & were in possession of

(b) *Power to Mortgage.*

6141. *Under trust for sale.*—A trust, "to make sale & dispose of" testator's real estates, by private sale or public auction:—*Held*: not to authorise a mtge., there appearing an intention on the part of testator that his whole real estate should be converted.—*HALDENBY v. SPOFFORTH* (1839), 1 Beav. 390; 8 L. J. Ch. 238; 3 Jur. 241; 48 E. R. 991.

Annotation:—*Consd.* *Stroughill v. Anstey* (1852), 1 De G. M. & G. 635.

6142. *Under power to sell.*—*BALL v. HARRIS*, No. 6175, *post*.

6143. *Real estate not vested in representative—To pay debt.*—E. by will, after charging all his real & personal estate with the payment of his debts, funeral & testamentary expenses, & of a certain legacy, devised the rents & profits of all his messuages, tenements, farms & lands, except his Bala houses, to A. his wife, & by the same will he gave her the whole of his personal estate & appointed her sole extrix.:—*Held*: the Bala houses passed to the heir at law of E., subject in equity to the charge of debts, & A. had no power to dispose [by mtge.] of them for the purpose of paying the debts.—*DOE d. JONES v. HUGHES* (1851), 6 Exch. 223; 20 L. J. Ex. 148; 17 L. T. O. S. 5; 155 E. R. 523.

Annotations:—*Reid. Walton v. Shalcross* (1853), 21 L. T. O. S. 154; *Robinson v. Lowater* (1854), 5 De G. M. & G. 272; *Hodkinson v. Quinn* (1860), 30 L. J. Ch. 118; *Greetham v. Colton* (1865), 34 Beav. 615; *Re Tanqueray-Willaine & Landau* (1882), 20 Ch. D. 465. *Mentd.* *Wright v. Wilkin* (1860), 2 B. & S. 232.

6144. *Real estate vested in representative—To pay debts & legacies—Law of Property Amendment Act, 1859 (c. 35).*—Sect. 18 of above Act does not apply to a case where testator has devised his real estate, by way of settlement, to a person or persons for life with remainders over. The meaning of that sect. is, that where testator has devised his whole estate & interest directly to A. or to A. & B., or any number of persons as tenants in common, or joint tenants in fee or in tail, so that the devisee

the property, & they resisted, on the ground of his having no title, contending that he could not acquire title through himself as administrator:—*Held*: pltf.'s title was valid at law.—*SMYTH v. McLEAN* (1868), 7 N. S. R. 310.—*CAN.*

m. — — —.]—The proposed purchaser of lands being one of the administrators, & therefore a trustee, has no right to purchase without leave of the ct.—*Re LOCKHART* (1912), 20 W. L. R. 413; 1 W. W. R. 933; 1 D. L. R. 754.—*CAN.*

n. — — —.]—The administratrix of a mtgee. applied to the registrar, as administratrix, for a sale by him of the mtged. lands. At the sale she became the purchaser in her own right, & not as administratrix, & the registrar executed a conveyance to her in her own name accordingly:—*Held*: there was no power for her to purchase, nor for the registrar to so convey to her.—*GRATTAN v. GILES*, 2 J. R. N. S. 213.—*N.Z.*

PART V. SECT. 2, SUB-SECT. 3.—
B. (b).

o. *Real estate vested in representative—To pay debts & legacies.*—Letters of administration were granted to the widow, & she, for the purpose of raising money wherewith to pay legacies, created a mtge. on the real

Sect. 2.—To alienate: Sub-sect. 3, B. (b) & (c), & C. (a).]

or devisees can themselves mtge. the property, then the exors. are not to have the power. But where the estate is devised by way of settlement, so that there is no individual or individuals who are able to make a title to a mtge., then that is a case to which sect. 16, by exors. are empowered to mtge. testator's real estate for payment of debts or legacies, was intended to apply. Testator, by his will, appointed certain persons therein named exors. & trustees thereof, & after making certain specific devises & bequests, he devised & bequeathed all the residue of his real & personal estate, subject to his debts, funeral & testamentary expenses, & to the legacies thereinbefore bequeathed, unto & equally between his two sons for life, with remainders over. Exors. mortgaged a portion of the residuary real estate:—*Held*: this was a case in which sect. 16 was applicable, & the mtge. was a perfectly valid one.—*Re WILSON, PENNINGTON v. PAYNE* (1886), 54 L. T. 600; 34 W. R. 512; 2 T. L. R. 443.

Annotation:—Consd. *Re Barrow-in-Furness Corpn. & Rawlinson's Contract*, [1903] 1 Ch. 339.

6145. Executors also devisees—To pay debts.]—The fact that, in the dealings for a loan, exors. who happen to be also beneficial owners have been treated with in their latter character, is not sufficient ground for inferring that the money was not borrowed to pay testator's debts.—*COLLINGWOOD v. RUSSELL* (1864), 5 New Rep. 1; 34 L. J. Ch. 22; 11 L. T. 322; 10 Jur. N. S. 1062; 13 W. R. 63, L. J.J.

6146. ———.]—CORSER v. CARTWRIGHT, No. 6178, post.

6147. ——— To pay debts & legacies.]—Land was devised beneficially in fee to a person named exor. of the will. It was charged generally with debts & legacies, & also with certain trust legacies which devisee was directed to pay, after the death of testator's widow, to the exors., who were empowered to give effectual receipts for the same. Before these became payable devisee mortgaged the land by deed reciting that the loan was required to assist in paying sums bequeathed by the will, & that the co-exor. joined for the purpose of consenting. He did not join in the receipt, but the money was paid with his privity to devisee. The widow & the co-exor. having died, devisee created a further charge on the land. The money raised under the mtge. & further charge was in fact applied by devisee for his own purposes.

estate:—*Held*: the widow had power to create the mtge.—*LUNDY v. MARTIN* (1874), 21 Gr. 452.—CAN.

p. ———.]—*Re O'DONNELL'S ESTATE*, [1905] 1 I. R. 409; 39 I. L. T. 165.—IR.

6145 i. Executors also devisees—To pay debts.]—Testatrix after a direction to him to pay her debts devised land to her exor. & trustee, & his exors. upon trust to retain it for his own use for life, & directed that, after his decease, his exors. should sell the land & divide the proceeds among her children:—*Held*: this was a devise of the land out & out as to the legal estate, & the exor. had the right to mtge. the entire fee for debts.—*MERCER v. NEFF* (1898), 29 O. R. 680.—CAN.

q. Necessity for consent of official guardian.]—*Re BENNINGTON*, 18 C. L. T. Occ. N. 239.—CAN.

r. Necessity for sanction of court.]

—Testator settled certain real estate upon his children, & devised his residuary estate to his wife, subject to the payment of his debts, etc. Shortly after his death the exors. named in the will, without first applying to the ct. for leave, obtained an advance of money, secured by the mtge. of the residuary estate, for the alleged purpose of paying testator's debts:—*Held*: the mtge. was valid, no application to the ct. being required, as the power to mtge. real estate given to exors. by Administration Act, 1879, s. 7, is unrestricted in its operation by sect. 8 of that Act.—*Re NOLAN, LUSH v. SHEA* (1892), 11 N. Z. L. R. 194.—N.Z.

s. ——— Or direction in will.]—Exors. cannot, in Cape Colony, mtge. any immovable property of the estate without directions to that effect in the will or the sanction of the ct.—*Re BROWN* (1890), 7 S. C. 239.—S. AF.

All testator's debts had been paid except an old mtge., but the land remained subject to the trust legacies:—*Held*: (1) although the mtge. was expressed to be made to assist in paying legacies, yet as debts & legacies were charged on the land, the exor.-devisee could give a good receipt for the money, & mtgee. was not bound to see to its application; (2) mtgor. was to be presumed to be acting in the discharge of his duties as exor.—*Re HENSON, CHESTER v. HENSON*, [1908] 2 Ch. 356; 77 L. J. Ch. 598; 99 L. T. 336.

6148. ——— To settle accounts.]—Testator appointed H. & J. exors. & trustees of his will, & directed that the trustees or trustee for the time being of his will should have full power to settle his accounts & wind up his affairs as they or he should think fit, & in so doing, "to make any sales & arrangements they or he shall judge expedient." Testator devised all his real estate unto & to the use of his trustees upon the trusts therein declared. After testator's death, J. (H. having renounced probate & disclaimed the trusts of the will), in order to meet some pressing claims against the estate, borrowed a sum of £500 upon the security of a mtge. of a portion of the real estate:—*Held*: under the terms of the will, J., being both exor. & trustee, had power to mortgage testator's real estate.—*Re JONES, DUTTON v. BROOKFIELD* (1889), 59 L. J. Ch. 31; 61 L. T. 661; 38 W. R. 90.

6149. ——— To secure executor's own debt—Legacy charged on property unsatisfied.]—A mtge. made by an exor. who is also residuary legatee to secure his private debt will be postponed to an unsatisfied legacy charged upon the mtged. property.—*BANK OF BOMBAY v. SULEMAN SOMJI* (1908), 99 L. T. 532; 24 T. L. R. 840; 52 Sol. Jo. 727, P. C.

6150. ——— Inclusion of own property in mortgage.]—An exor., & beneficial devisee of realty, subject to a charge of debts, included private property of his own in a mtge. of the devised estate:—*Held*: not to afford such intrinsic evidence of an intention on the part of exor. to misapply the money as to deprive the mtge. of his security.—*BARROW v. GRIFFITH, BARROW v. NEWMAN* (1864), 5 New Rep. 6; 11 Jur. N. S. 6; 13 W. R. 41.

(c) Other Powers.

6151. Power to give receipts.]—Testator devised his estates to trustees in trust to sell, & declared their receipts to be sufficient discharges, & he

t. Duty of court—To inquire whether mortgage—for benefit of estate.]—If the exor. of the estate of the first-dying, has mtged. land of the joint estate, the ct. will take upon itself the duty of inquiring whether such mtge. was raised for the benefit of the estate, & whether the money raised on loan was actually required for the payment of debts.—*WILLIAMS v. WILLIAMS* (1896), 13 S. C. 200.—S. AF.

PART V. SECT. 2, SUB-SECT. 3.—B. (e).

a. Power of representative of mortgagee—To transfer legal estate.]—The exor. of a mtgee. has not any power to convey the legal estate to a person purchasing the mtge.—*ROBINSON v. BYERS* (1862), 9 Gr. 572.—CAN.

b. ———.]—C. S. U. C., c. 87, s. 5, only authorises exors. to convey the legal estate on payment of the mtge.

directed his trustees to complete any contracts for the sale of his estates, entered into during his lifetime & remaining incomplete at his death :—*Held* : his exor. was the proper party to give receipts for the purchase-moneys of the estates contracted to be sold by testator.—*EATON v. SANXTER* (1834), 8 Sim. 517 ; 3 L. J. Ch. 197 ; 58 E. R. 688.

Annotation :—*Mentd. Skeeles v. Sherley* (1836), Donnelly, 127.

6152. Power to demise to co-executor.]—One or two joint-tenants may demise his or their portion to another, so as to create the relationship of landlord & tenant between them, with a right to distrain in respect of rent in arrear. Thus, three co-exors. may agree that one shall hold land, devised to them in trust, at a fixed rent, & if the rent falls into arrear, he may be distrained upon in respect of it.—*COWPER v. FLETCHER* (1865), 8 B. & S. 464 ; 6 New Rep. 145 ; 34 L. J. Q. B. 187 ; 12 L. T. 420 ; 29 J. P. 423 ; 11 Jur. N. S. 780 ; 13 W. R. 739 ; 122 E. R. 1267.

Annotations :—*Mentd. Re Potter & Ferrige, Ex p. Parke* (1874), De Colyar's County Court Cases, 235 ; *Leigh v. Dickeson* (1883), 12 Q. B. D. 194.

6153. Power to concur in partition—Testator tenant in common.]—(1) An exor. of testator who dies seised as tenant in common of an undivided share in real estate has power to concur with the co-owners of the other undivided shares therein in a deed of partition of the real estate, the exercise of such a power being a proper & reasonable step towards the beneficial realisation of the assets of testator.

(2) A purchaser of the land taken in severally by any one of the parties to such a deed of partition acquires a good title to the land purchased by him in the absence of notice of any impropriety in the transaction on the part of the exor.—*Re KEMNAL & STILL'S CONTRACT*, [1923] 1 Ch. 293 ; 92 L. J. Ch. 298 ; 129 L. T. 12 ; 39 T. L. R. 285 ; 67 Sol. Jo. 364, C. A.

Annotation :—*As to (2) Reid. Wise v. Whitburn*, [1924] 1 Ch. 460.

6154. Power of representative of mortgagee—To transfer legal estate—Vendor & Purchaser Act, 1874 (c. 78).]—Sect. 4 of above Act does not enable the legal personal representative of a deceased mtgee. of real estate to transfer the legal estate in it, on payment of all sums secured by the mtge.—*Re SPRADBURY'S MORTGAGE* (1880), 14 Ch. D. 514 ; 49 L. J. Ch. 623 ; 43 L. T. 82 ; 28 W. R. 822.

6155. — — —.]—Sect. 4 of above Act, does not enable the legal personal representative of deceased mtgee. of real estate to convey upon a sale under a power in the mtge.—*Re WHITE'S MORTGAGE* (1881), 51 L. J. Ch. 856 ; 29 W. R. 820.

debt ; it does not authorise them to convey to a purchaser from themselves.—*HUNTER v. FARR* (1864), 23 U. C. R. 324.—CAN.

c. Power to exchange lands.]—An exor. or administrator cannot make the lands of testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.—*TENUTE v. WALSH* (1893), 24 O. R. 309.—CAN.

d. —.]—Testatrix devised her real estate to be equally divided between her children with a power to the exor. "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so" :—*Held* : the exor. had no

authority to exchange the lands of testatrix for other lands.—*Re CONFEDERATION LIFE ASSOCN. & CLARKSON* (1903), 23 O. L. T. 325 ; 6 O. L. R. 606.—CAN.

PART V. SECT. 2, SUB SECT. 3.— C. (a).

6157 i. Debts remaining unsatisfied.]—Where debtor dies intestate & his lands are sold under execution against his heir for the private debt of the heir & the purchaser has notice before his purchase that there are debts of the ancestor outstanding of which the creditors claim payment out of the land seized, such purchaser takes only the beneficial interest of the heir, subject

C. Title of Alienee.

(a) Whether Title Impeachable.

6158. Land sold to pay debts—No action pending between heir-at-law & executor.]—A purchaser of lands appointed to pay debts is safe though there be a deficiency of the personal estate, but otherwise if the purchase be *pendente lite*, by the heir against the exor.—*CULPEPPER v. ASTON* (1682), 2 Cas. in Ch. 115 ; 22 E. R. 873.

Annotations :—*Consd. Bellamy v. Sabine* (1857), 1 De G. & J. 566. *Reid. Spalding v. Shalmer* (1684), 1 Vern. 301 ; *Roper v. Radcliffe* (1712), 9 Mod. Rep. 181 ; *Price v. Price* (1887), 35 Ch. D. 297.

6157. Debts remaining unsatisfied.]—Testator, by his will, directed all his just debts, & expenses, to be paid out of his estate & effects, & he gave all his freehold, leasehold, & other his real & personal estates, unto his wife S. during her life, & after her decease, he directed all his real & personal estate & effects to be sold either by private sale or public auction, & after payment of the expenses of sale, he directed the produce thereof to be paid as therein mentioned, & he thereby directed, that any purchaser or purchasers of the whole or any part of his real & personal estate should not be liable to see to the application of the purchase-money, & that the receipt & receipts of his exor., his heirs, exors., administrators, & assigns, or other persons acting in the administration of that his will, should be a sufficient discharge or discharges to the purchasers of the whole or any part of the real or personal estate directed to be sold under his will, & he appointed his wife S. extrix., & W. G. exor., of his will. In a suit brought by testator's extrix. & exor. against a party for the specific performance of a contract to purchase a portion of testator's real estate :—*Held* : the will contained not only an express power of sale, exercisable after the widow's death, but also an implied power of sale in extrix. & exor.

Qu. : whether the intention of an implied power of sale, to be exercised by extrix. & exor., was so expressed as to create a legal power.—*GOSLING v. CARTER* (1845), 1 Coll. 644 ; 14 L. J. Ch. 218 ; 4 L. T. O. S. 491 ; 63 E. R. 580 ; *sub nom. GOSTLING v. CARTER*, 9 Jur. 324.

Annotation :—*Reid. Robinson v. Lowater* (1854), 17 Beav. 592.

6158. — Inclusion of representative's own property in mortgage.]—*BARROW v. GRIFFITH, BARROW v. NEWMAN*, No. 6150, *ante*.

6159. — Alienee with notice of debts—Mortgage to secure executor's own debt.]—Where an exor. mortgages property, devised or bequeathed to him absolutely, as a security for his own antecedent debt, & mtgee. has notice that there are debts of devisor & testator unpaid, the property

to the payment of the ancestor's debts.—*PECK v. BUCKE* (1867), 2 Ch. Ch. 294.—CAN.

e. Breach of trust or devastavit committed.]—Administrator conveying intestate's land to sureties for the administration commits breach of trust, but is entitled to have land conveyed again to him.—*ACKERLY v. PALMER*, [1910] V. L. R. 339.—AUS.

f. Land not sold—Within appointed time — Whether trustees can make good title.]—Testator directed all his estate, real & personal, to be sold in eighteen months from his death, but with power to withhold the sale if they should deem it for the benefit of the heirs, but such sale not to be

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mortgaged still remains assets of testator.—*HALL v. ANDREWS* (1872), 27 L. T. 195; 20 W. R. 799.

6160. Legacy remaining unsatisfied—Title of mortgagee as against legatee.]—The short point was this: "Devisee in fee of lands charged with a particular legacy. Had the exors. power to sell?" It was plain in such cases that the legatee must concur if the purchaser was to get a good discharge. No authority had been produced for the proposition that an exor. could sell real estate where it was only charged with the payment of a legacy. There was no difference between a charge by contract & a charge by will. If a man deposited deeds by way of mtge. neither mtgor. nor mtgee. had a power of sale. Similarly if land was devised charged with the payment of a sum other than a legacy, there was no power of sale in anybody. Of course, testator's will might show that he intended a power of sale to be given, but that case did not arise here. The purchaser or mtgee. in this case had no title against the legatee, whose legacy was charged on the land (*CHITTY, J.*).—*Re REBBECK, BENNETT v. REBBECK* (1894), 63 L. J. Ch. 596; 71 L. T. 74; 42 W. R. 473; 38 Sol. Jo. 399; 8 R. 376.

Annotations:—Distd. Re Henson, Chester v. Henson, [1908] 2 Ch. 356. Reid. Re Barrow-in-Furness Corpn. & Rawlinson's Contract, [1903] 1 Ch. 339.

6161. Breach of trust or devastavit committed—Mortgage to secure executor's own debt—Alienee with notice of breach of trust.]—If the nature of the transaction affords intrinsic evidence that the exor. in the mtge. or sale is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mtge. or sale is a personal debt due from the exor. to mtgee. or purchaser, there such mtgee. or purchaser being a party to the breach of trust does not hold the property discharged from the trusts, but equally subject to the payment of debts & legacies as it would have been in the hands of the exor. (*LEACH, V.-C.*).—*WATKINS v. CHEEK* (1825), 2 Sim. & St. 199; 57 E. R. 321.

Annotations:—Consd. Eland v. Eland (1839), 4 My. & Cr. 420; *Stroughill v. Anstey* (1852), 1 De G. M. & G. 635; *Solomon v. Attenborough, [1912] 1 Ch. 451. Reid. Forbes v. Peacock* (1846), 1 Ph. 717; *Haynes v. Forshaw* (1853), 11 Hare, 93; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731; *Re Venn & Furze's Contract, [1894] 2 Ch. 101.*

6162. — Alienee with notice of debts of testator outstanding.]—*HALL v. ANDREWS*, No. 6159, *ante*.

6163. — — —.]—Where a security is made by deposit of the testator's title-deeds for an advance to & for the private benefit of exor. having power to deal with testator's real estate, & not for the purposes of the will, the person making the advance takes the security, subject to the trusts & charges created by the will, but subject thereto the security will extend to the beneficial interest

delayed longer than five years from death. The real estate was not sold within the five years:—*Held*: the trustees could make a good title, the limitation of the time being only directory.—*SCOTT v. SCOTT* (1858), 6 Gr. 366.—*CAN.*

g. Sale by administrator—Licence of Probate Court—Prior registration by heir.]—A deed from an administrator under licence from the Probate Ct. to sell for payment of debts:—*Held*: good against a bona fide purchaser from the heir though the deed of

the latter was first registered, & the application for licence was not made till nine years after the death of the ancestor.—*DOE d. BOWEN v. ROBERTSON* (1861), 5 All. 134.—*CAN.*

h. — — — Proof of licence necessary.]—An administrator's deed duly proved & registered is not sufficient proof of title in one claiming thereunder without proof of the licence to sell.—*JOHNSON v. CALNAN* (1907), 3 E. L. R. 65; 18 N. B. R. 52.—*CAN.*

k. Necessity for consent—Of all

of exor. in testator's property, & where exor. has any such interest, the lender will have a right to marshal the assets.—*HAYNES v. FORSHAW* (1853), 11 Hare, 93; 1 Eq. Rep. 527; 22 L. J. Ch. 1060; 22 L. T. O. S. 62; 17 Jur. 930; 68 E. R. 1201.

Annotation:—Consd. Farhall v. Farhall (1871), 7 Ch. App. 123.

6164. — Alienee with notice of breach of trust.]—An exor. & devisee in trust, having paid off all the debts of testatrix, borrowed £1,000 from H. upon deposit of the title-deeds of the estate, alleging that the money was required to pay debts, but £150, part of the £1,000 was taken out in wine. This debt was paid off, & subsequently, seventeen years after the death of testatrix, a further sum of £1,000 was borrowed in the same manner from H. by exor., who agreed to purchase £200 worth of wine. Exor. also agreed to execute a legal mtge. when called upon to do so. H., mtgee., assigned his security, & a legal mtge. was then executed. Upon bill filed against the representative of that mtgee.:—*Held*: the nature of the original transaction was sufficient proof that the money was not borrowed by exor. for payment of debts, & assignee from H., original mtgee. could not stand in a better position than H. himself. The mtge. was, therefore, declared void.—*BURT v. TRUEMAN* (1860), 29 L. J. Ch. 902; 2 L. T. 718; 0 Jur. N. S. 721; 8 W. R. 635.

—*See, also, No. 6161, ante.*

6165. — Alienee without notice of breach of trust.]—(1) The extrix. of testator kept an exorship account with a bank, & having a power under the will to mortgage the real estate in aid of the personalty, she deposited with the bank the title deeds of part of testator's real estate as security for the balance. The account was considerably overdrawn by the extrix., & the moneys to a great extent misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditors against testator's estate for the difference:—*Held*: they were not entitled to prove; for a person cannot, by contract with an exor., acquire a right to prove as a creditor against the estate, though the exor. has power to give him a lien on specific assets.

(2) It appears to me to be settled law that, upon a contract of borrowing made by an exor. after the death of testator, the exor. is only liable personally, & cannot be sued as exor. so as to get execution against the assets of testator (*MEILLISH, L.J.*).—*FARHALL v. FARHALL, Ex p. LONDON & COUNTY BANKING Co.* (1871), 7 Ch. App. 123; 41 L. J. Ch. 146; 25 L. T. 685; 20 W. R. 157, L. JJ.

Annotations:—As to (2) Reid. Padwick v. Scott, Re Scott's Estate, Scott v. Padwick (1876), 2 Ch. D. 736; *Watling v. Lewis, [1911] 1 Ch. 414. Generally, Reid. Re Morgan, Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93.

6166. — — —.]—*Re KEMNAL & STILL'S CONTRACT, No. 6153, ante.*

the executors.]—Testator devised to his wife for life land "with the power of sale at any time during her life subject to the consent of my exors." Three exors. were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving exors. was not sufficient:—*Held*: the title was not one which the ct. could force upon a purchaser.—*Re MACNABB* (1882), 1 O. R. 94.—*CAN.*

l. — Of beneficiaries.]—Testatrix

6167. Sale by general executors—Without concurrence of special executors appointed as to foreign property.]—Where by his will testator appoints special exors. as to property situate in a foreign country or in the Colonies & by the same will appoints other persons general exors. of his will, on a sale by the general exors. of testator's real estate in England a good title can be shown thereto without the concurrence of the special exors.—*Re COHEN'S EXECUTORS & LONDON COUNTY COUNCIL*, [1902] 1 Ch. 187; 71 L. J. Ch. 164; 86 L. T. 73; 50 W. R. 117.

6168. Lapse of time between death & date of alienation—No evidence of payment of testator's debts.]—*Re POTTER & WHARTON'S CONTRACT* (1922), 153 L. T. Jo. 85.

Alienation by executor being also devisee.]—See Nos. 6145–6150, *ante*.

Sale by administrator—Subsequent discovery of will.]—See Part II., Sect. 15, sub-sect. 3, *ante*.

(b) *Whether Alience bound to make Inquiries.*

6169. As to application of purchase-money—Land charged with particular debts.]—(1) Where lands are to be sold for payment of particular debts, the purchaser must take care to see his purchase-money rightly applied. But if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of a purchaser.

(2) Each shall be charged for no more than he actually receives. Otherwise, if the trustees join in receipts.—*SPALDING v. SHALMER* (1684), 1 Vern. 301; 23 E. R. 483.

Annotation:—As to (1) Rejd. Thomas v. Townsend (1852), 16 Jur. 736.

6170. ———.]—If lands are devised to be sold for payment of debts in a schedule, in that case the purchaser is bound to see the purchase-money applied to the payment of those debts, but if the trust be general, to pay debts, though he has notice of them, yet the purchaser is not obliged to see the money applied.—*ABBOT v. GIBBS* (1692), 1 Eq. Cas. Abr. 358; 21 E. R. 1101.

6171. ———.]—The general rule is, that if a trust directs, that land should be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied. On the other hand, if the trust directs, that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts were owing, the purchaser is bound to see that the money be applied for the payment of those debts. Where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold, but where they are only charged with the payment of debts it may be said that the trust is not performed till those debts are discharged (*per CUR.*).—*ELLIOT v. MERRYMAN* (1740), Barn. Ch. 78; 2 Atk. 41; 27 E. R. 562.

Annotations:—Consd. Bonney v. Ridgard (1784), 1 Cox, 145; *Shaw v. Borrer* (1836), Donnelly, 150. *Rejd. Andrew v. Wrigley* (1792), 4 Bro. C. C. 125; *Farr*

gave to her daughter some personal effects & \$4,000 to be paid by her son, charged on property devised to the son; & all the rest of her property she gave to her son, charged with \$4,000. The exors. contracted to sell a part of the real estate to applt., the daughter being alive & having three children, the son alive & unmarried, & brothers & sisters being also in existence. The

land was incumbered & there were other debts:—*Held*: the exors. even without the concurrence of the son & daughter, & *a fortiori* with their concurrence, could make a good title.—*Re ROSS & DAVIES* (1903), 24 C. L. T. 213; 7 O. L. R. 433; 3 O. W. R. 215.—*CAN.*

m. Land devised on trust for sale—Trust not exercised.]—Re INGLEBY &

v. Newman (1792), 4 Term Rep. 621; *Hardwick v. Mynd* (1792), 1 Anst. 109; *M'Leod v. Drummond* (1810), 17 Ves. 152; *Ball v. Harris* (1839), 4 My. & Cr. 264; *Page v. Adam* (1841), 4 Beav. 269; *Doe d. Jones v. Hughes* (1851), 20 L. J. Ex. 148; *Colyer v. Finch* (1856), 5 H. L. Cas. 905; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731; *Shirreff v. Wilks* (1880), 1 East, 48; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101; *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356.

6172. ———.]—(1) Under a trust to pay a specified debt of testator & debts generally, a purchaser of the estate is not bound to see the specified debt paid.

(2) When there is a charge of debts generally, or of legacies & debts generally, a purchaser is not bound to see to the application of the purchase-money. *Secus*: when the trust is to pay schedule debts or legacies simply.—*ROBINSON v. LOWATER* (1854), 17 Beav. 592; 2 Eq. Rep. 337; 23 L. J. Ch. 641; 23 L. T. O. S. 17; 18 Jur. 321; 2 W. R. 181; 51 E. R. 1165; *on appeal*, 5 De G. M. & G. 272, L. JJ.

Annotations:—As to (1) Rejd. Re Langmead's Trusts (1855), 20 Beav. 20. *As to (2) Rejd. Storry v. Walsh* (1854), 18 Beav. 559; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731. *Generally, Mentd. Eidsforth v. Armstead* (1856), 2 K. & J. 333; *Wrigley v. Sykes* (1856), 21 Beav. 337; *Hodkinson v. Quinn* (1860), 1 John. & H. 303; *Cook v. Dawson* (1861), 30 L. J. Ch. 359; *Greetham v. Colton* (1865), 34 Beav. 615; *Hamilton v. Buckmaster* (1866), L. R. 3 Eq. 323.

6173. ——— Land charged with debts generally.]—*ABBOT v. GIBBS*, No. 6170, *ante*.

6174. ———.]—*ELLIOT v. MERRYMAN*, No. 6171, *ante*.

6175. ———.]—(1) A charge on lands by testator for payment of his debts authorises a sale, & the purchaser is not obliged to see to the application of the purchase-money.

(2) *Semble*: a power to sell implies a power to mtge.

(3) The will of testator having charged his lands with payment of his debts & exor. & trustee having, pursuant to the trusts thereof, laid out the produce of the personal estate in the purchase of lands, which were directed by the will to be subject to the same trusts as the lands devised:—*Held*: exor. & trustee was empowered to deposit the title deeds of the purchased lands as a security for moneys borrowed for the purpose of paying testator's debts, & such deposit was a valid equitable mtge. against the parties beneficially interested in the lands under the devise contained in the will.—*BALL v. HARRIS* (1839), 4 My. & Cr. 264; 8 L. J. Ch. 114; 3 Jur. 140; 41 E. R. 103, L. C.

Annotations:—As to (1) Consd. Gosling v. Carter (1845), 1 Coll. 644. *Rejd. Robinson v. Lowater* (1854), 17 Beav. 592; *Barrow v. Griffith* (1864), 5 New Rep. 6. *As to (2) Consd. Stroughill v. Anstey* (1852), 1 De G. M. & G. 635; *Re Jones, Dutton v. Brookfield* (1889), 59 L. J. Ch. 31.

6176. ———.]—*ROBINSON v. LOWATER*, No. 6172, *ante*.

6177. ———.]—*Semble*: where a devisee of a real estate charged with payment of debts sells the real estate, the purchaser is not bound to inquire, unless special circumstances call for such

BOAK & NORWICH UNION INSURANCE CO. (1883), 13 L. R. Ir. 326.—*IR.*

PART V. SECT. 2, SUB-SECT. 3.—
C. (b).

*n. As to payment of debts.]—*Where an exor. sells realty for payment of debts the purchaser is not bound to inquire whether there are debts or

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mortgaged still remains assets of testator.—*HALL v. ANDREWS* (1872), 27 L. T. 195; 20 W. R. 799.

6160. Legacy remaining unsatisfied—Title of mortgagee as against legatee.]—The short point was this: "Devisee in fee of lands charged with a particular legacy. Had the exors. power to sell?" It was plain in such cases that the legatee must concur if the purchaser was to get a good discharge. No authority had been produced for the proposition that an exor. could sell real estate where it was only charged with the payment of a legacy. There was no difference between a charge by contract & a charge by will. If a man deposited deeds by way of mtge. neither mtgor. nor mtgee. had a power of sale. Similarly if land was devised charged with the payment of a sum other than a legacy, there was no power of sale in anybody. Of course, testator's will might show that he intended a power of sale to be given, but that case did not arise here. The purchaser or mtgee. in this case had no title against the legatee, whose legacy was charged on the land (*CHITTY, J.*).—*Re REBBECK, BENNETT v. REBBECK* (1894), 63 L. J. Ch. 596; 71 L. T. 74; 42 W. R. 473; 38 Sol. Jo. 399; 8 R. 376.

Annotations:—Distd. Re Henson, Chester v. Henson, [1908] 2 Ch. 356. *Reid. Re Barrow-in-Furness Corp'n. & Rawlinson's Contract*, [1903] 1 Ch. 339.

6161. Breach of trust or devastavit committed—Mortgage to secure executor's own debt—Alienee with notice of breach of trust.]—If the nature of the transaction affords intrinsic evidence that the exor. in the mtge. or sale is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mtge. or sale is a personal debt due from the exor. to mtgee. or purchaser, there such mtgee. or purchaser being a party to the breach of trust does not hold the property discharged from the trusts, but equally subject to the payment of debts & legacies as it would have been in the hands of the exor. (*LEACH, V.-C.*).—*WATKINS v. CHEEK* (1825), 2 Sim. & St. 199; 57 E. R. 321.

Annotations:—Consd. Eland v. Eland (1839), 4 My. & Cr. 420; *Stroughill v. Anstey* (1852), 1 De G. M. & G. 635; *Solomon v. Attenborough*, [1912] 1 Ch. 451. *Reid. Forbes v. Peacock* (1846), 1 Ph. 717; *Haynes v. Forshaw* (1853), 11 Hare, 93; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101.

6162. ——— Alienee with notice of debts of testator outstanding.]—*HALL v. ANDREWS*, No. 6159, *ante*.

6163. ———.]—Where a security is made by deposit of the testator's title-deeds for an advance to & for the private benefit of exor. having power to deal with testator's real estate, & not for the purposes of the will, the person making the advance takes the security, subject to the trusts & charges created by the will, but subject thereto the security will extend to the beneficial interest

of exor. in testator's property, & where exor. has any such interest, the lender will have a right to marshal the assets.—*HAYNES v. FORSHAW* (1853), 11 Hare, 93; 1 Eq. Rep. 527; 22 L. J. Ch. 1060; 22 L. T. O. S. 62; 17 Jur. 930; 68 E. R. 1201.

Annotation:—Consd. Farhall v. Farhall (1871), 7 Ch. App. 123.

6164. ——— Alienee with notice of breach of trust.]—An exor. & devisee in trust, having paid off all the debts of testatrix, borrowed £1,000 from H. upon deposit of the title-deeds of the estate, alleging that the money was required to pay debts, but £150, part of the £1,000 was taken out in wine. This debt was paid off, & subsequently, seventeen years after the death of testatrix, a further sum of £1,000 was borrowed in the same manner from H. by exor., who agreed to purchase £200 worth of wine. Exor. also agreed to execute a legal mtge. when called upon to do so. H., mtgee., assigned his security, & a legal mtge. was then executed. Upon bill filed against the representative of that mtgee.:—*Held*: the nature of the original transaction was sufficient proof that the money was not borrowed by exor. for payment of debts, & assignee from H., original mtgee. could not stand in a better position than H. himself. The mtge. was, therefore, declared void.—*BURT v. TRUEMAN* (1860), 29 L. J. Ch. 902; 2 L. T. 718; 6 Jur. N. S. 721; 8 W. R. 635.

—*See, also*, No. 6161, *ante*.

6165. ——— Alienee without notice of breach of trust.]—(1) The extrix. of testator kept an exorship. account with a bank, & having a power under the will to mortgage the real estate in aid of the personalty, she deposited with the bank the title deeds of part of testator's real estate as security for the balance. The account was considerably overdrawn by the extrix., & the moneys to a great extent misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditors against testator's estate for the difference:—*Held*: they were not entitled to prove; for a person cannot, by contract with an exor., acquire a right to prove as a creditor against the estate, though the exor. has power to give him a lien on specific assets.

(2) It appears to me to be settled law that, upon a contract of borrowing made by an exor. after the death of testator, the exor. is only liable personally, & cannot be sued as exor. so as to get execution against the assets of testator (*MEILLISH, L.J.*).—*FARHALL v. FARHALL, Ex p. LONDON & COUNTY BANKING Co.* (1871), 7 Ch. App. 123; 41 L. J. Ch. 146; 25 L. T. 685; 20 W. R. 157, L. JJ.

Annotations:—As to (2) Reid. Padwick v. Scott, Re Scott's Estate, Scott v. Padwick (1876), 2 Ch. D. 736; *Watling v. Lewis*, [1911] 1 Ch. 414. *Generally, Reid. Re Morgan, Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93.

6166. ———.]—*Re KEMNAL & STILL'S CONTRACT*, No. 6153, *ante*.

delayed longer than five years from death. The real estate was not sold within the five years:—*Held*: the trustees could make a good title, the limitation of the time being only directory.—*SCOTT v. SCOTT* (1858), 6 Gr. 366.—*CAN.*

g. Sale by administrator—Licence of Probate Court—Prior registration by heir.]—A deed from an administrator under licence from the Probate Ct. to sell for payment of debts:—*Held*: good against a bona fide purchaser from the heir though the deed of

the latter was first registered, & the application for licence was not made till nine years after the death of the ancestor.—*DOE d. BOWEN v. ROBERTSON* (1861), 5 All. 134.—*CAN.*

h. ——— Proof of licence necessary.]—An administrator's deed duly proved & registered is not sufficient proof of title in one claiming thereunder without proof of the licence to sell.—*JOHNSON v. CALNAN* (1907), 3 E. L. R. 65; 38 N. B. R. 52.—*CAN.*

k. Necessity for consent—Of all

the executors.]—Testator devised to his wife for life land "with the power of sale at any time during her life subject to the consent of my exors." Three exors. were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving exors. was not sufficient:—*Held*: the title was not one which the ot. could force upon a purchaser.—*Re MACNABB* (1882), 1 O. R. 94.—*CAN.*

l. ——— Of beneficiaries.]—Testatrix

6167. Sale by general executors—Without concurrence of special executors appointed as to foreign property.]—Where by his will testator appoints special exors. as to property situate in a foreign country or in the Colonies & by the same will appoints other persons general exors. of his will, on a sale by the general exors. of testator's real estate in England a good title can be shown thereto without the concurrence of the special exors.—*Re COHEN'S EXECUTORS & LONDON COUNTY COUNCIL*, [1902] 1 Ch. 187; 71 L. J. Ch. 164; 86 L. T. 73; 50 W. R. 117.

6168. Lapse of time between death & date of alienation—No evidence of payment of testator's debts.]—*Re POTTER & WHARTON'S CONTRACT* (1922), 153 L. T. Jo. 85.

Alienation by executor being also devisee.]—*See* Nos. 6145–6150, *ante*.

Sale by administrator—Subsequent discovery of will.]—*See* Part II., Sect. 15, sub-sect. 3, *ante*.

(b) *Whether Alienee bound to make Inquiries.*

6169. As to application of purchase-money—Land charged with particular debts.]—(1) Where lands are to be sold for payment of particular debts, the purchaser must take care to see his purchase-money rightly applied. But if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of a purchaser.

(2) Each shall be charged for no more than he actually receives. Otherwise, if the trustees join in receipts.—*SPALDING v. SHALMER* (1684), 1 Vern. 301; 23 E. R. 483.

Annotation:—As to (1) Rejd. Thomas v. Townsend (1852), 16 Jur. 736.

6170. ———.]—If lands are devised to be sold for payment of debts in a schedule, in that case the purchaser is bound to see the purchase-money applied to the payment of those debts, but if the trust be general, to pay debts, though he has notice of them, yet the purchaser is not obliged to see the money applied.—*ABBOT v. GIBBS* (1692), 1 Eq. Cas. Abr. 358; 21 E. R. 1101.

6171. ———.]—The general rule is, that if a trust directs, that land should be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied. On the other hand, if the trust directs, that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts were owing, the purchaser is bound to see that the money be applied for the payment of those debts. Where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold, but where they are only charged with the payment of debts it may be said that the trust is not performed till those debts are discharged (*per CUR.*).—*ELLIOT v. MERRYMAN* (1740), Barn. Ch. 78; 2 Atk. 41; 27 E. R. 562.

Bonney v. Ridgard (1784), 1 Cox, Cas. 145; *Shaw v. Borrer* (1836), Donnelly, 150. *Andrew v. Wrigley* (1792), 4 Bro. C. C. 125; *Farr*

v. Newman (1792), 4 Term Rep. 621; *Hardwick v. Mynd* (1792), 1 Anst. 109; *M'Leod v. Drummond* (1810), 17 Ves. 152; *Ball v. Harris* (1839), 4 My. & Cr. 264; *Page v. Adam* (1841), 4 Beav. 269; *Doe d. Jones v. Hughes* (1851), 20 L. J. Ex. 148; *Colyer v. Finch* (1856), 5 H. L. Cas. 905; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731; *Shirreff v. Wilks* (1880), 1 East, 48; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101; *Re Henson, Chester v. Henson*, [1900] 2 Ch. 356.

6172. ———.]—(1) Under a trust to pay a specified debt of testator & debts generally, a purchaser of the estate is not bound to see the specified debt paid.

(2) When there is a charge of debts generally, or of legacies & debts generally, a purchaser is not bound to see to the application of the purchase-money. *Secus*: when the trust is to pay schedule debts or legacies simply.—*ROBINSON v. LOWATER* (1854), 17 Beav. 592; 2 Eq. Rep. 337; 23 L. J. Ch. 641; 23 L. T. O. S. 17; 18 Jur. 321; 2 W. R. 181; 51 E. R. 1165; *on appeal*, 5 De G. M. & G. 272, L. JJ.

20 Beav. 20. *As to (2) Rejd. Storry v. Walsh* (1802), 10 Beav. 559; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731. *Generally, Mentd. Eidsforth v. Armstead* (1856), 2 K. & J. 333; *Wrigley v. Sykes* (1856), 21 Beav. 337; *Hodkinson v. Quinn* (1860), 1 John. & H. 303; *Cook v. Dawson* (1861), 30 L. J. Ch. 359; *Groetham v. Colton* (1865), 34 Beav. 615; *Hamilton v. Buckmaster* (1866), L. R. 3 Eq. 323.

6173. ——— Land charged with debts generally.]—*ABBOT v. GIBBS*, No. 6170, *ante*.

6174. ———.]—*ELLIOT v. MERRYMAN*, No. 6171, *ante*.

6175. ———.]—(1) A charge on lands by testator for payment of his debts authorises a sale, & the purchaser is not obliged to see to the application of the purchase-money.

(2) *Semble*: a power to sell implies a power to mtge.

(3) The will of testator having charged his lands with payment of his debts & exor. & trustee having, pursuant to the trusts thereof, laid out the produce of the personal estate in the purchase of lands, which were directed by the will to be subject to the same trusts as the lands devised:—*Held*: exor. & trustee was empowered to deposit the title deeds of the purchased lands as a security for moneys borrowed for the purpose of paying testator's debts, & such deposit was a valid equitable mtge. against the parties beneficially interested in the lands under the devise contained in the will.—*BALL v. HARRIS* (1839), 4 My. & Cr. 264; 8 L. J. Ch. 114; 3 Jur. 140; 41 E. R. 103, L. C.

Annotations:—As to (1) Consd. Gosling v. Carter (1845), 1 Coll. 644. *Rejd. Robinson v. Lowater* (1854), 17 Beav. 592; *Barrow v. Griffith* (1864), 5 New Rep. 6. *As to (2) Consd. Stroughill v. Anstey* (1852), 1 De G. M. & G. 635. *Re Jones, Dutton v. Brookfield* (1889), 59 L. J. Ch. 31.

6176. ———.]—*ROBINSON v. LOWATER*, No. 6172, *ante*.

6177. ———.]—*Semble*: where a devisee of a real estate charged with payment of debts sells the real estate, the purchaser is not bound to inquire, unless special circumstances call for such

gave to her daughter some personal effects & \$4,000 to be paid by her son, charged on property devised to the son; & all the rest of her property she gave to her son, charged with \$4,000. The exors. contracted to sell a part of the real estate to applt., the daughter being alive & having three children, the son alive & unmarried, & brothers & sisters being also in existence. The

land was incumbered & there were other debts:—*Held*: the exors. even without the concurrence of the son & daughter, & a fortiori with their concurrence, could make a good title.—*Re ROSS & DAVIES* (1903), 24 C. L. T. 213; 7 O. L. R. 433; 3 O. W. R. 215. —CAN.

m. Lunn devised on trust for sale—Trust not exercised.]—Re INGLEBY &

BOAK & NORWICH UNION INSURANCE Co. (1883), 13 L. R. Ir. 326.—IR.

PART V. SECT. 2, SUB-SECT. 3.—C. (b).

*n. As to payment of debts.]—*Where an exor. sells realty for payment of debts the purchaser is not bound to inquire whether there are debts or

Sect. 2.—To alienate: Sub-sect. 3, C. (b). Sect. 3: Sub-sect. 1.]

an inquiry, whether the money is applied in the payment of debts, or whether the sale was intended for that purpose.—*COLYER v. FINCH* (1856), 5 H. L. Cas. 905; 28 L. J. Ch. 65; 28 L. T. O. S. 27; 3 Jur. N. S. 25; 10 E. R. 1159, H. L.; *affg.* S. C. *sub nom.* *FINCH v. SHAW*, *COLYER v. FINCH* (1854), 19 Beav. 500.

Annotations:—*Apld.* *Corser v. Cartwright* (1875), L. R. 7 H. L. 731. *Consd.* *Re Venn & Furze's Contract*, [1894] 2 Ch. 101. *Reid.* *Re Rebbeck, Bennett v. Rebbeck* (1894), 63 L. J. Ch. 596; *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. *Mentd.* *Thompson v. Finch* (1856), 8 De G. M. & G. 560; *Carter v. Carter* (1857), 3 K. & J. 617; *Perry Herrick v. Attwood* (1857), 2 De G. & J. 21; *Hipkins v. Amery* (1860), 2 Giff. 292; *Hunt v. Elmes* (1860), 3 L. T. 796; *Phillips v. Phillips* (1862), 4 De G. F. & J. 208; *Hooper v. Gumm, McLellan v. Gumm* (1865), 13 L. T. 187; *Thorpe v. Holdsworth* (1868), L. R. 7 Eq. 139; *Wilkinson v. Castle* (1868), 37 L. J. Ch. 467; *Hunter v. Walters, Curling v. Walters, Darnell v. Hunter* (1870), L. R. 11 Eq. 292; *Dixon v. Muckleston* (1872), 8 Ch. App. 155; *Heath v. Crealock* (1873), L. R. 18 Eq. 215; *R. v. Shropshire Union Co.* (1873), L. R. 8 Q. B. 420; *Heath v. Pugh* (1881), 6 Q. B. D. 345; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Northern Counties of England Fire Insce. v. Whipp* (1884), 26 Ch. D. 482; *Manners v. Mew* (1885), 29 Ch. D. 725; *Taylor v. Russell*, [1891] 1 Ch. 8.

6178. — — —.]—An exor., who is also a devisee of an estate charged with the payment of debts, may be presumed by a *bond fide* purchaser or mtgee. of that estate to be dealing with it for the purposes of the administration, & may give a valid title to it. Such purchaser or mtgee., therefore, will not be bound to look to the application of the money. Mere absence of statement of the purpose for which the money obtained by the sale or mtge. is to be used, will not make the purchaser or mtgee. liable, on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of testator's debts. In a case, therefore, in which the Lords were satisfied that mtgee. himself was, as a matter of fact, entirely ignorant of any intended misapplication of the money by exor. & devisee of the estate charged, & that he had not constructive notice of it through his solr., who distinctly denied any knowledge or even suspicion of it:—*Held*: though the money was entirely misapplied, the mtge. could not be treated as subject to the debts of testator, & mtgee.'s title was not, therefore, to be postponed to the claims of testator's creditors.—*CORSER v. CARTWRIGHT* (1875), L. R. 7 H. L. 731; 45 L. J. Ch. 605, H. L.

Annotations:—*Consd.* *Re Venn & Furze's Contract*, [1894] 2 Ch. 101; *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. *Reid.* *Ricketts v. Lewis* (1882), 46 L. T. 368; *West of England & South Wales District Bank v. Murch* (1883), 23 Ch. D. 138; *Re Major, Taylor v. Major*, [1914] 1 Ch. 278.

6179. — Land charged with legacies—Sold before payment of debts.]—Where legacies were charged upon the real estates of a trader, & his devisee & exor. sold part of the real estates before the debts were paid:—*Held*: the purchaser was liable to see his purchase-money applied in payment of the legacies.—*HORN v. HORN* (1825), 2 Sim. & St. 448; 4 L. J. O. S. Ch. 52; 57 E. R. 417.

Annotations:—*Consd.* *Kinderley v. Jervis* (1856), 22 Beav. 1. *Reid.* *Re Rebbeck, Bennett v. Rebbeck* (1894), 63 L. J. Ch. 596. *Mentd.* *Spackman v. Timbrell* (1836), Donnelly, 171.

personalty.—*OLIFF v. O'NEIL* (1896), 17 N. S. W. L. R. 1; 12 N. S. W. W. N. 83.—*AUS.*

o. As to power of executor to

convey.]—A direction to pay debts constitutes a debt-charge upon the lands of testator; & the purchaser is not bound to inquire whether the

6180. — Land charged with debts & legacies generally.]—A purchaser of an estate devised subject to the payment of testator's debts & legacies in general need not look to the discharge of them, & of a bill brought against a devisee for payment of a debt generally out of an estate a purchaser is not bound to take notice.—*WALKER v. FLAMSTEAD* (1754), 3 Keny. 57; 96 E. R. 1306, L. C.

Annotation:—*Consd.* *Price v. Price* (1887), 35 Ch. D. 297.

6181. — — — Debts paid—Purchaser with knowledge of payment.]—Where an estate is charged generally with the payment of debts & legacies, & the debts have been paid, but not the legacies, the purchaser will not be bound to see to the application of the purchase-money, unless it be proved that he knew of the payment of the debts, & the taking of a general bond of indemnity, or of a bond of indemnity against the legacies only, will not raise the inference that he knew of such payment.—*JOHNSON v. KENNETT* (1835), 3 My. & K. 624; 6 Sim. 384; 40 E. R. 238, L. C.

Annotations:—*Expld.* *Spackman v. Timbrell* (1836), Donnelly, 171. *Consd.* *Eland v. Eland* (1839), 4 My. & Cr. 420. *Apld.* *Forbes v. Peacock* (1846), 1 Ph. 717. *Consd.* *Stroughill v. Anstey* (1852), 1 De G. M. & G. 635; *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. *Reid.* *Page v. Adam* (1841), 4 Beav. 269; *Howard v. Chaffer, Howard v. Robinson* (1863), 2 New Rep. 381; *Re Rebbeck, Bennett v. Rebbeck* (1894), 63 L. J. Ch. 596.

6182. — — —.]—The rule relieving a purchaser from seeing to the application of his purchase-money where there is a general charge of debts & legacies, has reference to the state of things at the death of testator, & if the debts are afterwards paid, leaving the legacies charged, that circumstance cannot vary the rule.—*ELAND v. ELAND* (1839), 4 My. & Cr. 420; 8 L. J. Ch. 289; 3 Jur. 474; 41 E. R. 102, L. C.

Annotations:—*Reid.* *Page v. Adam* (1841), 4 Beav. 269; *Forbes v. Peacock* (1846), 1 Ph. 717; *Howard v. Chaffer, Howard v. Robinson* (1863), 32 L. J. Ch. 686. *Mentd.* *Lyon v. Colville* (1844), 1 Coll. 449; *Beavan v. Oxford* (1856), 6 De G. M. & G. 507.

6183. — — —.]—ROBINSON v. LOWATER, No. 6172, ante.

6184. — — —.]—Re HENSON, CHESTER v. HENSON, No. 6147, ante.

6185. — Land charged with debts & annuities.]—Testator gave his real & personal estate to A. subject to the payment of his debts & certain annuities, & appointed his exor.:—*Held*: (1) A. could make a good title to the real estate, without the concurrence of the annuities, & a purchaser from A. was not bound to see to the application of the purchase-money.

(2) Freehold & leasehold estate was devised to A. subject to the payment of debts & annuities. A. sold the real estate. The purchaser insisting that the annuitants ought to concur, filed a bill against vendor for a specific performance. Vendor's answer admitted the sufficiency of the personal estate to pay the debts, that they had all been paid since the contract, & that the sale had not been made for the specific purpose of satisfying the debts:—*Held*: these circumstances did not vary the rule as to the liability of the purchaser to see to the application of the purchase-money, & he was bound to complete.—*PAGE v. ADAM*

power has been duly & correctly exercised by the exors.—*Re REYNOLDS & HARRISON* (1921), 51 O. L. R. 123; 86 D. L. R. 398.—*CAN.*

(1841), 4 Beav. 269; 10 L. J. Ch. 407; 5 Jur. 793; 49 E. R. 342.

Annotations:—As to (2) *Apld.* Forbes v. Peacock (1846), 1 Ph. 717. *Consd.* Stroughill v. Anstey (1852), 1 De G. M. & G. 635. *Generally, Mentd.* Morley v. Cook (1842), 2 Hare, 106; Wood v. Machu (1846), 8 L. T. O. S. 210; Greaves v. Wilson (1858), 25 Beav. 290.

6186. — Land ordered generally to be sold—Purchase-money to be part of personal estate.]—Where land is ordered generally to be sold, & the money to be part of the personal estate, the purchaser is not bound to see to the application of the money.—SMITH v. GUYON (1783), 1 Bro. C. C. 186; 28 E. R. 1072, L. C.

6187. As to payment of debts & legacies—Out of personal estate—On conveyance of real estate charged with such payment.]—Testatrix gave the residue of her real & personal estate, subject to the payment of her debts & legacies, in trust for D. absolutely, & she appointed D. & R. exors. of her will. D. died, & R., by deed, reciting that the debts & legacies had been paid out of the personal estate, conveyed the real estate to D.'s devisees:—*Held*: the devisees could make a good title, without proof of the fact of payment of debts & legacies, as stated in the recital, & a purchaser from them was not bound to inquire as to such payment.—STORRY v. WALSH (1854), 18 Beav. 559; 27 L. J. Ch. 338; 33 L. T. O. S. 35; 18 Jur. 503; 2 W. R. 300; 52 E. R. 219.

Annotations:—*Reid.* Howard v. Chaffers, Howard v. Robinson (1863), 2 Drew. & Sm. 236; Graham v. Drummond, [1896] 1 Ch. 988.

6188. — Sale many years after testator's death.]—Where exors. in whom the legal fee is vested are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid unless twenty years have elapsed from testator's decease.—*Re* TANQUERAY-WILLAUME & LANDAU (1882), 20 Ch. D. 465; 51 L. J. Ch. 434; 46 L. T. 542; 30 W. R. 801, C. A.

Annotations:—*Consd.* *Re* Whistler (1887), 35 Ch. D. 561; *Re* Venn & Furze's Contract, [1894] 2 Ch. 101. *Reid.* *Re* Verrell's Contract, [1903] 1 Ch. 65; Solomon v. Attenborough, [1912] 1 Ch. 451. *Mentd.* Marshall v. Gingell (1882), 21 Ch. D. 790; *Re* De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson (1889), 41 Ch. D. 568; *Re* Lashmar, Moody v. Penfold (1890), 60 L. J. Ch. 143; *Re* Stokes, Parsons v. Miller (1892), 67 L. T. 223; *Re* Brooke, Brooke v. Brooke (1893), 63 L. J. Ch. 159; *Re* Adams & Perry's Contract (1899), 80 L. T. 149.

Sale of settled land.—*See* Settled Land Act, 1925 (c. 18), s. 110 (3) i.

SECT. 3.—TO COMPROMISE CLAIMS.

SUB-SECT. 1.—IN GENERAL.

See Trustee Act, 1893 (c. 53), s. 21; Trustee Act, 1925 (c. 19), s. 15.

6189. Power to release—Who may release—

PART V. SECT. 3, SUB-SECT. 1.

p. Power to compound debts—During action without knowledge of legal advisers—Misconduct sufficient to remove executor.]—An exor. during the course of an action against a debtor, came to an arrangement with debtor whereunder, without the cognisance of his legal advisers, he recognised as valid a stale & unsupported counterclaim set up by debtor. It appeared that he had actually been working in opposition to his legal advisers & that his conduct

would put the estate to much expense:—*Held*: he had been guilty of gross misconduct & must be removed from his office.—ALIE'S ESTATE v. ARNOLD (1908), 25 S. C. 302.—S. AF.

q. Power to compromise claim of creditor.—Where a claim is made against the estate of testator, & the exors. in the *bond fide* discharge of their duty compromise the claim, it is not necessary on passing the accounts of the exors. that any corroborative evidence should be adduced.—*Re*

Co-executor.—If one exor. will release a debt without the consent of his co-partner, whereby the will cannot be performed, the releasor & the releasee shall be ordered therefore in Chancery.—ANON. (1488), Cary, 15; 21 E. R. 8, L. C.

6190. — — —.]—(1) Two have an obligation as exors., & the one releases; it is good, & a good cause of equity against him who releases: a will is made, & A. is made exor., & no trust is declared in the will; & at his death testator declares, that his will is for the benefit of his children: may not this intent be averred? There is nothing more common (HYDE, C.J.).

(2) There are two exors.; one commits waste, or releaseth, etc., the other has no remedy at the common law, for that breach of trust (JONES, J.).—EVERS & OWEN'S CASE (1627), Godb. 431; 78 E. R. 253.

6191. — — —.]—Joint exors. in trust for an infant; one of them broke his trust in sealing a release, by which the infant lost £600. Decreed, that the release should be set aside, & that the £600 should be made good to the estate of the infant, either by him to whom the release was given, or by the trustee.—JENNINGS v. GORGES (1679), Cas. temp. Finch, 428; 23 E. R. 233.

6192. — — —.]—HUDSON v. HUDSON, No. 6424, *post*.

6193. — — —.]—JACOMB v. HARWOOD, No. 6030, *ante*.

6194. — — — Co-administrator.]—HUDSON v. HUDSON, No. 6424, *post*.

6195. — — —.]—JACOMB v. HARWOOD, No. 6030, *ante*.

6196. — — — Infant executor.]—(1) A release by an infant exor. does not bar him.

(2) On payment or satisfaction to an infant exor., he may acquit & discharge the debtor for as much as he receives.

(3) A release by a *feme covert* extrix. is not good, but a release by her husband is.—RUSSEL'S CASE (1584), 5 Co. Rep. 27 a; Moore, K. B. 146; 77 E. R. 91; *sub nom.* RUSSEL v. PRAT, 1 And. 177; *on appeal* (1589), 1 Leon. 193, Ex. Ch.

Annotations:—As to (1) *Reid.* Ketleys Case (1613), 1 Brownl. 120; Kniveton v. Latham (1637), Cro. Car. 490; Rudston & Yates Case (1641), March, 141; Pennington v. Healey (1833), 1 Cr. & M. 402. As to (2) *Reid.* Kniveton v. Latham (1637), Cro. Car. 490. As to (3) *Reid.* Thrustout v. Coppin (1772), 2 Wm. Bl. 801; Pemberton v. Chapman (1858), E. B. & E. 1056. *Generally, Mentd.* Sale v. Coventry (Bp.) (1590), 1 And. 241; Rutland v. Rutland (1595), Cro. Eliz. 377; Lemasons & Dicksons Case (1650), Poph. 189; Wankford v. Wankford (1703), 1 Salk. 299.

6197. — — — Executrix married woman.]—RUSSEL'S CASE, No. 6196, *ante*.

Releases generally, *see* CONTRACT, Vol. XII., pp. 497 *et seq.*

ROBBINS (1876), 23 Gr. 162.—CAN.

r. What amounts to compromise—Where assets subsequently become valuable.]—Where an agreement between administrator & creditors of intestate is drawn up reciting that there is an insufficiency of assets:—*Held*: the fact that the administrator has in his possession shares, then of no realisable value, but which subsequently become valuable, is not a material fact, the omission to disclose which entitles the creditors to avoid

Sect. 3.—To compromise claims: Sub-sects. 1, 2

6198. Power to compound debts—Owing to estate by poor debtors.]—GRIFFITH v. JONES (1886), 2 Rep. Ch. 391; 21 E. R. 697.

6199. — After judgment obtained against debtor.]—An exor. or administrator, who has obtained a verdict for a debt of his testator or intestate, may make a fair & reasonable compromise to discharge debtor out of custody, without rendering himself liable for the amount of the verdict as assets.

An administrator having recovered a verdict for £750, after debtor had remained in prison a considerable time, & petitioned the Insolvent Ct. for his discharge, received, by way of compromise, the sum of £150, & consented to debtor's liberation:—*Held*: in an action by a creditor of the intestate, & evidence that the costs of the former suit exceeded £150, the proper question was, whether the compromise was fair & reasonable; & a verdict for debt. was right.—PENNINGTON v. HEALEY (1833), 1 Cr. & M. 402; 3 Tyr. 319; 2 L. J. Ex. 98; 149 E. R. 455.

6200. — Compromise beneficial to executor Compromise contrary to wishes of co-executors.]—One of several exors., contrary to the wishes of the others, compromised a debt of their testator, from which a benefit might result to himself. Upon a bill by his co-exors.:—*Held*: it was not binding on the estate of testator, & it must be set aside.—STOTT v. LORD (1862), 31 L. J. Ch. 391; 5 L. T. 817; 8 Jur. N. S. 249; 10 W. R. 284.

6201. Power to settle account with debtor—Who may settle account—Co-executor.]—In the settlement of accounts by exors. two or more may bind the others, though with notice of their dissent, provided there is neither fraud nor gross error. Such settlement will also bind their *cestuis que trust*.—SMITH v. EVERETT (1859), 27 Beav. 446; 29 L. J. Ch. 236; 34 L. T. O. S. 58; 5 Jur. N. S. 1332; 7 W. R. 605; 54 E. R. 175.

Annotations:—*Mentd.* Mellersh v. Keen (No. 2) (1860), 28 Beav. 453; Robertson v. Quiddington (1860), 28 Beav. 529.

6202. — By consent—Whether sanction of court required.]—Dismissal of bills in which exors. & trustees are parties may be by consent, but not upon terms of an agreement between the parties, unless the ct. has heard & sanctioned such terms.—WARWICK v. COX (1852), 9 Hare, App. I., xiv.; 20 L. T. O. S. 204; 68 E. R. 762.

6203. Power to compromise claim of legatees.]—The power to compromise debts & other claims conferred on exors. by 23 & 24 Vict. c. 145, s. 30, is not confined to claims against their testator's estate in the nature of debts, but extends to claims by persons who seek to come in under the will & share as residuary legatees.—*Re* WARREN, WEEDON v. READING (1884), 53 L. J. Ch. 1016; 51 L. T. 561; 32 W. R. 916.

6204. Power to compromise claim of annuitant.]

the agreement.—*Re* WARREN'S ESTATE, NATIONAL TRUSTEES EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. v. WHITE (DANIEL) & CO., LTD., [1909] V. L. R. 6.—AUS.

s. — Where assets subsequently discovered—Neglect of duty by executors.]—Where evidence showed that some of the property subsequently discovered was such that debts. as

exors. ought to have known, even if they did not, of its existence at the time of the compromise:—*Held*: even though the exors. had no such knowledge, & there was no actual fraud, yet there was such culpable ignorance & neglect of duty on their part as to amount to fraud, & carry with it the consequences of knowledge; & as the compromise had in consequence been entered into by the parties & sanctioned

—D. by his marriage settlement conveyed certain leasehold hereditaments, subject to a mtge., to trustees upon trust after his death to raise an annuity for his widow. There being large arrears of the annuity, a deed was executed by the widow & the husband's exor., whereby the former agreed to abandon part of the arrears on the remainder being capitalised & interest thereon, & punctual payment for the future, being secured by a mtge. of the leaseholds, & by the covenant of the exor. to pay ground rent & interest on the mtge. out of the general assets, exclusive of the rents of the leaseholds:—*Held*: on bill filed by the widow, she was entitled to the benefit of the indenture.—DEPREY v. BEDBOROUGH (1862), 10 W. R. 875.

6205. Power to compromise claim of creditor—Who may compromise—Co-executor.]—Assignment of part of the assets, & judgment confessed, to a creditor by one exor. not available against the dissent of the others, on behalf of the general creditors.—LEPARD v. VERNON (1813), 2 Ves. & B. 51; 35 E. R. 237.

Annotations:—*Refd.* *Re* Ingham, Jones v. Ingham, [1893] 1 Ch. 352; Astbury v. Astbury, [1898] 2 Ch. 111. *Mentd.* Gaunt v. Taylor (1843), 2 Hare, 413; Gurnell v. Gardner (1863), 4 Giff. 626.

6206. What amounts to compromise—Sale of partnership interest—For cash, paid up shares & extinguishment of debt.]—Testator, who carried on business in partnership with his brother, by his will of Nov. 23, 1861, directed payment of his debts, &, after bequeathing specific & pecuniary legacies, he devised & bequeathed all his real & leasehold & personal estate to trustees, upon trust for sale & conversion into money, & to hold the proceeds of sale on certain trusts. In 1872 the brother & testator's widow, who was then the sole trustee & extrix. of the will, joined in selling & conveying real estate, of which the brother & testator had been tenants in common, & which was in fact partnership property, to a limited co. who purchased the business. The purchase-money was to be paid partly in cash & partly in fully-paid shares & debentures of the co. At the same time an arrangement was made for the handing over of the whole purchase-money to the bankers of the partnership, to whom the partnership was largely indebted, & whose debt was secured by mtges. of the partnership property, in satisfaction of the debt due to the bankers, the bankers undertaking to pay the other creditors of the partnership, & handing back to the extrix. a sum of cash & some of the debentures, & providing certain other benefits for the brother. The conveyance of the real estate to the co. contained a recital that the brother & the widow were entitled to the property in equal undivided moieties, & the widow purported to convey as trustee of her husband's will, but it was not stated in the deed that she was his extrix. or that the property was partnership property. On a subsequent sale of the property by the co., the purchaser objected that the sale by the widow was not authorised by the trust for sale, the consideration not being entirely paid in money:—*Held*: (1) the arrangement as to the

by the ct. under a misapprehension of material facts, pltf. was entitled to have the compromise set aside.—SOLOMON v. ABDOL AZEEZ (1881), 1 L. R. 6 Cal. 587; 1 C. L. R. 169.—IND.

t. Power to compromise claim of dower.]—An administrator with the will annexed has no authority as such to compromise dower or other claims by assigning to claimant a portion of

disposition of the purchase-money received from the co. amounted to a compromise by the widow with the creditors & with the surviving partner into which it was competent to her as extrix. to enter under 23 & 24 Vict. c. 145, s. 30; (2) this being so, & the real estate being partnership property which the widow, as extrix., was entitled to sell, & inasmuch as she, as trustee, had the legal estate, & as extrix. was the proper person to receive the purchase-money, the sale to the co. was a valid one, & their title good.—WEST OF ENGLAND & SOUTH WALES DISTRICT BANK v. MURCH (1883), 23 Ch. D. 138; 31 W. R. 467; *sub nom.* WEST OF ENGLAND BANK v. MURCH, *Re* BOOKER & CO., 52 L. J. Ch. 784; 48 L. T. 417.

Annotations:—As to (1) *Consd.* *Re* Morrison, *Morrison v. Morrison*, [1901] 1 Ch. 701. *Generally*, *Mentd.* *Niemann v. Niemann* (1889), 43 Ch. D. 198; *Re* Leon, [1892] 1 Ch. 348; *Re* Tollemache, [1903] 1 Ch. 457.

SUB-SECT. 2.—CLAIMS OF AND DEBTS DUE FROM CO-EXECUTORS.

6207. Compromise of claim.—Testator appointed B. & G. his exors. & trustees, bequeathed to G., if he should accept the offices of trustee & exor., £200, & declared that G. & every future trustee of his will who might be a solr., should be entitled to receive out of the estate his usual professional costs & charges for business transacted by him, including business not strictly professional, but which might or would have been performed in person by a trustee not being a solr. Considerable sums were charged by G. against the estate for business done by him, including charges for his trouble in matters not strictly professional:—

Held: in the absence of special powers in the will, trustees cannot settle the amount payable out of estate to one of themselves, so as to bind the *cestuis que trust*, & the residuary legatees were entitled to have G.'s costs & charges investigated.

—*Re* FISH, BENNETT v. BENNETT, [1893] 9 Ch. 413; 62 L. J. Ch. 977; 2 R. 467; *sub nom.* *Re* FISH, FISH v. BENNETT, 69 L. T. 233, C. A.

Annotations:—*Mentd.* *Clarkson v. Robinson*, [1900] 2 Ch. 722; *Re* Chalinder v. Herington, [1907] 1 Ch. 58.

6208. — **Executor acting honestly & reasonably.**—It is competent for an exor. in a proper case to compromise a claim by his co-exor. against the estate.

Where an exor., acting honestly & reasonably, allowed, after inquiry, a claim by testator's widow, who was co-extrix. of the will, to a large sum of money which, as she alleged, belonged to her, but was represented by securities apparently belonging to testator:—*Held*: the transaction was valid & binding on residuary legatees.—*Re* HOUGHTON, HAWLEY v. BLAKE, [1904] 1 Ch. 622; 73 L. J. Ch. 317; 90 L. T. 252; 52 W. R. 505; 20 T. L. R. 276; 48 Sol. Jo. 312.

6209. Compromise of debt—Not beneficial to

the real estate of deceased.—*IRWIN v. TORONTO GENERAL TRUSTS CO.* (1897), 24 A. R. 484.—CAN.

PART V. SECT. 3, SUB-SECT. 2.

a. *Compromise of debt—Beneficial to estate.*—A compromise of a debt due from the estate to one of several

exors. can be upheld only if found beneficial to the estate.—*STUPPLES v. DRANSFIELD* (1888), 6 N. Z. L. R. 584.—N.Z.

PART V. SECT. 3, SUB-SECT. 3.

b. *Co-executor.*—One of two exors. can settle an account on behalf

co-exors., in accordance with the terms of the will & without objection from the parties interested, to set off the £3,000 against the like amount of the debt then payable by him, at the same time paying about £1,000 in cash. Thereafter, having become C. agreed, by way of compromise with

of the compromise the debt due to testator's estate was treated by the exors. as amounting to £19,808, thus in effect reviving the debt of £6,000 which had been previously discharged, & accepting in respect of it a composition of 5s. in the pound; & the exors. also treated as revived C.'s right to one-sixth of testator's estate. In a suit brought by a legatee against the exors., all of whom proved the will:—*Held*: (1) the above agreement of set-off extinguished C.'s debt *pro tanto*, & had the same effect as if C. had paid £6,000 in cash. It also extinguished C.'s right under the bequest, unless it should turn out that the one-sixth share exceeded the estimated £6,000, & subject to his liability to refund *pro tanto* in case the same should fall short of the estimated £6,000; (2) the agreement of compromise was a breach of trust & void as against pltf., & it was fraudulent as regards C. The secret arrangement, though not legally binding, was sufficient to vitiate the compromise; (3) whether or not a compromise by exors. of a debt due from one of themselves will be excused & upheld if beneficial to the estate, the above compromise & the mode in which it was carried out as above were injurious to the estate & to pltf., & pltf., in the absence of any consent or acquiescence by him, was not bound thereby; (4) C. was liable to the estate for the full amount of what would have been due & payable by him if the compromise had never been effected, & the co-exors. were severally liable for so much of the amount as would or might at any time have come to their hands but for their wilful neglect & default.—*DE CORDOVA v. DE CORDOVA* (1879), 4 App. Cas. 602; 41 L. T. 43; 28 W. R. 105, P. C.

SUB-SECT. 3.—ON WHOM COMPROMISE BINDING.

6210. Co-executor — Although dissenting — No fraud or gross error.—*SMITH v. EVERETT*, No. 6201, *ante*.

6211. Cestuis que trust—Settlement of accounts by co-executor—Dissent of co-executors—No fraud or gross error.—*SMITH v. EVERETT*, No. 6201, *ante*.

6212. —.—*Re* FISH, BENNETT v. BENNETT, No. 6207, *ante*.

6213.

for estate to one-third of wh

In 1833 A.

of the estate with a debtor & the account so settled in the absence of fraud, collusion or material error affecting the whole account is binding on the other exor.—*SWIFT v. McDONALD* (1896), 17 N. S. W. Eq. 375.—AUS.

c. —.—Where claimant's delay in accepting an offer made by exors.

3.—*To compromise claims: Sub-sect. 3. Sect. 4: Sub-sects. 1, 2 & 3.]*

wrote to B. & C., offering, in order to prevent the necessity of accounts & the probability of dispute, to pay each £1,000 for his share. B. accepted the offer, & C. wrote to say that whatever B. determined "would meet with his approbation." A. & B. acted on the contract as complete, & C. never repudiated it or asked for any accounts or explanations. Upon the death of B., seventeen years afterwards, C. insisted that there was no contract binding on him, & he claimed one-third of the estate:—*Held*: C. had acquiesced & was bound by the contract.—*COOD v. COOD* (1863), 33 Beav. 314; 3 New Rep. 275; 33 L. J. Ch. 273; 38 N. S. 1335; 55 E. R. 388.

Annotations:—*Mentd. Adams v. Clutterbuck* (1883), 31 W. R. 723; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

6214. *Residuary legatee—Compromise of claim of co-executor.*—*Re HOUGHTON, HAWLEY v. BLAKE*, No. 6208, *ante*.

SECT. 4.—TO PAY INTO COURT.

SUB-SECT. 1.—RIGHT TO PAY IN.

See Trustee Act, 1893 (c. 53), s. 42; Trustee Act, 1925 (c. 19), s. 63; & generally, TRUSTS & TRUSTEES.

6215. *Contingent legacy.*—An exor. is not entitled, under Legacy Duty Act, 1796 (c. 52), s. 32, to pay into the Ct. of Ch. the amount of a contingent legacy.—*Ex p. KRANS* (1845), 2 Holt, Eq. 178; 14 L. J. Ch. 453; 71 E. R. 839; *sub nom. Ex p. KRAUS*, 5 L. T. O. S. 366.

6216. *Stock legacy—To account of infant legatees.*—Order made upon petition under Legacy Duty Act, 1796 (c. 52), s. 32, for transferring into the hands of the Accountant-General a stock legacy to the account of infant legatees.—*Re WATLINGTON'S WILL* (1853), 20 L. T. O. S. 257; 1 W. R. 194.

6217. *Legacy to infant.*—An infant being entitled to a legacy of £50, the exors. under the will invested that sum, minus the legacy duty, in the 3 per cent. consols, & tendered the amount produced by sale of the stock, with the interest upon it, to the infant upon her coming of age. A bill was filed against the exors. by the legatee for the amount of the legacy, with 4 per cent. interest:—*Held*: the exors. ought to have paid the legacy into ct. under Legacy Duty Act, 1796 (c. 52), & a decree was made for plff., with costs.—*RIMELL v. SIMPSON* (1848), 18 L. J. Ch. 55.

Annotation:—*Reid. Potheary v. Potheary* (1848), 2 De G. & Sm. 738.

6218. —.—.]—By his will dated Oct. 17, 1904, testator, after giving a number of legacies, gave £500, to each of his great-nephews & great-nieces "born previously to the date of this my will," to whom no other pecuniary bequest had been given by his will. He then gave his residuary estate to trustees upon trust for sale & conversion,

had liberated them from that offer:—*Held*: their obligation was not revived by the exors. having minuted claimant's subsequent acceptance, since there had been present at that meeting only one exor. besides claimant, nothing then done was binding in a question with claimant.—*MACKINTOSH*

v. WILLIAMSON (1849), 11 Dunl. (Ct. of Sess.) 1246.—*SCOT*.

PART V. SECT. 4, SUB-SECT. 1.

d. *Legacy to infant—Resident abroad—Payment to foreign guardian refused.*—*FLANDERS v. D'EVELYN* (1884), 4

& out of the proceeds to pay testamentary expenses, debts & legacies, & divide the net residue as therein mentioned; & testator empowered his to postpone the sale & conversion, & the payment of legacies until after sale & conversion, but he declared that all legacies not paid within a year from his death should carry interest at 4 per cent. A large number of the legatees were infants. One of the great-nieces was not born until Mar. 14, 1905, & was thus *en ventre sa mere* at the date of testator's will:—*Held*: the trustees could not free the residue by setting apart proper securities to answer the legacies to infants, but they could pay the legacies into ct. under Trustee Act, 1893 (c. 53), s. 42, when the clause as to the payment of the 4 per cent. interest would cease to operate.—*Re SATAMAN DE PASS v. SONNENTHAL*, [1907]

2 Ch. 40; 10 L. J. Ch. 210, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Annotation:—*Consd. Re Salomons, Public Trustee v. Wortley*, [1920] 1 Ch. 290.

6219. —.— *Costs of application to pay in accruing interest.*—On an application by an exor. to be at liberty to pay in the interest which had accrued on a legacy payable to an infant, the ct. refused to order the costs of the application to be paid out of such interest.—*Ex p. COBB* (1835), 4 L. J. Ch. 271.

.]—*See, generally, Part IV., Sect. 5, sub-sect. 14, ante.*

6220. *Legacy to married woman—Husband & wife abroad.*—Payment into ct. by an exor. of a legacy bequeathed to a married woman, not specifically appropriated, the husband & wife being abroad, & the husband requiring it to be paid under a power of attorney:—*Held*: the exor. had a right to pay it in, his costs of paying in, to be out of the general estate; his costs of appearing on a petition to pay out the legacy, out of the legacy.—*Re JONES* (1857), 3 Drew. 679; 5 W. R. 336; 61 E. R. 1063.

6221. —.—.]—A trustee is always justified in refusing to pay over the wife's fund to the husband, even at her request, & insisting on affording her an opportunity of asserting her equity to a settlement; & where a trustee has paid into ct. a fund to which a married woman is absolutely entitled, he is entitled as of course to his costs between solr. & client, unless his conduct has been simply capricious or vexatious.—*Re SWAN* (1864), 2 Hem. & M. 34; 4 New Rep. 53; 10 L. T. 334; 12 W. R. 738; 71 E. R. 371.

Annotation:—*M.F. Re Roberts's Trusts* (1869), 38 L. J. Ch. 708.

6222. —.—.]—Trustees are not justified, as a matter of course, in paying a married woman's legacy into ct.; but will be liable for costs if such payment appear vexatious & unnecessary.—*Re ROBERTS'S TRUSTS* (1869), 38 L. J. Ch. 708; 17 W. R. 639.

6223. *Right of legatee to payment in dispute.*—H. being entitled in remainder to £500 under a will made an assignment for the benefit of his creditors & became insolvent. The legacy fell into possession, & H. sent a written notice to the

O. R. 704.—*CAN.*

o. —.—.]—*Re PARR* (1886), 11 P. R. 301.—*CAN.*

i. —.— *Where entitled to maintenance.*—Where infants are entitled to maintenance out of a fund in the hands of the exor. against whose character

surviving exor. of the will not to pay it to any one but himself. A claim was also made by the trustees of the deed, & the exor. paid the £500 into ct. under Trustee Relief Act. Upon a petition for payment out of ct., asking costs against the exor.:—*Held*: he was justified in paying the money into ct. & must have his costs.—*Re HEADINGTON'S TRUST* (1857), 27 L. J. Ch. 175; 6 W. R. 7.

In action against representative.]—See Part VII., Sect. 2, *post*.

6224. What amount may be paid in—Principal sum without dividends accrued due.]—The ct. will in certain cases permit an exor. to transfer a principal sum of stock standing in the books in his name, & purchased out of the estate of his testator a considerable time before, without the dividends which have accrued in the meantime.—*DELLA CAINEA v. HAYWARD* (1824), M'Cle. 16; 148 E. R. 7.

6225. Decision obtainable by originating summons—Costs.]—(1) Testator bequeathed his residuary personal estate amongst six persons equally. Three of the residuary legatees predeceased testator, & their shares lapsed:—*Held*: the costs of ascertaining the next of kin of testator entitled to the lapsed shares ought to be paid out of the general residuary estate, & not out of the lapsed shares.

(2) Trustees who pay money into ct. under Trustee Relief Act, when the question arising might be decided upon an originating summons under R. S. C., Ord. 55, will in future not be allowed the costs occasioned by such payment into ct.—*Re GILES* (1886), 55 L. J. Ch. 695; 55 L. T. 51; 34 W. R. 712.

Annotation:—*As to* (1) *Folld. Re Hall-Dare, Le Marchant v. Lee Warner*, [1916] 1 Ch. 272.

Liability to pay into court—On admission of assets.]—See Part VI., Sect. 7, sub-sect. 4, B., *post*.

SUB-SECT. 2.—EFFECT OF PAYMENT IN.

6226. Payment into court on trusts of will—General administration involved.]—Where, under Trustee Relief Acts, money is paid into ct., "upon the trusts of a will," it involves the general administration of the estate, & the ct. will not order it to be transferred to a particular account, except at the request, & on the responsibility, of the trustee.—*Re WRIGHT'S TRUSTS* (1852), 15 Beav. 367; 18 L. T. O. S. 268; 51 E. R. 580.

6227. — Whether court will transfer money to particular account—Request by representative.]—*Re WRIGHT'S TRUSTS*, No. 6226, *ante*.

6228. Investment of money paid into court—In what securities.]—Legacy paid into ct., in a suit, ordered to be invested in new 3 per cents. instead of Consols.—*HANSON v. MURRAY* (1855), 3 Eq. Rep.

or solvency there is no imputation, it is nevertheless their right to have the fund brought into ct.—*Re HUMPHRIES, MORTIMER v. HUMPHRIES* (1899), 18 P. R. 289.—CAN.

PART V. SECT. 4, SUB-SECT. 2.

6229 i. Right of representative to petition for declaration of rights & distribution.]—Testator directed his exors. to insert a sum of money & apply the income in payment to his son A. of a weekly sum for mainte-

nance until they should be of opinion that it would be prudent to pay him the principal. The income was applied as directed by the exor. who proved the will, & after his death by his exors., who afterwards paid the principal into ct.:—*Held*: the payment into ct. deprived the exors. of the exor. of any discretion they had as to payment of the principal.—*Re MURPHY'S TRUSTS*, [1900] 1 I. R. 145.—IR.

6230 i. Whether fund in court can be garnished.]—A creditor of deceased

758; 25 L. T. O. S. 245; 1 Jur. N. S. 917; 3 W. R. 557.

6229. Right of representative to petition for declaration of rights & distribution.]—Exors., at the request of a legatee, sold out the stock representing the particular legacy. Having learnt that the legatee was an uncertificated bkpt., had been insolvent, & had assigned his legacy, the exors. paid the money into ct. under Trustee Relief Acts, & gave notice to the trade & official assignees of the legatee. They afterwards presented a petition, for declaration of the rights & distribution amongst the parties interested of the fund representing the legacy; a petition was also presented by the assignees:—*Held*: although the ct. had jurisdiction to declare the rights & distribute the fund upon the petition of the exors., they were not justified in taking such a proceeding, having discharged themselves from liability by paying the money into ct.; & they were only allowed such costs as they would have had if they had appeared as resps.—*Re CAZNEAU'S LEGACY* (1856), 2 K. & J. 249; 2 Jur. N. S. 157; 69 E. R. 772; *sub nom. Re HOUSMAN'S TRUST*, 4 W. R. 274.

Annotation:—*Reid. Re Hutchinson's Trusts* (1860), 1 Drew. & Sm. 27.

6230. Whether fund in court can be garnished.]—A judgment creditor obtained a garnishee order nisi under C. L. P. Act, 1854 (c. 125), against the exors. of P., a debtor of the judgment debtor. At that time P.'s estate was being administered in the Ct. of Ch., & after the service of the garnishee order the exors. paid the personal estate in their hands into ct., & a sufficient sum to answer P.'s debt to the judgment debtor was carried to the separate account of the judgment debtor in the suit. The judgment debtor afterwards filed a petition for liquidation & obtained an injunction restraining the judgment creditor from proceeding with his garnishee order. The trustee in the liquidation then applied in the suit for payment to him of the sum standing to the separate account of the judgment debtor:—*Held*: there was no debt owing to the judgment debtor in the hands of the exors. of P. at the time when they were served with the garnishee order, within sects. 61 & 62 of the above Act, & consequently the judgment creditor had no charge on the fund in ct.—*STEVENS v. PHELIPS* (1875), 10 Ch. App. 417; 44 L. J. Ch. 689; 23 W. R. 716, L. JJ.

Annotations:—*Consd. Re Watt, Ex p. Joselyne* (1878), 8 Ch. D. 327. *Mentd. Re London Cotton Mills Co., Re Brander* (1876), 25 W. R. 109.

SUB-SECT. 3.—PAYMENT OUT.

6231. When ordered—Legatee abroad—Joint petition by legatee & party authorised to receive legacy.]—A legatee being absent in India, the exors. paid his legacy into ct. under Legacy Duty Act, 1796 (c. 52). The legatee, by letter,

whose estate is being administered by the curator of estates of deceased persons may not institute proceedings by way of attachment against the curator.—*BALLHAUSEN v. MITCHELL* (1898), 23 V. L. R. 629.—AUS.

PART V. SECT. 4, SUB-SECT. 3.

g. When ordered—Legacy for maintenance of infants.]—A sum of money left by testator to his daughter, who predeceased him, was paid into ct. by his exors. The daughter, by

Sect. 5.—To appropriate: Sub-sect. 1.]

administration to intestate's estate & paid his lunatic sister's share into ct.; paid to his two brothers their shares & took receipts, & retained a fourth of the estate, including the mtge., for himself. Interest on the mtge. was paid by the tenant for life of the equity of redemption to C. F., the administrator till his death in 1863; then to his widow, extrix. & residuary legatee under his will, till 1883, when she died intestate; & then to her administrator & sole next of kin till 1886. In an action by the last named person for foreclosure of the mtge. all defts. admitted the payment of interest, but two of them set up the defence of Stat. Limitations, & argued that an administrator had no power to appropriate a chose in action; that the mtge. was, therefore, not properly appropriated by C. F. & did not pass under his will; that after his death there was no legal personal representative of the mtgee., & consequently, that the subsequent payments of interest were not made to persons entitled to receive them:—*Held*: (1) Stat. Limitations did not apply; (2) an administrator had power to appropriate a debt in this way; (3) the right of administrator, who was also one of the next of kin, to appropriate part of the estate to his own share was a right entirely independent of the agreement of the next of kin, & this right was not confined to chattels; & (4) the payments of interest were made to the right persons.—*BARCLAY v. OWEN* (1889), 60 L. T. 220.

Annotations:—*As to* (1) *Refd. Re England, Steward v. England* (1895), 73 L. T. 237. *As to* (2) *Refd. Re Beverley, Watson v. Watson*, [1901] 1 Ch. 681. *As to* (3) *Refd. Re Brooks, Coles v. Davis* (1897), 76 L. T. 771; *Re Bythway, Gough v. Dames* (1911), 80 L. J. Ch. 246.

6259. —.]—*Re RICHARDSON, MORGAN v. RICHARDSON*, No. 6282, *post*.

6260. —.]—A sole exor. who is also a beneficiary cannot validly appropriate towards his own legacy or share of residue any securities which have no market value & at his own price.

A sole extrix. was entitled to pecuniary legacies of £10,000 & £1,000 under the will. By her own will she specifically bequeathed those legacies, describing them as "the two several sums of £10,000 & £1,000." During her life she purported to appropriate certain shares & debentures towards her legacies:—*Held*: she had made no valid appropriation, & therefore her bequest of these legacies was not *pro tanto* adeemed.—*Re BYTHWAY, GOUGH v. DAMES* (1911), 80 L. J. Ch. 246; 104 L. T. 411; 55 Sol. Jo. 235.

6261. Effect of power to postpone conversion.—Testatrix directed her trustees to pay the interest or annual rent of £2,000 to A. during her life, & after her death to divide that sum among her children; & to pay the interest or annual rent of a similar amount to B. in life-rent, with the fee to her children. The trustees were empowered by the deed to realise, or to continue to "hold any or all of such shares or stocks" as might belong to testatrix at her decease, "should they consider it advisable or expedient to do so without any personal responsibility for loss, if any, thereby sustained"; with power also "to lend or place out on such securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2,000 & £2,000 respectively, the securities to be conceived in favour of my trustees, & that for the purposes of this trust & no other-

wise." Testatrix at her death held £850 stock of an unlimited bank. The trustees, at the desire of A. & without consulting B., set £200 of this stock aside as part of the fund appropriated to A. & realised the remainder. They afterwards, on the narrative of the purposes of the trust deed, & of the sums invested for the two specific legacies of £2,000, & that they had paid the residue, received their discharge from A. & B. Statements & separate accounts of interest on the investments allocated to each were sent half yearly to A. & B. All the investments stood in the names of testatrix's trustees. The bank became insolvent, & calls were made upon the trustees in respect of the £200 stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. B. objected to any portion of her legacy being taken:—*Held*: the trustees had the power to sever & had severed the two legacies, & had placed them in separate investments for behoof of the respective beneficiaries, & therefore the trustees had no right to relief from the investments allotted to B. & her family for liabilities incurred on those allotted to A. & her family.—*FRASER v. MURDOCH* (1881), 6 App. Cas. 855; *sub nom. ROBINSON v. MURDOCH*, 45 L. T. 417; 30 W. R. 162, H. L.

Annotations:—*Consd. Re Brooks, Coles v. Davis* (1897), 76 L. T. 771. *Distd. Re Craven, Watson v. Craven*, [1914] 1 Ch. 358. *Refd. Re Hall, Foster v. Metcalfe* (1902), 72 L. J. Ch. 74; *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58. *Mentd. Hobbs v. Wayet* (1887), 36 Ch. D. 256; *Re Kidd, Kidd v. Kidd* (1894), 42 W. R. 571; *Hardoon v. Bellios*, [1901] A. C. 118; *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194; *Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705; *Re Towndrow, Gratton v. Machen*, [1911] 1 Ch. 662.

6262. —.]—Testator gave specific property upon trust to sell & invest the proceeds, & set apart portions to answer settled legacies, & he gave power to the trustees to retain any part of his personal estate in the investments in which they were at the time of his decease, & the residue he bequeathed upon trust for all his children & the issue of such as should be dead, in equal shares, the shares of daughters to be settled. Part of the securities held by testator at the time of his death consisted of shares in a brewery which had been very successful. Some of these the trustees appropriated to answer one of the settled legacies, & the remainder to the same legatee in part satisfaction of her share of residue. On a summons asking whether they were justified in so doing:—*Held*: (1) as to the settled legacies, there was power to appropriate, having regard to the power to retain existing investments, & to the decision in *Fraser v. Murdoch*, No. 6261, *ante*; (2) as to the residue, these shares being an authorised investment, there was no duty to sell & invest on security of the like nature, & they, therefore, might be appropriated, even, according to *Re Richardson, Morgan v. Richardson*, No. 6282, *post*, in advance; all such appropriations must be fairly made, & there being no allegation of unfairness, the trustees had acted within their powers.—*Re BROOKS, COLES v. DAVIS* (1897), 76 L. T. 771.

Annotations:—*As to* (1) *Follid. Re Cooke's Settlement, Tarry v. Cooke*, [1913] 2 Ch. 661. *Distd. Re Craven, Watson v. Craven*, [1914] 1 Ch. 358. *Refd. Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58. *As to* (2) *Refd. Re Beverley, Watson v. Watson*, [1901] 1 Ch. 681.

6263. —.]—*Re CRAVEN, WATSON v. CRAVEN*, No. 6271, *post*.

6264. To what property power extends—Residuary personal estate.—*STANWAY v. STYLES* (1734), 2 Eq. Cas. Abr. 247; 22 E. R. 209.

6265. — Chose in action.] — *BARCLAY v. OWEN*, No. 6258, *ante*.

6266. — Specific portion of assets.]—An exor. has power, even though no express authority be given him for that purpose in the will, to agree with a legatee to appropriate a specific portion of the estate to him.

An exor., who had no special authority for that purpose, agreed with one of the residuary legatees to appropriate to him a mtge. as part of his share, & for that purpose handed to him the mtge. deed, but executed no transfer of the mtge. to him. At the time when this was done the sum secured by the mtge. was not more than the estimated amount of the legatee's share in the residue; but by reason of the subsequent loss of some of the assets the residuary estate was greatly reduced, & the other residuary legatees claimed the mtge. as part of testator's assets:—*Held*: the appropriation was complete, & the legatee could not be deprived of the mtge.—*Re LEPINE, DOWSETT v. CULVER*, [1892] 1 Ch. 210; 61 L. J. Ch. 153; 66 L. T. 360, C. A.

Annotations:—*Consd. Re Nickels, Nickels v. Nickels*, [1898] 1 Ch. 630. *Reid. Re Brooks, Coles v. Davis* (1897), 76 L. T. 771; *Re Beverley, Watson v. Watson*, [1901] 1 Ch. 681; *Re Hall, Foster v. Metcalfe* (1902), 72 L. J. Ch. 74; *Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379.

6267. — —.]—*Re RICHARDSON, MORGAN v. RICHARDSON*, No. 6282, *post*.

In reference to settled legacies.]—*See* Sub-sect. 3, *post*.

6268. — Chattels real.]—(1) The principle upon which exors. & trustees under a will which contains a trust for sale & conversion have power to appropriate any specific part of the residuary estate towards satisfaction of a legacy or share of the residue, is that they have power to sell the particular assets to the legatee, & to set off the purchase-money against the legacy. The doctrine, therefore, is not confined to pure personal estate, but extends to chattels real; *semble*: to real estate which is subject to a trust for sale & conversion.

(2) Land Transfer Act, 1897 (c. 65), s. 4 (1), applies to personal estate as well as to real estate; but it does not, where there is a trust for sale & conversion, take away the former power of appropriation.—*Re BEVERLY, WATSON v. WATSON*, [1901] 1 Ch. 681; 70 L. J. Ch. 295; 84 L. T. 296; 49 W. R. 343; 17 T. L. R. 228; 45 Sol. Jo. 259.

Annotations:—*As to* (1) *Consd. Re Cooke's Settlement, Tarry v. Cooke*, [1913] 2 Ch. 661; *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358. *As to* (2) *Consd. Re Hall, Foster v. Metcalfe* (1902), 72 L. J. Ch. 74. *Reid. Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

6269. — Real estate subject to trust for sale & conversion.]—*Re BEVERLY, WATSON v. WATSON*, No. 6268, *ante*.

6270. — Securities of no certain value.]—*Re BYTHWAY, GOUGH v. DAMES*, No. 6260, *ante*.

6271. — Existing investments not authorised under will—Effect of power to postpone conversion.]—Testator by his will devised & bequeathed his residuary real & personal estate to three trustees, two of whom were his sons, upon trust to sell & convert & to stand possessed of the proceeds upon trust for all his children, except his son J., in equal shares, & he directed that all properties & investments acquired by him in the names of any

of his children or advances to or for the benefit of his children should be treated as absolute gifts to such children of the properties, investments, & advances which might be taken in their names individually or given to or for their benefit, & that such children should not be liable to repay to him or his estate the consideration which he had paid for the properties or the amounts that might have been advanced or invested on such securities or otherwise. He further directed that in the division of his estate his trustees should equalise his children's shares as far as possible by treating all gifts to them as having been made in satisfaction or part satisfaction of their shares. Testator then settled the shares of his daughters & declared that his trustees might postpone the sale & conversion of his real & personal estate for so long as they should think fit, the income of the unconverted property to go to the persons to whom the income produced by the sale & conversion would for the time being be payable if the sale & conversion had been actually made. The investment clause did not authorise the investment in the shares of private cos. Testator died in Dec. 1892, leaving six children other than J., who took no interest in the residue, viz. two sons & four daughters. A considerable part of testator's estate consisted of shares in a private co. called C. Ltd., the articles of which contained restrictive provisions with reference to the transfer of shares. There was no market for these shares, & the trustees, although they had advertised, had been unable to obtain an offer for them. During his lifetime testator had made advances to certain of his children, & subsequently to his death the trustees had made further advances to two of his sons. The trustees had, for the purpose of dividing the income, pending the distribution of the estate, added to the income of the actual estate interest at 4 per cent. *per annum* on the advances to the children, & had then divided the total thus ascertained into six equal shares, & had paid one of such shares to each of the children, deducting in the case of an advanced child 4 per cent. on the amount of the advance to that child:—*Held*: the power to postpone conversion applied to the C. shares only so long as the estate was retained by the trustees as a whole, & did not extend to authorise them to appropriate those shares to the settled shares of the daughters when the estate was divided.—*Re CRAVEN, WATSON v. CRAVEN*, [1914] 1 Ch. 358; 83 L. J. Ch. 403; 109 L. T. 846; 58 Sol. Jo. 138.

Annotations:—*Consd. Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58. *Mentd. Re Forster-Brown, Barry v. Forster-Brown*, [1914] 2 Ch. 584; *Re Cooke, Randall v. Cooke*, [1916] 1 Ch. 480; *Re Tod, Bradshaw v. Turner*, [1916] 1 Ch. 569; *Re Foster, Hunt v. Foster*, [1920] 1 Ch. 391.

6272. Refusal to appropriate—Jurisdiction of court to compel representative to appropriate.]—A testator, who was possessed of a large personal estate, consisting of various foreign securities, with the exception of a small sum of ready money, bequeathed to his trustees so much of his personal estate & effects as, at the time of his decease, should produce the clear annual income of £1,500: & he directed that the same should be selected, & appropriated, & set apart as soon as conveniently might be after his decease, by his trustees or trustee, in their uncontrolled discretion; & that the trustees or trustee should stand possessed of

PART V. SECT. 5, SUB-SECT. 1.

62661. To what property power extends—Specific portion of assets.]—An exor. has power to agree with a legatee to appropriate a specific portion of the estate to him.—*Re HINSCH'S WILL* (1896), 17 N. S. W. L. R. (B.) 21.—AUS.

Sect. 5.—To appropriate: Sub-sects. 1, 2, 3 & 4.]

the personal estate & effects so to be appropriated, etc., upon trust to pay the interest, dividends, & annual produce thereof, half-yearly, to his wife during her life; after her death, to sink into the residue; with a direction, that if the interest or dividends should, from any cause, be increased or reduced in amount, his wife should have the increase, or bear the loss. The residue of his estate & effects he gave upon certain trusts for his children; & he gave his trustees or trustee for the time being the fullest discretion to leave his property invested on foreign securities, but with full powers to alter & vary the securities as they should think fit. One exor. only proved the will, the others being abroad; he paid testator's debts, & a legacy given by the will, but, in consequence of disputes arising between the widow of testator & some of the residuary legatees as to the construction of the will, he declined to exercise his discretion as to appropriating a sufficient amount of testator's estate to meet the annuity of £1,500 given to the widow, & refused to exercise his discretion except under the direction of the Ct. of Ch. In consequence of this the annuitant filed her bill to have a sufficient amount of the foreign securities sold, & the proceeds invested in the 3 per cents., so as to yield an annuity of £1,500. Upon the construction of the entire will:—*Held*: the exor. & trustee having refused to exercise his discretion as to the appropriation of part of the estate to meet the annuity of £1,500, the Ct. of Ch. could not exercise any discretion in the matter. —*PRENDERGAST v. PRENDERGAST* (1850), 3 H. L. Cas. 195; 14 Jur. 989; 10 E. R. 75, H. L.

Annotations:—*Mentd.* Thornton v. Ellis (1852), 15 Beav. 193; *Re Elmore's Trusts* (1860), 3 L. T. 359; *Re McMahon, Wells v. Tyrer* (1911), 55 Sol. Jo. 552; *Re Marsh, Rhys v. Needham* (1917), 62 Sol. Jo. 41.

Duty to appropriate to meet contingent liabilities.]

—*See* Part IV., Sect. 3, sub-sects. 1 & 2, *ante*.

6273. Proof of appropriation—Necessity for proof of title to appropriate.]—An extrix., by a deed, reciting that she intended to appropriate a part of her testator's assets in payment of a debt due from him to her, declared trusts of the fund intended to be thus appropriated. She died without making the appropriation, which was made after her decease by her exors. New trustees of the deed, subsequently appointed, executed a declaration of trust, contained in the deed appointing them, whereby they declared that they would hold the fund upon the trusts. On their inquiring before their appointment, for evidence in verification of the recital as to the existence of the debt from testator to the extrix., none could be discovered:—*Held*: the trustees could not be compelled to execute these trusts without further evidence of settlor's title to appropriate the fund. —*NEALE v. DAVIES* (1854), 5 De G. M. & G. 258; 2 Eq. Rep. 530; 23 L. J. Ch. 744; 2 W. R. 358; 43 E. R. 869, L. JJ.

Annotation:—*Mentd.* Gent v. Harrison (1859), 29 L. J. Ch. 68.

6274. — Necessity for proof of date of appropriation.]—It is the duty of a person setting up an appropriation to prove when the appropriation took place.—*ROGERS v. ROGERS* (1855), 25 L. T. O. S. 262, L. C.

PART V. SECT. 5, SUB-SECT. 2.

1. No direction by testator to appropriate.]—Testamentary trustees, directed to pay a legacy of £5,000 at a

postponed date, invested that sum in trust-investments & appropriated them to the legacy. The trust-deed contained no direction to appropriate investments to particular legacies:—

6275. Costs of appropriation—Liability of residuary legatee.]—Testator gave his real & personal estates to trustees upon trust for sale & conversion, & to stand possessed of the proceeds upon trust, among other things, to set apart & appropriate a sum of £10,000 for the benefit of pliffs.; & made one of the trustees his residuary legatee. Pliffs. requested the trustees to pay the money into ct. under 10 & 11 Vict., c. 96. The trustees declined, saying that they had invested the money as directed by the will, & did not wish to relinquish the trust. Pliffs. then filed a bill for the payment into ct. of the sum of £10,000. The trustees by their answer said that the suit was unnecessary & improper, but admitted at the bar that pliffs. had a right to have the legacy brought into ct.:—*Held*: (1) upon the language of the will, & upon established principles of equity, the expenses of severing, appropriating, & securing the legacy must be borne by the residuary legatee; (2) the costs of the legatees, who had been forced by the conduct of defts. to bring a suit for the recovery of their legacy, which might have been paid in by the trustees under 10 & 11 Vict., c. 96, must also be borne by the residuary estate.—*HANDLEY v. DAVIS* (1859), 28 L. J. Ch. 873; 32 L. T. O. S. 330; 5 Jur. N. S. 190.

6276. — Liability of estate.]—A testatrix leaving an ample estate in personalty, but £26,000 of it being out on mtge. & not capable of realisation for six months, the exors. paid some of the legacies, & invested the trust gifts under the will, & paid the debts within three months, leaving the £26,000 on mtge. to answer six legacies, two of those legatees being residuary legatees. One of the residuary legatees declined to consent to the payment to the unpaid pecuniary legatees of the interest due on the mtge. from the time of the payment of the other legacies until the mtge.-money was received; & the exors. petitioned under Law of Property Amendment Act, 1859 (c. 35), for the advice of the ct. as to whether they should pay such interest, stating that they had intended to appropriate, & had in law appropriated the £26,000:—*Held*: petitioners ought to pay such interest to the six legatees; costs to be out of the estate.—*Re MURRAY'S TRUST* (1868), 18 L. T. 747

SUB-SECT. 2.—CONTINGENT LEGACIES.

6277. Where interest payable—Amount of interest payable.]—Legacy to a female infant, to be paid at twenty-one, or marriage, with interest at 4 per cent., but if she die before, to sink into the residue, ordered to be paid into the Bank, in order to secure the legacy; &, if greater interest made, that it should be for the benefit of the child. —*GREEN v. PIGOT* (1781), 1 Bro. C. C. 103; 2 Dick. 585; 28 E. R. 1013, L. C.

Annotations:—*Foll.* Carey v. Askew (1786), 2 Bro. C. C. 58. *Dist.* *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226. *Reid.* Gawler v. Standerwick (1788), 2 Cox, Eq. Cas. 15; *Hutcheson v. Hammond* (1790), 3 Bro. C. C. 128c; *Crickett v. Dolby* (1795), 3 Ves. 10; *Sitwell v. Bernard* (1801), 6 Ves. 520.

6278. — —.]—Legacy left to A. on marrying with consent, & till marriage interest to be paid at 3 per cent. The extrix. lays it out in the funds,

Held: the trustees were not entitled to appropriate investments to the legacy.—*COLVILLE'S TRUSTEES v. COLVILLE*, [1914] S. C. 255.—*SCOT*.

& conveys to trustees in trust to pay the legacy, with 3 per cent. interest & to pay the surplus interest to her. This is not a good appropriation, & the stock having sunk in value, the extrix's estate shall make it good.—(*COOPER v. DOUGLAS* (1787), 2 Bro. C. C. 231; 29 E. R. 129, L. C.)

6279. Where no interest payable — Whether security must be given.]—Where contingent legacy in sterling money is given, the ct. does not secure it by appropriating what may be deemed a sufficient amount of stock to pay it when it becomes due: but it will direct security for the payment of the legacy, if the contingency should happen, to be given by the person who, till the contingency does happen, is entitled to the fund.—*WEBBER v. WEBBER* (1823), 1 Sim. & St. 311; 1 L. J. O. S. Ch. 219; 57 E. R. 126.

Annotations:—Folld. Re Parry, Scott v. Leak (1889), 42 Ch. D. 570. *Refd. King v. Maltcott* (1852), 1 Hare, 692; *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226.

6280. — Necessity for consent of legatee to appropriation.]—In the case of a contingent legacy of a sum of money, given without interest in the meantime until the happening of the contingency, an exor. cannot make an appropriation of authorised securities to meet it if he thinks fit, & without the consent of the legatee, & then require any loss arising from a depreciation in the investment which he has thus appropriated to be borne by the legatee, the question always being in such a case whether the investment became the property of the legatee or remained part of testator's estate.—*Re HALL, FOSTER v. METCALFE*, [1903] 2 Ch. 226; 72 L. J. Ch. 554; 88 L. T. 619; 51 W. R. 529; 47 Sol. Jo. 514, C. A.

Annotations:—Appld. Re Kirkley, Halligey v. Kirkley (1918), 87 L. J. Ch. 247. *Expld. Re Salomons, Public Trustee v. Wortley*, [1920] 1 Ch. 290. *Refd. Re Salaman, De Pass v. Sonnenthal*, [1907] 2 Ch. 46.

Effect of appropriation.]—See Sub-sect. 4, *post*.

SUB-SECT. 3.—SETTLED LEGACIES.

6281. Power to appropriate specific assets.]—The securities appropriated in satisfaction of a legacy in which infants are interested must be of a permanent character. Testator directed his trustees & exors. to invest a sum of £15,000 upon such securities as they might in their absolute discretion think fit, & to stand possessed thereof in trust for his widow during her life, with remainder to his children, some of whom were infants. The trustees, by arrangement with the tenant for life, set apart for the purpose of answering the legacy certain securities, some of which were preference stocks, which appeared to be liable to be paid off. The tenant for life being dead:—*Held*: the appropriation was not binding upon the children, & the full sum of £15,000 must now be invested.—*STEWART v. SANDERSON* (1870), L. R. 10 Eq. 26; 39 L. J. Ch. 337; 22 L. T. 10; 18 W. R. 278.

6282. — To one share—Without making corresponding appropriation to other shares.]—Exors. may appropriate specific assets to a trust share of residue or transfer them to the legatee of a share in advance of final division.

Exors. entitled to two-fifths of a residue, the other three-fifths being settled, before final division transferred securities, since risen in value, at the market price, to one of themselves as part of his

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fifth share:—*Held*: though no corresponding appropriation in respect of the settled shares, the transaction was valid against beneficiaries.—*Re RICHARDSON, MORGAN v. RICHARDSON*, [1896] 1 Ch. 512; 65 L. J. Ch. 512; 74 L. T. 12; 44 W. R. 279; 40 Sol. Jo. 225.

Annotations:—Consd. Re Nickels, Nickels v. Nickels, [1898] 1 Ch. 630. *Refd. Re Brooks, Coles v. Davis* (1897), 76 L. T. 771; *Re Beverley, Watson v. Watson*, [1901] 1 Ch. 681.

6283. — — — — —.]—Where a residuary trust fund is settled by will upon trust for several persons & their families, the trustees have power *virtute officii* to appropriate specific investments to any of the settled shares before the period of final division without making any corresponding appropriation to the other shares. A testator gave the proceeds of his residuary estate upon trust as to one undivided sixth to pay the income to his eldest son for life, & after his death to pay the capital to his children, & as to the remaining five-sixths upon similar trusts for testator's four other sons & his daughter & their children, & he empowered his trustees to pay over a portion of the capital of the settled shares to any of his six children absolutely, notwithstanding the previous trusts. In 1881, the then trustees paid to each of the five sons one-half of his share, & to the daughter one-sixth of her share absolutely; & they also set aside for the daughter & her children a sum of stock sufficient at its then value to make up with the sum advanced to her one-half of her share. The income of the stock was paid to the daughter till her death in 1896:—*Held*: there was a valid appropriation of the stock to the daughter's share, & the distribution to her children ought to proceed on that footing.—*Re NICKELS, NICKELS v. NICKELS*, [1898] 1 Ch. 630; 67 L. J. Ch. 406; 78 L. T. 379; 46 W. R. 422; 42 Sol. Jo. 414.

Annotations:—Refd. Re Beverley, Watson v. Watson, [1901] 1 Ch. 681; *Re Ruddock, Newberry v. Mansfield* (1910), 102 L. T. 89.

6284. — — — — —.]—*Re WATERS, PRESTON v. WATERS*, [1889] W. N. 39.

Annotations:—Refd. Re Beverley, Watson v. Watson, [1901] 1 Ch. 681; *Re Hall, Foster v. Metcalfe* (1902), 72 L. J. Ch. 74.

6285. Power to postpone conversion.]—*Re BROOKS, COLES v. DAVIS*, No. 6262, *ante*.

Effect of appropriation.]—See Sub-sect. 4, *post*.

SUB-SECT. 4.—EFFECT OF APPROPRIATION.

6286. Investments remaining in trustees' names —Whether set apart.]—*FRASER v. MURDOCH*, No. 6261, *ante*.

6287. Subsequent profit or loss—Direction for sale of stock without attention to rise or fall.]—Direction for sale or transfer of stock without attention to the rise or fall; the party must take it, as it happens at the time of appropriation.—*Ex p. PYE, Ex p. DUBOST* (1811), 18 Ves. 140; 34 E. R. 271, L. C.

Annotations:—Mentd. Cotteen v. Missing (1815), 1 Madd. 176, *Wetherby v. Dixon* (1815), Coop. G. 279; *Hooper v. Goodwin* (1818), 1 Swan. 485; *Colvin v. Fraser* (1829), 2 Hag. Ecc. 266; *Platt v. Platt* (1830), 3 Sim. 503; *Wharton v. Durham* (1834), 3 My. & K. 472; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Powys v. Mansfield* (1837), 3 My. & Cr. 359; *Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Hughes v. Stubbs* (1842), 1 Hare, 476; *M'Fadden v. Jenkyns* (1842), 1 Hare, 458; *Meek v. Kettlewell* (1842), 1 Hare, 464; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Suisse v. Lowther* (1843), 2 Hare, 424; *Kirk v. Eddowes*

Sect. 5.—To appropriate: Sub-sect. 4. Sect. 6: Sub-sect. 1.]

(1844), 3 Hare, 509; Griffith v. Ricketts, Griffith v. Lunell (1849), 7 Hare, 299; Kekewich v. Manning (1851), 1 De G. M. & G. 176; Price v. Price (1851), 14 Beav. 598; Dipple v. Corles (1853), 11 Hare, 183; Woale v. Ollivo (1853), 17 Beav. 252; Donaldson v. Donaldson (1854), Kay, 711; Tierney v. Wood (1854), 19 Beav. 330; Airey v. Hall (1856), 3 Sm. & G. 315; Parnell v. Hingston (1856), 3 Sm. & G. 337; Forbes v. Forbes (1857), 3 Jur. N. S. 1206; Vandenberg v. Palmer (1858), 4 K. & J. 204; Thomas v. Thomas (1859), 8 W. R. 71; Milroy v. Lord (1862), 4 De G. F. & J. 264; Peckham v. Taylor (1862), 31 Beav. 250; Forrest v. Forrest (1865), 34 L. J. Ch. 428; Grant v. Grant (1865), 34 Beav. 623; Roberts v. Roberts (1865), 13 L. T. 492; Tucker v. Burrow (1865), 2 Hem. & M. 515; Chichester v. Coventry (1867), L. R. 2 H. L. 71; Penfold v. Mould (1867), L. R. 4 Eq. 562; Richardson v. Richardson (1867), L. R. 3 Eq. 686; Warriner v. Rogers (1873), L. R. 16 Eq. 340; Bennet v. Bennet (1879), 10 Ch. D. 474; Harding v. Harding (1886), 17 Q. B. D. 442; Montagu v. Sandwich (1886), 32 Ch. D. 525; Re Hamlet, Stephen v. Cunningham (1888), 38 Ch. D. 183; Re Lacon, Lacon v. Lacon, [1891] 2 Ch. 482; Re Ashton, Ingram v. Papillon, [1897] 2 Ch. 574; Re Jaques, Hodgson v. Braisley, [1903] 1 Ch. 267; Re Roby, Howlett v. Newington, [1908] 1 Ch. 71; Carter v. Hungerford (1916), 115 L. T. 857; Re Dawson, Swainson v. Dawson, [1919] 1 Ch. 102.

6288. ——— Deferred legacy—Bonâ fide set apart.]

—Re WATERS, PRESTON v. WATERS, [1889] W. N. 39.

*Annotations:—*Reid. Re Beverley, Watson v. Watson, [1901] 1 Ch. 681; Re Hall, Foster v. Metcalfe (1902), 72 L. J. Ch. 74.

6289. ——— ———.]—Trustees are not insurers, & if they have & retain in their hands assets which, fairly valued, are sufficient to meet legacies which are not payable, but have to be held in trust, they are justified in paying other legacies *pari passu* with them, but payable at once; & trustees making such payments are not personally responsible to the unpaid legatees if the assets retained for them should in the result prove insufficient to pay them in full.—Re HURST, ADDISON v. TOPP (1892), 67 L. T. 96; 8 T. L. R. 528, C. A.

6290. ——— Contingent legacy.]—COOPER v. DOUGLAS, No. 6278, *ante*.

6291. ———.]—ROCK v. HARDMAN (1819), 4 Madd. 253; 56 E. R. 699.

6292. ——— Appropriation without consent.]—Re HALL, FOSTER v. METCALFE, No. 6280, *ante*.

6293. ——— Settled legacy.]—A testator bequeathed an annuity to his wife for life, & his residuary estate to his children. The exors. set apart a fund to answer the annuity. Some of the children settled their shares in this fund, by specific description, & they afterwards incumbered the shares in the other residuary estate. By the reduction of the interest of the fund set apart, the capital of it was resorted to for payment of the annuity:—*Held*: the persons claiming under the settlements were not entitled, as against the incumbrancers of the residue, to have the annuity fund made good out of the residuary estate.—WEDDERBURN v. WEDDERBURN (1858), 25 Beav. 113; 53 E. R. 579.

6294. ———.]—Testator gave the yearly sum of £2,000 sterling, to his wife for her life, & after her decease, to his trustees, upon the same trusts as after declared concerning the yearly sum

of £3,000. He [then gave to his trustees the yearly sum of £3,000 sterling to issue out of a sufficient sum of stock in the 5 per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for life, & after her decease, for her children. The trustees invested £100,000 5 per cents., to answer the two yearly sums. The stock was afterwards converted into 4 per cents., whereby the dividends became insufficient to pay the yearly sums:—*Held*: the legatees were not entitled to have the deficiency supplied out of testator's residuary estate.—KENDALL v. RUSSELL (1830), 3 Sim. 424; 8 L. J. O. S. Ch. 108; 57 E. R. 1057.

6295. ———.]—Testator gave his estate to his wife & two other trustees, upon trust to convert & invest the same, & to allow his wife to receive £100 a year during her life; & he gave the residue to his children, after deducting so much thereof as would be sufficient to produce the clear yearly interest of £100, without any deduction, in order to satisfy the said annuity, which money he directed his trustees to appropriate & set apart. The trustees appropriated £2,500, £4 per cent. annuities, to this annuity, & divided the residue between the children. By the reduction of the dividends the income became less than £100 a year:—*Held*: the representative of the widow could have the deficiency raised out of the corpus as against the children, but not as against incumbrancers without notice on their shares, where the widow had been cognisant of the incumbrance.—UPTON v. VANNER (1861), 1 Drew. & Sm. 594; 5 L. T. 480; 8 Jur. N. S. 405; 10 W. R. 99; 62 E. R. 505.

6296. ——— Appropriation without consent.]—A testator by his will, gave £2,300 bank annuities to trustees upon trust to pay so much of his debts as his ready money should be insufficient to satisfy, & to hold the residue upon trust to pay the dividends to his wife during her life, & after her death to sell the fund, & also his household furniture, & out of the proceeds, & all other his personal estate, to pay seven legacies amounting to £1,075 & to pay the residue to W. absolutely. Testator died in 1882, & his estate was administered, & the whole of the sum of £2,300 bank annuities, no part being required for payment of debts, was transferred into the names of the trustees. Both trustees died, & the administrators of the survivor got possession of the fund & misappropriated the greater part of it, so that only £716 was forthcoming. The widow died in 1862:—*Held*: there having been no consent of the legatees to the special appropriation of the fund, the ordinary rule, that the residuary legatee could take nothing till all the pecuniary legatees had been paid, must prevail.—BAKER v. FARMER (1868), 3 Ch. App. 537; 37 L. J. Ch. 820; 16 W. R. 923, L. JJ.

6297. ———.]—STEWART v. SANDERSON, No. 6281, *ante*.

6298. ——— Appropriation for settled legacy only.]—A testator who died in 1863 gave certain life annuities including one of £8 to the mother of pltf., & after her death he bequeathed a legacy of £200 to her children equally. The interest of

PART V. SECT. 5, SUB-SECT. 4.

6290 i. Subsequent profit or loss—Contingent legacy.]—Testatrix bequeathed a sum of £300 to her exors. in trust to pay the interest to her

nephew for life. A particular fund, which had been set apart during the life of the tenant for life to answer the bequest, having risen in value:—*Held*: there had been such an appropriation

of that fund in payment of the legacy, as to entitle the party to whom the legacy was now payable to the benefit of the increase.—KIMBERLEY v. TEW (1843), 4 Dr. & War. 139.—IR.

his residuary estate was given to testator's daughter for life, & then the capital to her children. In an action to administer testator's estate, it was ordered in 1873 that a sum of £266 13s. 4d. Consols should be carried to a separate account to answer the annuity of £8. By subsequent orders made in 1885, & 1904, of which no notice was given to the annuitant or her children, various sums were directed to be paid out to the residuary legatees. On the death of pltf.'s mother in 1917 the sum of Consols proved insufficient to satisfy in full the legacy of £200 to her children. In an action by pltf., as one of the children entitled to a share of this legacy, against the representatives of one of the residuary legatees to make good the deficiency:—*Held*: the fund having been set aside to secure the annuity only pltf. was entitled to follow the assets in the hands of the residuary legatees & to recover the deficiency in her legacy, as she could not be held bound by proceedings to which she was not a party.—*Re RIVERS, PULLEN v. RIVERS*, [1920] 1 Ch. 320; 88 L. J. Ch. 462; 121 L. T. 57; 63 Sol. Jo. 534.

6299. Calls on shares—Investments set apart but not transferred—Whether whole estate liable.]—*FRASER v. MURDOCH*, No. 6261, *ante*.

6300. By residuary legatee & executor—To residue—Leaseholds.]—Election by residuary legatee & exor. to take part of leaseholds as part of residue is election to take whole.—*HINSON v. BUTTON* (1620), 2 Roll. Rep. 158; 81 E. R. 723.

6301. Bankruptcy of executor—Liability of legatees to contribute.]—One of several exors., whilst testator's assets were sufficient for payment of his debts & the several legacies given by his will, which were a charge on his real estate, appropriated two sums in favour of two legacies, & afterwards, becoming bkpt., was found a defaulter to testator's estate in a considerable sum of money in respect of assets wasted by him. A bill was afterwards filed by one of the residuary legatees

against the several other parties interested in testator's estate & effects, seeking the administration thereof, but containing no prayer for a direction that the legatees who had received their legacies in full should proportionally abate the same. The master, on reference to him, had, by his report, which had been duly confirmed, found that the two legacies in question had been appropriated by the exor.:—*Held*: the two legatees whose legacies had been appropriated, could not be ordered to contribute in respect of the deficiency of testator's estate to answer the demands upon it.—*KNIGHT v. KNIGHT* (1846), 15 L. J. Ch. 363.

Abatement of legacies.]—See Part IV., Sect. 5, sub-sect. 6, *ante*.

6302. Intention to appropriate—Actual appropriation delayed—Right to accruing interest.]—*Re MURRAY'S TRUST*, No. 6276, *ante*.

SECT. 6.—REMUNERATION.

SUB-SECT. 1.—IN GENERAL.

6303. General rule—No right to allowance for time & trouble.]—An exor. is to have no allowance for his care & trouble, but if goods are consigned to a factor in the lifetime of his principal, though they come to his hands after his death, & he is made his exor., he shall be allowed commission money.—*SCATTERGOOD v. HARRISON* (1729), Mos. 128; 25 E. R. 310, L. C.

Annotation:—*Reid. Moore v. Frowd* (1837), 3 My. & Cr. 45.

6304. ———.]—The ct. never allows an exor. or trustee for his time & trouble, especially where there is an express legacy for his pains, etc., neither will it alter the case, that the exor. renounces, & yet is assisting to the exorship.; nor even though it appears, that the exor. has deserved more, & benefited the trust, to the prejudice of his own

PART V. SECT. 6, SUB-SECT. 1.

m. General rule—When executor charged with wilful default.]—A commission should not in general be allowed to an exor. or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default.—*BALD v. THOMPSON* (1870), 17 Gr. 151.—CAN.

n. For work done—Carrying on testator's business.]—Where exors. have carried on testator's business, without any express authority in the will to do so, the ct. will not disallow them commission, unless there is an entire absence of, at all events, apparent authority to carry on the business.—*Re M'ILLREE'S WILL* (1886), 12 V. L. R. 298.—AUS.

Extent of commission.]—Exors. were authorised by the will to carry on testator's business. The exors. received money from sales:—*Held*: entitled to commission only on the net proceeds of the business.—*Re MATHESON'S WILL* (1887), 13 V. L. R. 587.—AUS.

p. ———.]—*Re WHITE'S WILL* (1908), 8 S. R. N. S. W. 582.—AUS.

q. ———.]—*Re KILLICOAT*, [1914] S. A. L. R. 141.—AUS.

r. ———.]—*In the Will of SHARLAND* (1890), 17 N. Z. L. R. 729.—N.Z.

1901), 20 N. Z. L. R. 633.—N.Z.

t. ——— Without authority.]—An exor. or administrator who carries on the business of deceased without authority will not be allowed commission.—*Re SOLOMON* (1903), 4 S. R. N. S. W. 242; 20 N. S. W. W. N. 255.—AUS.

a. ——— Same executors in different estates—Remuneration granted by will.]—Testator gave to each of his exors. a sum of £30 clear of duty, as remuneration to be accepted in lieu of or in satisfaction of any claim for commission or remuneration. Another testator gave a similar sum to each of his exors. who should prove his will. The trustees, who were the same in both estates, carried on the business for some years:—*Held*: that in both cases the ct. could allow commission.—*Re DOLBEL & DOLBEL* (1911), 30 N. Z. L. R. 478.—N.Z.

b. ——— After period provided for in will.]—Testator by his will provided that each of his trustees should be entitled to a sum of £200 p.a. "for his trouble therein until my youngest child, if a son, shall attain 21, or if a daughter shall attain that age or die under that age or marry":—*Held*: the ct. could & should give such commission as might be just in respect of the work done after the period provided for in the will.—*WINTER IRVING v. WINTER*, [1907] V. L. R. 546.—AUS.

c. ——— Gratuitously, by agent of executor.]—In no case will an exor. be entitled to allowance for services performed by an agent, which were so

performed by him gratuitously.—*CHISHOLM v. BARNARD* (1964), 10 Gr. 479.—CAN.

d. ———.]—*McMILLAN v. McMILLAN* (1874), 21 Gr. 369.—CAN.

e. ——— Whether court will apportion commission amongst several executors—According to work performed.]—Three extrices, were appointed under the will. The chief burden of the management of the estate fell upon the third extrix., who asked the ct. to apportion the commission amongst the extrices, proportionably to the amount of work performed by each:—*Held*: the commission could only be allowed to the extrices, as a body & the ct. could not interfere with its distribution.—*Re ADAMS* (1905), 24 N. Z. L. R. 892.—N.Z.

f. ———.]—*Re EDMONDSON* (1907), 26 N. Z. L. R. 1404.—N.Z.

g. ——— As auctioneer.]—An exor. who acts as auctioneer in selling estate assets is not entitled to pay himself auctioneer's commission out of the estate in addition to the ordinary exor.'s commission, nor is he entitled to retain for his own benefit commission which is payable by purchasers of estate assets.—*HORN'S EXECUTOR v. THE MASTER*, [1919] C. P. D. 48.—S. AF.

h. Whether commission allowed—On property realised out of jurisdiction.]—The ct. will not allow commission to an exor. on property realised out of the

Sect. 6.—Remuneration: Sub-sect. 1.]

affairs.—ROBINSON v. PETT (1734), 3 P. Wms. 249; 2 Eq. Cas. Abr. 454; 24 E. R. 1049; *sub nom.* ROBINSON v. LORKIN, 2 Barn. K. B. 435, L. C.

*Annotations:—*Appld. New v. Jones (1833), 1 Mac. & G. 668, n.; Moore v. Frowd (1837), 3 My. & Cr. 45. *Consd.* Re Barber, Burgess v. Vinicome (1886), 34 Ch. D. 77. *Refd.* Creswick v. Woodhead (1842), 4 Man. & G. 811; Harrison v. Harrison (1846), 1 Rob. Eccl. 406.

6305. ———.]—Exor. & trustee cannot claim compensation for personal trouble & loss of time in the performance of trusts under a will, but should have made a special case for compensation before he entered on the performance of the trusts.—BROCKSOPP v. BARNES (1820), 5 Madd. 90; 56 E. R. 829.

6306. ———.]—*Held*: a solr. who accepts a trust under a will or settlement is not entitled to charge for work & labour done by him as a solr. in executing the trust.—NEW v. JONES (1833), 1 Mac. & G. 668, n.; 1 H. & Tw. 632, n.; 41 E. R. 1429.

*Annotations:—*Consd. Moore v. Frowd (1837), 3 My. & Cr. 45; Bainbrigge v. Blair (1845), 8 Beav. 588; Cradock v. Piper (1850), 1 Mac. & G. 664; Broughton v. Broughton (1855), 5 De G. M. & G. 160. *Refd.* Burge v. Brutton (1843), 7 Jur. 988; York v. Brown (1844), 1 Coll. 260.

6307. ———.]—If the duty of a trustee in this country is ever so laborious no commission is allowed to him for what he does (*per Cur.*).—DENTON v. DAVY (1836), 1 Moo. P. C. C. 15; 12 E. R. 716.

*Annotation:—*Refd. Campbell v. Campbell (1842), 13 Shm. 108.

jurisdiction.—Re BROWN'S WILL (1875), 1 V. L. R. 41.—AUS.

k. ———.]—Where testator died possessed of property in this & in other colonies the order for commission to his exors. will be limited to the property within this colony.—Re SARGOOD'S ESTATE (1878), 4 V. L. R. 43.—AUS.

l. ———.]—*Grant to trustee company jointly with individuals.*—Testator appointed the Perpetual Trustee Co. exor. & trustee in conjunction with two other persons.

In addition to a New South Wales estate, testator was possessed of property in Victoria & Queensland:—*Held*: the co. was entitled to commission upon sums remitted to New South Wales in respect of assets collected & realised in Queensland.—In the Will of TYSON (1909), 9 S. R. N. S. W. 287.—AUS.

m. ———.]—*When executors given legacy by testator.*—Commission will be given to exors., although testator has given them each a legacy, as an acknowledgment for the trouble of executing the trusts of his will.—Re KAY'S WILL (1876), 2 V. L. R. 94.—AUS.

n. ———.]—The giving of a legacy to exors. on condition of their acting is not intimation of an intention on the part of testator to exclude commission.—Re MILLIN'S WILL (1876), 2 V. L. R. 86.—AUS.

o. ———.]—Testator bequeathed to each of his exors. £1,000 "as compensation for his trouble in executing my will":—*Held*: this was not a case in which the exors. were entitled to commission.—Re BLAKE (1878), 1 N. S. W. S. C. R. N. S. 253.—AUS.

—.]—Re FULLERTON'S WILL (1885), 6 N. S. W. L. R. (P.) 15; 1 N. S. W. W. N. 140.—AUS.

—.]—Re STEELK, [1915]

S. R. N. S. W. 247; 32 N. S. W. W. N. 66.—AUS.

r. ———.]—Where a legacy is given to exors. as compensation, they are at liberty to claim a further sum under the statute if it is not sufficient.—DENISON v. DENISON (1870), 17 Gr. 306.—CAN.

s. ———.]—HELLEM v. SEVERS (1876), 24 Gr. 320.—CAN.

t. ———.]—Exors. were allowed the amount of their commission; but refused the legacies given by the will, which were expressed to be in remuneration for their trouble.—KENNEDY v. PINGLE (1879), 27 Gr. 305.—CAN.

a. ———.]—McCLENNAGHAN v. PERKINS (1902), 23 C. L. T. 84; 5 O. L. R. 129; 1 O. W. R. 191, 752.—CAN.

b. ———.]—The ct. will allow an exor. commission even where a legacy is given him by testator for his trouble, unless the intention of testator to deprive him of commission can be gathered from the will.—Re PROCTOR (1884), 3 N. Z. L. R. 126 (S. C.).—N.Z.

—.]—Re CRUMMER'S WILL (1897), 16 N. Z. L. R. 176.—N.Z.

CHAVANNES (1898), 16 N. Z. L. R. 639.—N.Z.

e. ———.]—*Onus of proving inadequacy on executors.*—Where a testator has left to his exors. a legacy which he might reasonably consider a fair allowance for their services, in an application for further remuneration, the onus is on the exors. of showing clearly that the remuneration allowed is inadequate.—Re McLEAN (1911), 31 N. Z. L. R. 139.—N.Z.

surviving executor.—*Extent of commission.*—Where one of several exors. applies for commission

6308. ———.]—An exor.'s expenses in keeping up an establishment not disallowed *simpliciter*, but there being a question whether travelling expenses were thereby economised, an inquiry directed with liberty to the exor. to bring forward afterwards such claims as he might have to be recouped his expenses, notwithstanding the further consideration of the cause was the proper time for so doing.

An exor. will not have a salary given him in the absence of some contract to that effect between him & testator.—BROWNE v. COLLINS (1872), 21 W. R. 222.

6309. ———.]—Unless allowed by court in special circumstances.—MARSHALL v. HOLLOWAY (1820), 2 Swan. 432; 36 E. R. 681, L. C.

*Annotations:—*Apprvd. Morison v. Morison (1838), 4 My. & Cr. 215. *Consd.* Bainbrigge v. Blair (1845), 8 Beav. 588. *Mentd.* Ibbotson v. Ibbotson (1840), 10 Sim. 495; Ferrand v. Wilson (1845), 4 Hare. 344; Browne v. Stoughton (1846), 14 Sim. 369; Dugannon v. Smith (1846), 12 Cl. & Fin. 546; Turvin v. Newcome (1856), 3 K. & J. 16; Christie v. Gosling (1866), L. R. 1 H. L. 279; Holloway v. Webber, Holloway v. Holloway (1868), L. R. 6 Eq. 523; Martelli v. Holloway (1872), L. R. 5 H. L. 532; Tewart v. Lawson (1874), L. R. 18 Eq. 490; Re Stamford & Warrington, Payne v. Grey, [1911] 1 Ch. 255; Re Lewis, Busk v. Lewes, [1918] 2 Ch. 308.

6310. ———.]—The appointment of a deft. who is an exor. & trustee to be a consignee, with the usual profits, is a matter for the discretion of the ct.—MORISON v. MORISON (1838), 4 My. & Cr. 215; 41 E. R. 85; *sub nom.* MORRISON v. MORRISON, 3 Jur. 528, L. C.

*Annotation:—*Mentd. Morison v. Morison (1847), 17 L. J. Ch. 65.

under Administration Act, 1872, s. 25, for his pains & trouble, the ct. will narrow the allowance, if it is shown that a deceased exor. has taken part in the labour, for which compensation is sought.—Re BROWN'S WILL (1875), 1 V. L. R. 41.—AUS.

g. ———.]—*After appointment of trustee company.*—Where, upon the death of one of two exors., probate is granted to a trustee co. the other exor. may be entitled to commission, both for the period up to the death of his co-exor. & for the period subsequent thereto.—Re FLEMING (1900), 26 V. L. R. 559.—AUS.

h. ———.]—*To executor appointed to succeed renouncing executor.*—Where testator appointed three exors., one of whom renounced & another was appointed, the ct. granted commission only to the original exors.—Re SARGOOD'S ESTATE (1878), 4 V. L. R. 43.—AUS.

aa. ———.]—*Where commission fixed by will.*—Where the will fixes a commission to be paid to executors, the ct. will not make an order for the allowance of commission.—Re STANWAY'S WILL (1883), 9 V. L. R. 36.—AUS.

bb. ———.]—Re HUTCHINGS' WILL (1889), 15 V. L. R. 419.—AUS.

cc. ———.]—WINTER IRVING v. WINTER, [1907] V. L. R. 546.—AUS.

dd. ———.]—Re LANGLANDS (1901), 21 N. Z. L. R. 100.—N.Z.

ee. ———.]—*To administrator retaining debt due to him.*—*Semble*: where a creditor obtains administration of his debtor's estate, & seeks to retain his debt thereout, he should not also be allowed commission.—BAILEY v. WRIGHT (1883), 9 V. L. R. 67.—AUS.

ff. ———.]—*In advance.*—The ct. has no jurisdiction to make a prospective order for commission to exors.

6311. ——— **Commission for collecting rents.]**—The *cestuis que trust*, some of whom were infants under a settlement of freehold farms in Wales, dated in 1840, were all resident out of the jurisdiction either in Canada or the United States. The settlement contained a power of sale exercisable with the consent of the equitable tenant for life, & a power of appointing new trustees exercisable by the surviving or continuing trustee, or the heirs or assigns of the last surviving or continuing trustee. In 1874, when both the original trustees of the settlement were dead, the extrix. of the last surviving trustee, erroneously believing herself empowered in that behalf, purported to appoint two persons resident in Canada to be trustees of the settlement. These two persons, believing themselves to be duly appointed, had acted as trustees since 1874, & had employed an English agent to receive the rents of the farms, paying him a commission for so doing. The heir of the last surviving trustee could not be found, & there was no one capable of exercising the power of appointing new trustees contained in the settlement. Upon a petition by all the *cestuis que trust* for the appointment by the ct. of the two Canadians & the English agent as new trustees, & for authority to pay the English trustee a commission on the rents while acting as manager & receiver, the ct. appointed the two persons resident in Canada & the English agent to be new trustees of the settlement, but required an undertaking by the trustees out of the jurisdiction in case the power of appointing new trustees should become exercisable by them, or either of them, not to appoint any new trustee resident out of the

jurisdiction without the consent of the ct. The ct. also, subject to the production of evidence as to the number of the holdings, the rents & dates of payment, the necessity of paying a commission for collecting the rents, & that the proposed remuneration was proper, sanctioned the payment of a commission to the English trustee.—*Re FREEMAN'S SETTLEMENT TRUSTS* (1887), 37 Ch. D. 118; 57 L. J. Ch. 160; 57 L. T. 798; 36 W. R. 71.

——— **Unless representative is judicial trustee.]**—See Judicial Trustee Act, 1896 (c. 35), s. 1 (5).

——— **Unless public trustee acting as representative.]**—See Public Trustee Act, 1906 (c. 55), s. 9.

6312. ——— **Except formerly in respect of Indian assets.]**—CHETHAM v. AUDLEY (LORD) (1798), 4 Ves. 72; FREEMAN v. FAIRLIE (1817), 3 Mer. 24; COCKERELL v. BARBER (1826), 2 Russ. 585; DENTON v. DAVY (1836), 1 Moo. P. C. C. 15; CAMPBELL v. CAMPBELL (1842), 13 Sim. 168; CAMPBELL v. CAMPBELL (1843), 2 Y. & C. Ch. Cas. 607; MATTHEWS v. BAGSHAW (1851), 14 Beav. 123.

6313. **For work done — As accountant.]** — McDONALD v. RICHARDSON, RICHARDSON v. MARTEN, No. 7167, *post*.

6314. ——— **As agent.]**—An agent, named exor., is not entitled to charge commission on business done subsequently to testator's death.—SHERIFF v. AXE (1827), 4 Russ. 33; 38 E. R. 717.

Annotation:—*Reid*. Moore v. Frowd (1837), 3 My. & Cr. 45.

— *Re* SHORT (1885), 11 V. L. R. 631.—AUS.

q. ——— **.]**—It is wrong in principle to allow to an exor. moneys that are to be earned in the future or which may never be earned, & the fact that the exor. is a strong co. & likely to be permanent does not alter the principle.—*Re FORTUNE ESTATE* (1915), 30 W. L. R. 735; 25 Man. L. R. 239.—CAN.

r. ——— **On income of investments made out of accumulations.]**—Upon the passing of their accounts by exors. the chief clerk may allow them commission upon the income investments of the accumulated rents of real estate, the principal of which has already been the subject of commission.—CROWLEY v. CRANE (1895), 21 V. L. R. 258.—AUS.

s. ——— **To executor on debt due by himself.]**—Testator directed that his exor. should receive 2½ per cent. commission on all receipts & expenditure. At testator's death his exor. was indebted to testator. The amount of this debt was subsequently paid by the exor. into the estate bank account:—*Held*: the exor. was not entitled to any commission in respect of such debt.—*Re RODD'S ESTATE* (1900), 21 N. S. W. B. 37.—AUS.

t. ——— **To personal executor — After receipt of commission by co-executor.]**—A personal exor. may be allowed commission on passing his accounts, his co-exor.—a trustee co.—having already received commission.—*Re PRIOR* (1900), 26 V. L. R. 230.—AUS.

u. ——— **To trustee company — Extent of commission.]**—A trustee co. acting as exor. is entitled to commission on the capital value of the estate without deducting the amount of any mtge. debts secured thereon in cases where the mtgee. had not gone into possession of the estate under mtge.—*Re MCINTOSH* (No. 3), PERPETUAL

TRUSTEE CO., LTD. v. M (1903), 4 S. R. N. S. W. 59; 21 N. S. W. W. N. 29.—AUS.

payable.]—Where a co., empowered by its private Act to act as exor. & to receive commission, had proved a will, & applied for leave to mortgage the realty for payment of debts, & the commissions:—*Held*: commission was not payable until the estate was wholly or partly administered.—*Re TATE* (1906), 2 Tas. L. R. 59.—AUS.

c. ——— **Appointed jointly with individual.]**—The ct. has power to make a grant of probate to a trustee co. with an individual or individuals; & the co. is entitled to commission as in the case where it is appointed sole exor.—*In the Will of TYSON* (1908), 8 S. R. N. S. W. 461.—AUS.

d. ——— **To attorneys of trustees abroad — Allowed commission by principals.]**—Scottish probate was sealed in Victoria by attorneys of Scottish trustees:—*Held*: the attorneys in Victoria were not trustees of the will & were not entitled to more than the commission allowed them by the Scottish trustees.—CATTANACH v. MACPHERSON, [1908] V. L. R. 390.—AUS.

e. ——— **On assets not devolving under grant.]**—The ct. has jurisdiction to allow an exor. or administrator commission other than out of local assets which devolve upon him under the grant made by the ct.

Where an exor. had collected assets in Queensland by virtue of an ancillary or subsidiary grant of representation in that state, he was refused commission on such assets from the New South Wales ct.—*Re FERGUSON'S WILL* (1908), 11 S. R. N. S. W. 298.—AUS.

f. ——— **Executor committing breach of trust.]**—Exors. who have committed a breach of trust in an important particular will be deprived of com-

mission. Where an exor. with the concurrence of his co-exor. purchased a portion of the trust estate at auction:—*Held*: they were thereby disentitled to commission. It is immaterial in such a case that the breach of trust has really resulted in a benefit to the trust estate.—*Re GREER'S WILL* (1911), 11 S. R. N. S. W. 21; 28 N. S. W. W. N. 17.—AUS.

——— **Executor retaining moneys.]**—Where an exor. had retained money in his hands unemployed, for which on passing his accounts he was charged by the accountant, with interest & rests, he was, notwithstanding, allowed his commission & costs of the suit.—GOULD v. BURRITT (1865), 11 Gr. 523.—CAN.

h. ——— **Where administration suit pending.]**—Where a suit for the administration of an estate is pending in the Ct. of Ch. it is improper for the surrogate judge to interfere by ordering the allowance of a commission to trustees or exors.—CAMERON v. BETHUNE (1868), 15 Gr. 480.—CAN.

k. ——— **Balance found against executor.]**—The fact that, on an account being taken pursuant to a decree in an administration suit, a balance has been found against an exor., is not alone sufficient to disentitle him to compensation.—SIEVEWRIGHT v. LEYS (1882), 1 O. R. 375.—CAN.

l. ——— **.]**—ARCHER v. SEVERN (1886), 13 O. R. 316.—CAN.

m. ——— **When accounts inaccurate — Time for allowing compensation.]**—An exor. who discharges his duty honestly but owing to want of business training keeps his accounts loosely & inaccurately is entitled to compensation for his care, pains & trouble, but the amount of compensation should not, in such a case, be relatively large. Compensation when allowed should be credited to the exor. at the end of each

Sect. 6.—Remuneration: Sub-sect. 1.]

6315. — Broker.]—Undoubtedly, a solr. who is a trustee is not allowed to make a profit out of his trusteeship, & the same rule applies to him in regard to exorship. He stands, in respect of this general principle, in the same position as a broker, commission agent, or the like, who may be appointed trustee or exor., & who may be appointed trustee or exor., & who may transact some of the business relating to the estate which requires the assistance of either broker, commission agent, or the like; & if the exor. or trustee transacts business of that kind for the estate, he is allowed, of course, his costs out of pocket, that is to say, the expenditure, but not anything for his time or trouble. That principle is based upon this consideration, that the Ct. of Equity will not allow a man to place himself in a position in which his interest & duty are in conflict. . . . Consequently, if an exor., being a solr., acts solely for himself, or acts for himself & his co-trustee in the business of a trust, he, in the absence of any provision to the contrary in the instrument creating the trust, is not entitled to receive out of the trust estate profit costs. That is the rule where the business is done not in a suit, but out of ct. The same rule applies where the solr. does business in ct. acting for himself as solr. where he is pltf. in an action, & also where he is the deft. (CHITTY, J.).—*Re BARBER, BURGESS v. VINICOME* (1886), 34 Ch. D. 77; 56 L. J. Ch. 216; 55 L. T. 882; 35 W. R. 326.

Annotation:—Apprvd. Re Corsellis, Lawton v. Elwes (1887), 34 Ch. D. 675.

year.—*HOOVER v. WILSON* (1897), 24 A. R. 424.—CAN.

n. — To executor guilty of misconduct not amounting to fraud.]—Where an exor. has been guilty of negligence, mismanagement, & breach of trust in his management of the estate, but there has been nothing of a dishonest or fraudulent character, & the losses resulting are capable of being compensated for, & made good in money, the exor. is not to be deprived of compensation.—*McCLENAUGHAN v. PERKINS* (1902), 23 C. L. T. 84; 5 O. L. R. 129; 1 O. W. R. 191, 752.—CAN.

o. — Interim remuneration.]—The ct. may allow an exor. a reasonable sum on account for interim remuneration, without expressing any opinion as to the amount which has actually been earned by the exor. up to the time of the application.—*Re FORTUNE ESTATE* (1915), 30 W. L. R. 735; 25 Man. L. R. 239.—CAN.

p. —]—*Re PROCTOR* (1884), 3 N. Z. L. R. 126 (S. C.).—N.Z.

q. —]—*Re KENNEDY* (1890), 9 N. Z. L. R. 305.—N.Z.

r. — When estate insolvent.]—Commission will be allowed to an exor. who has administered the estate of his testator though the assets available for distribution are insufficient to pay the creditors in full.—*In the Will of KERN* (1891), 10 N. Z. L. R. 255.—N.Z.

s. — To representatives of deceased executor.]—The surviving exors. are the proper persons to ask for remuneration, which is not given to them simply because they are exors., but for their pains & trouble; & the claims of the representatives of a deceased exor. who did nothing by way of realising the estate will not be considered on an appln. for commission by the exors. who realised the estate.—*In the Will of CAMPBELL* (1892), 11

N. Z. L. R. 514.—N.Z.

t. — In absence of directions in will—Fidei commissum—Transcribing & guaranteeing inheritance.]—Testator, a director of the S. A. Assocn., by will dated 1881, burdened an inheritance with a *fidei commissum*, & appointed the assocn. administrators thereof. Upon payment of the capital to the *fidei-commissary* heirs the assocn. charged them with a commission for transcribing & guaranteeing the inheritance, but there was no direction in the will authorising such a charge.—*Held*: even if the ct. should consider that testator, knowing it to be the practice of the assocn. to charge the commission in similar cases, intended that the practice should be followed in regard to the inheritance in question, the charge was not allowable in the absence of any specific directions to that effect in the will.—*SOUTH AFRICAN ASSOCN. N. O. v. HOFFMAN* (1913), App. D. 377.—S. AF.

u. — Failure to file account.]—*SMITH v. MYLREA* (1913), C. P. D. 929.—S. AF.

b. Discretion of court to fix amount.]—An exor.'s commission should be reasonable, & the ct. has discretion to fix the amount.—*Re GIBBON* (1889), 3 Q. L. J. 120.—AUS.

c. —]—Where the agent, after the decease of the principal intestate, had procured letters of administration to his estate, & subsequently the person who became possessed of the assets as the personal representative of the administrator refused to account, & a bill was filed to enforce it, the ct. allowed defts. a commission of five per cent. on all moneys received & paid over or properly expended by themselves or their testator, & two & a half per cent. on all moneys received by him or them, but not yet paid over.—*McLENNAN v. HEWARD* (1862), 9 Gr. 279.—CAN.

6316. — Commission agent.]—*Re BARBER, BURGESS v. VINICOME*, No. 6315, ante.

6317. — Factor.]—*SCATTERGOOD v. HARRISON*, No. 6303, ante.

6318. — As banker.]—An exor., who is one of a banking firm, cannot charge the ordinary banker's commission against his testator's estate.—*HEIGHINGTON v. GRANT* (1840), 9 L. J. Ch. 142; on appeal, 5 My. & Cr. 258, L. C.

Annotation:—Reid. Feltham v. Turner (1870), 23 L. T. 345.

6319. — As employee in testator's firm.]—L. was a trustee of his father's will. His father had been one of the managing directors of a partnership firm & by the will L. was nominated to be a partner in the firm in the place of his father, but he was to hold the share in the partnership to which he thus succeeded upon the trusts of the will. L. had, prior to his father's death, acted as salesman of the firm at a salary. He continued so to act after his father's death & after his admission as a partner, under an agreement with the other members of the firm. The agreement to employ L. was made *bond fide* & was for the interest of the firm & thus of the trust estate.—*Held*: L. received his salary as salesman by virtue of his agreement with the firm & not by reason of the trusts of the will, & consequently he was entitled to retain the salary in addition to certain remuneration which he obtained under the will for acting as managing partner & he need not account for the salary to the trust estate.—*Re LEWIS, LEWIS v. LEWIS* (1910), 103 L. T. 495; 55 Sol. Jo. 29.

d. —]—Where the estate was large, requiring great care & judgment in its management for a number of years, the ct. sustained an allowance of \$1,500 to the principal exor. & trustee, & \$1,500 to the others jointly.—*DENISON v. DENISON* (1870), 17 Gr. 306.—CAN.

e. —]—Letters of administration having been granted to the widow of an intestate, she, without any formal appointment as such, acted as a guardian of their infant children, & received the rents & profits of the real estate, all of which she duly accounted for. The master in taking the accounts allowed her compensation for the receipt & application of such rents & profits, as well as the personal estate, amounting in all to \$133. On further directions the ct., regarding the case as an exceptional one, refused to interfere with such allowance.—*DOON v. DAVIS* (1876), 23 Gr. 207.—CAN.

f. —]—The right of an exor. to compensation depends entirely upon lt. S. C., 1877, c. 107, ss. 37, 41, & as that statute has fixed no standard, each case is to be dealt with on its merits, according to the discretion of the judge.—*Re FLEMING* (1886 11 P. R. 426.—CAN.

g. —]—Exors. claimed compensation in respect of receipts & disbursements. All the work of collecting & paying over was done after an order for administration had been made, under the advice of solrs., & in the more important matters under the direction of the master.—*Held*: the administration order greatly diminished the responsibility of the exors., & the compensation was reduced.—*THOMPSON v. FAIRBAIRN* (1890), 11 P. R.

h. —]—Where there appeared a large number of items on each side of the account, & it appeared that there had been a good deal of labour, care, &

6320. — As expert in works of art.]—Testator, who died possessed of a valuable collection of works of art, by his will bequeathed £1,000 to each exor. proving & accepting the trusts, & recommended his trustees, without imposing any obligation on them, to employ the firm of X. to sell his collection, & to be advised by that firm as to prices. The will contained the usual clause empowering any exor. or trustee engaged in any profession or business to charge & be paid all usual professional or other charges for any business done by him, whether in the ordinary course of his profession or business or not. R., one of the exors. & trustees, was keeper of certain antiquities at the British Museum, & was employed professionally to report on works of art, but had no other professional place of business:—*Held*: he was entitled to charge $\frac{1}{2}$ per cent. commission for services rendered in connection with sales by private treaty of testator's works of art.—*Re WERTHEIMER, GROVES v. READ* (1912), 106 L. T. 590; 28 T. L. R. 337.

6321. — As surviving partner.]—Surviving partner, being exor., not entitled without express stipulation to any allowance for carrying on the trade after testator's death. Allowed expenses actually incurred under an erroneous conception, that he was sole proprietor by purchase from his co-exors.; set aside as a breach of trust; though

trouble, in the management of the estate:—*Held*: five per cent. on the total sum come to the hands of the exors. was not excessive as compensation, although estate moneys remained in their hands with which they were chargeable.—*ARCHER v. SEVERN* (1886), 13 O. R. 316.—CAN.

k. —.]—*Re HART, PAYZANT v. COLEMAN* (1908), 5 E. L. R. 93.—CAN.

l. —.]—*Re FERGUSON'S ESTATE* (1909), 18 Man. L. R. 532.—CAN.

m. — How amount may be questioned.]—The amount allowed by the Surrogate Ct. judge to the exors. for their care, pains & trouble, cannot be questioned in an action for an account, nor otherwise than upon an appeal from the order of that judge.—*SPROULE v. MURRAY* (1919), 45 O. L. R. 326; 48 D. L. R. 368; 16 O. W. N. 841.—CAN.

n. —.]—Exors. are not entitled as of right to remuneration for their services; but, upon petition, the ct. may, in cases of more than ordinary difficulty, grant remuneration.—*Re SOUTHCOTT'S ESTATE* (1903), 8 Nfld. L. R. 645.—NFLD.

o. — General principles governing award.]—In fixing the amount of compensation to trustees, there should be taken into consideration: the magnitude of the trust; the care & responsibility springing therefrom; the time occupied in performing its duties; the skill & ability displayed: the success which has attended its administration.

Such compensation, while fair & just, must be reasonable but not necessarily liberal.—*Re SANFORD'S ESTATE* (1908), 18 Man. L. R. 413.—CAN.

.]—The commission allowed to exors. will be varied according to the nature of the property left by testator & the time & trouble which it has cost the exors. in converting it.—*In the Will of COSTLEY* (1884), 3 N. Z. L. R. 155 (S. C.).—N.Z.

q. — Basis of remuneration.]—The rate of compensation to exors. or trustees should depend upon the

amount passing through their hands, & the time & labour spent by them. In this case, a commission of five per cent. on all moneys received & expended by them, & half that amount on the moneys received but not expended, having been allowed, an appeal from the master's report, on the ground of excess, was allowed.—*THOMPSON v. FREEMAN* (1868), 15 Gr. 384.—CAN.

r. —.]—The exors. took over about \$60,000 worth of the property. Of this they distributed less than half, & set apart the remainder for payment of annuities, legacies not matured, etc. They collected about \$16,500 of interest. They managed the estate for a period of a little more than four years down to the date of a report providing for their remuneration:—*Held*: they were not entitled to an allowance upon taking over the estate, but should be allowed $\frac{2}{3}$ per cent. upon such portion of the corpus of the estate as they had taken over & distributed, & when the remainder of the corpus taken over should be distributed, they should have a like allowance upon the portions distributed from time to time; they should be allowed 5 per cent. on the interest collected, & to be collected; & \$100 a year in addition, for the first two years, & \$75 a year for the last two years, for management of the estate & services not covered by the other charges, including the care & preservation of the corpus.—*Re MCINTYRE, MCINTYRE v. LONDON & WESTERN TRUSTS CO.* (1904), 24 C. L. T. 268; 7 O. L. R. 548; 3 O. W. R. 258; *affd.* 9 O. L. R. 408.—CAN.

s. —.]—A trustee's remuneration for administering an estate was increased to 5 per cent. of the amount in the trustee's hands for distribution among the beneficiaries instead of $\frac{1}{2}$ per cent. of the sum "actually collected," the basis of the increased remuneration being in accordance with Trustee Act, s. 80, which bases the remuneration on "the gross value of the estate."—*CANADIAN FINANCIAL TRUST CO. v. CHAN SHUN CHONG*, [1921] 2 W. W. R. 984.—CAN.

bond fide.—*BURDEN v. BURDEN* (1813), 1 Ves. & B. 170; 35 E. R. 67, L. C.

Annotations:—*Foll.* *Stocken v. Dawson* (1843), 6 Beav. 371. *Apprvd.* *Stocken v. Dawson* (1848), 17 L. J. Ch. 282. *Consd.* *Wedderburn v. Wedderburn* (No. 4) (1856), 22 Beav. 84. *Reid.* *Heathcote v. Hulme* (1819), 1 Jac. & W. 122; *Wightwick v. Lord* (1857), 6 H. L. Cas. 217.

6322. —.]—A surviving partner being the exor. of his deceased partner, is not entitled to an allowance for carrying on the business after his partner's decease, for the benefit of the estate; nor is an exor. & legatee of such surviving partner.—*STOCKEN v. DAWSON* (1843), 6 Beav. 371; 1 L. T. O. S. 455; 49 E. R. 869.

6323. — As receiver.]—Testator appointed, as trustee & exor., a person who for many years had been the paid receiver & manager of his estate. The tenant for life being an infant, the ct. continued the exor. as receiver at a salary.—*NEWPORT v. BURY* (1857), 23 Beav. 30; 53 E. R. 12.

— **As solicitor.]—**See Sub-sect. 2, *post*.

6324. What expenses allowed—Expenses incurred under mistake.]—*BURDEN v. BURDEN*, No. 6321, *ante*.

6325. — How amount fixed—Necessity for inquiry.]—In an administration suit, the ct. having held that the exors. were entitled, under the particular circumstances of the case to remuneration

t. —.]—*OSMOND BEERY v. KHITISH CHANDRA ACHARJYA* (HOWDHURY) (1914), 1 L. R. 41 Calc. 771.—IND.

u. — Estate administered under statute.]—In an estate administered under Act 24 of 1913, a commission of $\frac{2}{3}$ per cent. was allowed on a sum of £4,700, representing amounts on fixed deposit in a bank, & which the ct. held was not "cash found in the bank," but came under the term "other securities realised," as set out in the tariff of remuneration to exors. framed under sect. 118 of the said Act.—*TESTATE ESTATE FYNNEY* (1915), 36 N. L. R. 125.—S. AF.

v. —.]—*Re SMITH'S ESTATE* (1918), 39 N. L. R. 325.—S. AF.

w. Direction in will — Commission on all receipts & expenditure—Commission to executor on legacies paid.]—Testator, after appointing his widow & his son S. his exor. & exor., directed that "S. shall receive $\frac{2}{3}$ per cent. commission on all receipts & expenditure":—*Held*: S. was entitled to commission on the amount paid by him in respect of legacies under the will.—*Re RODD'S ESTATE* (1900), 21 N. S. W. B. 37.—AUS.

x. Corpus commission — Due to trustee company—Out of what assets payable.]—The corpus commission to which a trustee co. is entitled on the capital value of a testator's estate is not payable out of the residuary estate, but is chargeable proportionally against the respective component parts of the estate.—*Re POWELL* (1907), 7 S. R. N. S. W. 874.—AUS.

y. Retention of commission by executor—Order of court necessary.]—It is a breach of trust for exors. to retain commission out of an estate without obtaining an order of the ct.—*CROFT v. BEISSEL*, [1909] V. L. R. 207.—AUS.

z. Necessity for surrogate judge's order—Discretion of master.]—Since 22 Vict. c. 93, s. 47, C. S. U. C., c. 16, s. 66, it has been the settled practice of the master here, in passing the accounts of exors., to allow them compensation for their executorship,

Sect. 6.—Remuneration: Sub-sects. 1 & 2, A.]

for carrying on certain farms, being part of testator's estates fixed the amount of such remuneration by the decree, without directing an inquiry.—

FORSTER v. RIDLEY (1864), 4 De G. J. & Sm. 452; 4 New Rep. 417; 11 L. T. 200; 40 E. R. 993, L. JJ.

Annotation:—*Consd. Re Salmen, Salmen v. Bernstein* (1912), 107 L. T. 108.

6326. —. —. —.]—BROWNE v. COLLINS, No. 6308, *ante*.

SUB-SECT. 2.—OF SOLICITOR-REPRESENTATIVE.**A. Work done out of Court.**

See, also, SOLICITORS; TRUSTS & TRUSTEES.

6327. General rule—No right to allowance for time & trouble.]—NEW v. JONES, No. 6306, *ante*.

6328. —. —. —. Unless allowed by court in special circumstances.]—A trustee acting as solr. in the trusts matters, is merely entitled to costs out of pocket. The rule is not inflexible, & compensation may, in special cases, be made him, under the authority of the ct., by a fixed allowance, but not by allowing him to make the usual professional charges.—BAINBRIGGE v. BLAIR (1845), 8 Beav. 588; 1 New Pract. Cas. 283; 5 L. T. O. S. 454; 9 Jur. 765; 50 E. R. 231; *sub nom.* BLAIR v. BAINBRIGGE, 14 L. J. Ch. 405.

Annotations:—*N.F. Cradock v. Piper* (1850), 19 L. J. Ch. 107. *Consd. Re Barber, Burgess v. Vinicombe* (1886), 34 Ch. D. 77. *Refd. Broughton v. Broughton* (1855), 5 De G. M. & G. 160; *Re Corsellis, Lawton v. Elwes* (1886), 33 Ch. D. 160.

6329. —. —. —.]—Deft. W. & deft. T. who was a solr., were appointed trustees & exors. of the will of the testator in this cause, who died in June, 1836. T. was the acting trustee & exor., & he also acted as solr. when the services of a solr. were required in the execution of the trust; in other words, he was both solr. & client; he was acting as solr. for himself in his character of trustee. The rule of the ct. on the subject is perfectly well known, that when a trustee is a solr. & employs himself in matters relating to the trust, he is only entitled to be paid his disbursements or money out of pocket, & he is entitled to nothing for his time or professional trouble (LORD LANGDALE, M.R.).—TODD v. WILSON (1846), 9 Beav. 486; 1 New Pract. Cas. 489; 15 L. J. Ch. 450; 10 Jur. 626; 50 E. R. 431.

6330. —. —. —. Unless special direction in will.]—Trustees can only be allowed costs out of pocket, for professional business transacted by a firm, one of whom is a trustee, though the business be done by one of the partners who is not a trustee.

A trustee is not allowed to act as his own solr. & then charge his *cestui que trust* with the amount

without an order from the surrogate judge allowing the same. Before the master obtained such an order, which the master acted upon without exercising his own judgment, an appeal from the report of the master by the creditors was allowed, & the exors. ordered to pay the costs thereof.—BIGGAR v. DICKSON (1868), 15 Gr. 233.—CAN.

g. Setting aside order for remuneration—*Acquiescence.*]—Where, for nearly

eleven years after an order for remuneration had been made, a beneficiary had been furnished year by year by the exors. with accounts, & had herself received for one exor. his share of the remuneration, she cannot apply to set aside the order; but an *ex p.* order for remuneration may be set aside on the ground that the rate is excessive, if there have been no laches or acquiescence.—*Re LANGLANDS* (1901), 21 N. Z. L. R. 100.—N.Z.

professional fees. The rule admits of exception, when testator or creator of the trust expressly authorises the trustee to retain his professional costs, showing thereby, that he would rather run the risk of abuse, by uniting the two characters, & pay the solr. his costs, than lose his services as trustee (LORD LANGDALE, M.R.).—CHRISTOPHERS v. WHITE (1847), 10 Beav. 523; 50 E. R. 683.

Annotations:—*Consd. Broughton v. Broughton* (1854), 11 Eq. Rep. 131. *Refd. Lincoln v. Windsor* (1851), 9 Hare, 158; *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch.

Sufficiency of direction.]—See Nos. 6335–6341, *post*.

6331. —. —. —.]—(1) An extrix. & trustee under a will employed her co-trustee, who was a solr., to transact the necessary legal business of the trust:—*Held*: the solr. was only entitled to costs out of pocket.

(2) No person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solr. acting as a trustee (LORD CRANWORTH, C.).—BROUGHTON v. WHITE, BROUGHTON v. BROUGHTON (1855), 5 De G. M. & G. 160; 25 L. J. Ch. 250; 26 L. T. O. S. 54; 1 Jur. N. S. 965; 3 W. R. 602; 43 E. R. 831, L. C.

Annotations:—*As to (1) Consd. Re Barber, Burgess v. Vinicombe* (1886), 34 Ch. D. 77. *As to (2) Apld. Nicholson v. Tutin* (1857), 3 Jur. N. S. 235. *Consd. Re Corsellis, Lawton v. Elwes* (1887), 34 Ch. D. 675. *Refd. Pollard v. Doyle* (1860), 3 L. T. 432; *Crosskill v. Bower, Bower v. Turner* (1863), 32 Beav. 86; *Field v. Hopkins* (1890), 44 Ch. D. 524; *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129; *Re Andrew, Mellor v. Smith* (1895), 39 Sol. Jo. 363; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618.

6332. —. —. —.]—The rule, that a solr. trustee acting in the trust shall not be allowed profit costs, is not restricted to cases of express trust; but applies to the case of an exor. or trustee, though there be no express trust.—POLLARD v. DOYLE, KEARNS v. DOYLE (1860), 1 Drew. & Sm. 319; 3 L. T. 432; 6 Jur. N. S. 1139; 9 W. R. 28; 62 E. R. 401.

6333. —. —. —.]—*Re BARBER, BURGESS v. VINICOME*, No. 6315, *ante*.

6334. —. —. —.]—As a general rule, neither a solr. trustee nor a firm of which the trustee is a member can receive out of the trust estate profit costs by way of remuneration for transacting legal business in connection with the trust.—*Re DOODY, FISHER v. DOODY, HIBBERT v. LLOYD*, [1893] 1 Ch. 129; 62 L. J. Ch. 14; 68 L. T. 128; 41 W. R. 49; 9 T. L. R. 77; 37 Sol. Jo. 49; 2 R. 166, C. A.

Annotations:—*Apld. Wellby v. Still* (1893), 37 Sol. Jo. 481; *Eyre v. Wynn-Mackenzie*, [1894] 1 Ch. 218.

6335. Special direction in will—Necessity for

PART V. SECT. 6, SUB-SECT. 2.—A.

6327 i. General rule—No right to allowance for time & trouble.—*Administration ad colligenda bona.*]—Letters of administration *ad colligenda bona* were issued to the solr. who had acted for deceased in his lifetime:—*Held*: he was not entitled to special remuneration for acts done in connection with the management of the estate.—D'ARCY v. O'KELLY (1921), 55 L. L. T. 48.—IR.

express words.]—To entitle a solr. trustee, acting as solr. to the trust estate under a direction to that effect in a will, to charge against the estate for work done by him, which, although not professional work, he could have charged for without any special bargain against a client who was not a trustee, there must be express words in the will showing that such was testator's intention. Testator appointed exors. & trustees, & directed that one of them should be the solr. to his trust property & should be allowed "all professional & other charges for his time & trouble," notwithstanding his being an exor. & trustee:—*Held*: this clause did not authorise the solr. trustee to charge for work which was not professional work, although it was such work as he might have charged for against a client who was not a trustee.—*Re CHALINDER & HERINGTON*, [1907] 1 Ch. 58; 76 L. J. Ch. 71; 96 L. T. 196; 23 T. L. R. 71; 51 Sol. Jo. 69.

6336. — What charges authorised—Whether charges for work not strictly professional.]—A solr. who is appointed exor., & is by the will authorised to charge for his "professional services," can only charge for services which are strictly professional, & not for business done which an exor. in his ordinary character can & ought to do, such as attendance to transfer stock, make payments, correspondence, etc.

The principle is this:—if a gentleman who is not an attorney is appointed exor., he undertakes the duties which, as exor., he has to perform, & he must not employ a solr. to do all those ordinary things which an exor. ought to do himself, as for instance, to write an ordinary letter. If he employ a solr. to do such matters, he must pay him, but not out of testator's estate (*ROMILLY*, M.R.).—*HARBIN v. DARBY* (No. 1) (1860), 28 Beav. 325; 29 L. J. Ch. 622; 2 L. T. 531; 25 J. P. 84; 6 Jur. N. S. 906; 8 W. R. 512; 54 E. R. 391.

Annotation:—*Mentd. Pain v. Bowden* (1896), 45 W. R. 18.

6337. — — — — —.]—Testatrix by her will appointed her solr., who prepared her will, one of her two exors. & trustees, & stating that it was her desire that he should continue to act as solr. in relation to her property & affairs, & should "make the usual professional charges," expressly directed that notwithstanding his acceptance of the office of trustee & exor. he should be entitled to make the same professional charges & to receive the same pecuniary emoluments & remuneration for all business done by him, & all attendances, time, & trouble given & bestowed by him in or about the execution of the trusts & powers of the will, & the management & administration of the trust estate, real or personal, as if he, not being himself a trustee or exor., were employed by the trustee or exor. Under this direction the solr. exor. delivered his bills of costs which included charges for all business done by him, whether such business was strictly professional or could have been transacted by a lay exor. without the assistance of a solr.:—*Held*: all items which were not of a strictly professional character ought to be disallowed.

A trustee or exor. would not employ, & ought not to employ, a solr. to do things which he could properly do himself (*KAY*, J.).—*Re CHAPPLE*,

NEWTON v. CHAPMAN (1884), 27 Ch. D. 584; 51 L. T. 748; 33 W. R. 336.

Annotation:—*Reid. Re Fish, Bennett v. Bennett*, [1893] 2 Ch. 413.

6338. — — — — —.]—*Re FISH, BENNETT v. BENNETT*, No. 6207, *ante*.

6339. — — — — —.]—Testator directed that "any trustee or exor. hereunder being a solr. or other person engaged in any profession or business shall be entitled to charge he paid all usual professional or other charges for any business done by him or his firm in relation to the management & administration of my estate, & carrying out the trusts, powers, & provisions of this my will, whether in the ordinary course of his profession or business or not, & although not of a nature strictly requiring the employment of a solr. or other professional person":—*Held*: this clause enabled a trustee to charge for any work done for the estate in the course of his profession or business, whether done in the ordinary course or not in the ordinary course thereof, but did not authorise him to charge for work done outside his profession or business.—*CLARKSON v. ROBINSON*, [1900] 2 Ch. 722; 69 L. J. Ch. 859.

Annotation:—*Consd. Re Devereux, Re Garrood* (1902), 46 Sol. Jo. 320.

6340. — — — — —.]—*Re DEVEREUX, Re GARROOD* (1902), 46 Sol. Jo. 320.

6341. — — Insolvent estate.]—A solr. who is the sole exor. & trustee of a will is not entitled to his profit costs of acting as solr. to the estate if it turns out to be insolvent, even though the will contains a clause declaring that he should be the solr. to the estate, & should be allowed to charge for work done as such solr.; for the clause is in effect a legacy of profit costs to the solr. & being bounty he cannot claim it as against creditors. The rule applies to all professional trustees.—*Re WHITE, PENNELL v. FRANKLIN*, [1898] 2 Ch. 217; 67 L. J. Ch. 502; 78 L. T. 770; 46 W. R. 676; 14 T. L. R. 503; 42 Sol. Jo. 635, C. A.

Annotations:—*Apld. Re Salmen, Salmen v. Bernstein* (1912), 107 L. T. 108; *Re Brown, Wace v. Smith* (1918), 62 Sol. Jo. 487.

— — — — — Costs of proceedings in court.]—*See* No. 6352, *post*.

6342. When acting for body of representatives—No right to allowance for time & trouble.]—The rule which allows a solr., being also a trustee & a party to a cause, to charge full costs, where he acts in the suit for a body of trustees, of which he himself is one, does not apply to the case of a solr. being a trustee & acting as solr. for himself & his co-trustees in the administration of the trust estate out of ct.—*LINCOLN v. WINDSOR* (1851), 9 Hare, 158; 20 L. J. Ch. 531; 18 L. T. O. S. 39; 15 Jur. 765; 68 E. R. 456.

Annotations:—*Consd. Re Corsellis, Lawton v. Elwes* (1887), 34 Ch. D. 675. *Reid. Broughton v. Broughton* (1855), 5 De G. M. & G. 180.

6343. — — — — —.]—*BROUGHTON v. WHITE, BROUGHTON v. BROUGHTON*, No. 6331, *ante*.

6344. — — — — —.]—*Re BARBER, BURGESS v. VINICOME*, No. 6315, *ante*.

6345. Representative member of firm.]—Business relating to a trust estate was transacted by

6336 i. Special direction in will—What charges authorised—Whether charges for work not strictly professional.]—A will provided that every trustee being a solr., should be entitled to all

usual professional charges for work done by him or his firm in relation to the administration of the estate:—*Held*: a trustee, being a solr., was entitled to be allowed moneys paid for

accountancy & other non-legal work performed by the firm of which he was a member.—*Re SMITH* (1916), 16 S. R. N. S. W. 422.—*AUS.*

Sect. 6.—Remuneration: Sub-sect. 2, A. & B.
Sect. 7: Sub-sect. 1.]

two solrs. in partnership, one of whom was a trustee [& exor.] of the estate:—*Held*: in passing his accounts costs out of pocket could alone be allowed.—*COLLINS v. CAREY* (1839), 2 Beav. 128; 48 E. R. 1128.

Annotations:—*Folld. Burge v. Brutton* (1843), 12 L. J. Ch. 368. *Reid. York v. Brown* (1844), 1 Coll. 260.

6346. ———.]—(1) The principle, that an exor., a solr., is not entitled to profit costs out of the estate, applies equally where the exor. is one of a firm of solrs.

(2) Payment of costs to a London agent allowed to exor., as costs out of pocket.—*BURGE v. BRUTTON* (1843), 2 Hare, 373; 12 L. J. Ch. 368; 7 Jur. 988; 67 E. R. 153.

Annotations:—*As in* (2) *Reid. Walters v. Walters* (1881), 44 L. T. 769. *Generally, Mentd. Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B. 347.

6347. ——— **Business done by partner.]** — *CHRISTOPHERS v. WHITE*, No. 6330, *ante*.

6348. ——— **Agreement that partner not to participate in profits.]**—The rule that a trustee shall make no profit of his trust does not extend to his partner. Therefore, where a trustee, being a solr., employed his partner professionally in the matter of the trust, upon the terms of such partner being alone entitled to the profits, the Ct. allowed the professional charges.—*CLACK v. CARLON* (1861), 30 L. J. Ch. 639; 7 Jur. N. S. 441; 9 W. R. 568.

Annotation:—*Reid. Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129.

6349. ———.]—It is a well-established rule in equity, that a trustee cannot, as against his *cestui que trust*, make any profit out of the execution of the trusts in respect of the application of his personal trouble. This principle applies, not only in the case of one trustee, but to the case where he is a partner with others, & the charge is made by the partnership (*KINDERSLEY, V.-C.*).—*MATTHISON v. CLARKE* (1854), 3 Drew. 3; 3 Eq. Rep. 127; 24 L. J. Ch. 202; 24 L. T. O. S. 105; 18 Jur. 1020; 3 W. R. 2; 61 E. R. 801.

Annotations:—*Reid. Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129; *The Benwell Tower* (1895), 72 L. T. 664; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618. *Mentd. Furber v. Cobb* (1887), 18 Q. B. D. 494; *Thorne v. Heard*, [1894] 1 Ch. 599.

Taxation of solicitor-representative's bill of costs.]—See **SOLICITORS**.

B. Work done in Legal Proceedings.

6350. General rule—No right to allowance for time & trouble.]—The rule, that a solr. being also a trustee [& exor.] & a party to a cause is not entitled to charge costs except costs out of pocket, does not extend beyond the case of his acting as solr. for himself alone.

Application of the rule to the case of a solr. acting for a body of trustees, of whom he himself was one.

Under an order to tax costs generally or to tax costs as between solr. & client, the taxing-masters are at liberty to take notice of the fact that the solr. is also a trustee, & to apply the rule accordingly.—*CRADOCK v. PIPER* (1850), 17 Sim. 41; 1 Mac. & G. 664; 1 H. & Tw. 617; 19 L. J. Ch. 107; 15 L. T. O. S. 61; 14 Jur. 97; 41 E. R. 1422.

Annotations:—*Consd. Lincoln v. Windsor* (1851), 9 Hare, 158; *Broughton v. Broughton* (1855), 5 De G. M. & G. 160. *Dbtd. Manson v. Baillie* (1855), 26 L. T. O. S. 24; *Folld. Re Barber, Burgess v. Vinicome* (1886), 34 Ch. D. 1.

(1893), 1 Ch. 129. *Reid. Vipont v. Butler*, (1898), 78 L. T. 770. *Reid. Vipont v. Butler*, 64.

6351. ———.]—*Re BARBER, BURGESS v. VINICOME*, No. 6315, *ante*.

6352. Special direction in will—Insolvent estate.]—A solr. who is sole exor. & trustee of a will is not entitled, if the estate is found to be insolvent, to his costs of defending an administration action in person, nor to any other costs, except his out-of-pocket expenses, even though the will contained a clause empowering him to make professional charges, & the order in the action on further consideration directed the costs, of deft. to be taxed as between solr. & client, & retained by him out of the balance due from him.—*Re WORTH, LILLEY v. MOORE* (1911), 55 Sol.

———— **Charges for work done out of court.]**—*See* No. 6341, *ante*.

6353. When acting for body of representatives Entitled to usual costs.]—*CRADOCK v. PIPE* No. 6350, *ante*.

6354. ———.] — *LINCOLN v. WINDSOR*, No. 6342, *ante*.

6355. ———.]—*Re BARBER, BURGESS v. VINICOME*, No. 6315, *ante*.

6356. ——— **Whether proceedings hostile or friendly.]**—E., a partner in a firm of country solrs., was one of two trustees of a will which contained no power to charge for professional services. E. & his co-trustee were resps. to an application for maintenance by a next friend on behalf of an infant under the summary procedure of the Ct. & E.'s firm, through their London agents, acted as solrs. for E. & his co-trustee & made profit costs:—*Held*: E.'s firm were entitled to receive those profit costs as coming within the exception laid down in *Craddock v. Piper*, No. 6350, *ante*. Although that case has been often disapproved it has been so long acted on as a binding authority that it ought not now to be overruled.

The exception applies not only to proceedings in a hostile suit, but to friendly proceedings in chambers, such as an application for maintenance of an infant.—*Re CORSELLIS, LAWTON v. ELWES* (1887), 34 Ch. D. 675; 56 L. J. Ch. 294; 56 L. T. 411; 51 J. P. 597; 35 W. R. 309; 3 T. L. R.

A.

Fisher v. Doody, Hibbert
Mentd. Ingram v. Little

(1883), 11 Q. B. D. 251.

PART V. SECT. 6, SUB-SECT. 2.—B.

h. Whether commission allowed.]—The duties of a person acting as exor. of, & as solr. to, the estate of a deceased person, are quite distinct & the fact that deceased, by his will, expressed a wish that his exor. should act as solr. to the estate, & thereby empowered him to charge for any pro-

fessional business, will not diminish his right to commission as exor.—*Re SHORR* (1885), 11 V. L. R. 634.—**AUS.**

k. Commission in lieu of costs in administration suits—How allotted.]—In administration suits the commission in lieu of costs should be divided into equal fractional parts, & the parts

allotted to the solrs. in proportion to the amount of work done by & the responsibility imposed upon them.—*v. CLAPP* (1880), 8 P. R. 388.—**CAN.**

l. Professional remuneration—When allowed.]—The Ct. will not allow professional remuneration to a solr. who is an exor. unless the will specially

6357. ———.]—VIPONT v. BUTLER, [1893] W. N.

6358. What costs allowed—Costs of town agent.]—BURGE v. BRUTTON, No. 6346, ante.

—— Taxation of bill of costs.]—See SOLICITORS.

SECT. 7.—INDEMNITY.

SUB-SECT. 1.—IN GENERAL.

See Settled Land Act, 1925 (c. 18), s. 99.

6359. Redeeming personally deceased's goods.]—ANON. (1504), Jenk. 188; 145 E. R. 126.

6360. ———.]—Exors. may redeem with their own money goods pledged by testator, or pay his debts & retain the value of what they pay.—ANON. (1514), 1 Dyer, 2 a; 73 E. R. 5, Ex. Ch.

Annotation:—Refd. Marriott v. Thompson (1739), 7 Mod. Rep. 292.

6361. Payment personally of deceased's debts.]—CLAYDON v. SPENCER (1519), Ben. 11; 123 E. R. 9; *sub nom.* CLEYDON v. SPENSAR, Moore, K. B. 2.

Annotation:—Refd. Marriott v. Thompson (1739), 7 Mod. Rep. 292.

6362. ———.]—SHELLEY v. SACKVILLE (1552), 1 And. 24; 123 E. R. 333.

Annotation:—Refd. Marriott v. Thompson (1739), 7 Mod. Rep. 292.

6363. ———.]—A man devised his debts to be paid out of his real & personal estate; the exor. paid more than his personal estate, he shall be reimbursed out of the real estate.—ANON. (1682), 2 Cas. in Ch. 109; 22 E. R. 870.

6364. ———.]—WALLIS v. EVERARD (1708), 3 Rep. Ch. 161; 21 E. R. 756, L. C.

6365. ———.]—(1) Estates being devised to trustees to be sold for payment of debts, & subject thereto for testator's infant children, the surviving trustee retains possession of one of the estates in satisfaction of debts, which he alleges himself to have paid, testator being insolvent. On a bill for an account & conveyance of this estate by one of the children, & the representatives of another forty-five years after testator's death, stating that they had recently discovered the facts, special inquiries directed to ascertain whether they had any notice of the circumstances; whether they had in any manner released; & whether the trustee had advanced to the amount of the value of the estate.

(2) On an inquiry into very remote transactions, accounts kept by a deceased party at the time, directed to be taken as *prima facie* evidence throwing on the other side the *onus* of impeaching them.

It will be very reasonable if an account was regularly kept of the administration of the estate, that it should be considered as *prima facie* evidence of his receipts & payments (PLUMER, M.R.).

provides for it.—In the Will of COSTLEY (1884), 3 N. Z. L. R. 155 (S. C.).—N.Z.

PART V. SECT. 7, SUB-SECT. 1.

m. Executor becoming surety for debt due by testator.]—A testator who

owed debts exceeding his personal estate, devised his land to one of his sons, whom he appointed exor. The devisee paid debts exceeding the personal estate, & left but one debt unpaid. For the creditor to whom that debt was due the devisee became surety for an amount exceeding the debt so

(3) Exors. paying to creditors more than the value of testator's personal assets, acquire an absolute right to them.—CHALMER v. BRADLEY (1819), 1 Jac. & W. 51; 37 E. R. 294.

Annotations:—As to (1) Refd. Wedderburn v. Wedderburn (1838), 4 My. & Cr. 41; Soar v. Ashwell, [1893] 2 Q. B. 390. As to (3) Refd. Hearn v. Wells (1844), 1 Coll. 323. Generally, Mentd. A.-G. v. Murdoch (1852), 1 De G. M. G. 86.

6366. ———.]—Certain bond creditors upon a testator's estate, lent the money due upon their bonds to the exor., by delivering up to him the bonds with a general release of the estate indorsed, & taking in return his personal security for payment of their respective debts. On exceptions to the master's report in a creditor's suit afterwards instituted to administer the estate:—Held: the exor. was entitled to be allowed the sums secured by the bonds in discharge, it appearing that the exor., at the date of the transactions with the bond creditors, had assets, consisting of wine, furniture, & effects, in his hands, to an amount in value exceeding the amount of the debts secured by the bonds.—HEPWORTH v. HESLOR (1849), 6 Hare, 561; 18 L. J. Ch. 352; 13 Jur. 166; 67 E. R. 1286.

Annotations:—Consd. Re Jones, Peak v. Jones, [1914] 1 Ch. 742. Refd. Spackman v. Holbrook (1860), 2 Giff. 198; Vane v. Rigden (1870), 5 Ch. App. 663.

6367. ———.]—R., an exor., being liable to his testator's estate for the default of his co-exor., died, after the institution of a suit for the administration of testator's assets. The exor. of R., pending the suit laid out large sums for the benefit of R.'s estate, & had a balance of £2,000 due to him on that account. By an order of the ct., the real estates of R., were ordered to be sold, & it was declared that the debt due to testator's estate ought to be paid out of the estate of R. The real estates of R. having been sold, & the proceeds being insufficient to pay all the claims, it was contended that the exor. of R. had no right to retain in priority for the sums expended by him, but must come in *pari passu* with the other creditors:—Held: the doctrine of retainer did not apply; but R. having laid out moneys as trustee, was entitled to be recouped before any of the debts were paid.—SPACKMAN v. HOLBROOK (1860), 2 Giff. 198; 2 L. T. 367; 6 Jur. N. S. 881; 66 E. R. 83.

6368. ———.]—A., who was both heir & administrator, gave to a creditor of intestate a mtgc. on the descended estate for his debt, which he covenanted to pay. The creditor thereupon gave to A., as administrator, a receipt for the debt, but no money passed. In taking an account of the personal estate of intestate as against A.:—Held: he was entitled to charge the amount of this debt as a payment out of the personal estate.—GEORGE v. GEORGE (No. 2) (1866), 35 Beav. 382; 55 E. R. 943.

Payment of legacy duty.]—See ESTATE & OTHER DEATH DUTIES.

6369. Liability in respect of covenants in lease—Dilapidations.]—A. by her will gave to B. certain leaseholds absolutely during the residue of her

due by testator:—Held: the debt due by testator was to be applied towards the discharge of the sum for which the devisee had become surety.—GOLD-SMITH v. GOLDSMITH (1870), 17 Gr. 313.—CAN.

n. Costs incurred as representative.]

Sect. 7.—Indemnity: Sub-sects. 1 & 2, A.]

term therein, subject to the payment of the rent, & performance of the covenants reserved & contained in the lease, under which she held the same premises; & as to her residuary real & personal estate, subject to the payment of her debts, funeral, testamentary & other expenses, she gave, devised, & bequeathed the same to C., his heirs, exors., administrators, & assigns absolutely. The lease contained a covenant to keep the premises in repair. At A.'s death there were delapidations, but it did not appear whether they had taken place before she took possession of the premises under a will, by which they were bequeathed to her. By an order of the ct. below, B. was let into possession, & a sum of stock was set aside out of testatrix's estate to indemnify the exors.:—*Held*: the exors. of A. being liable, as between themselves & the lessor for such dilapidations, were entitled to an indemnity from B., before he was let into possession.—*HICKLING v. BOYER* (1851), 3 Mac. & G. 635; 21 L. J. Ch. 388; 20 L. T. O. S. 33; 16 Jur. 137; 42 E. R. 401, L. C.; subsequent proceedings (1852), 1 De G. M. & G. 762, L. C.

Annotations:—*Reid*. *Harris v. Poyner* (1852), 1 Drew. 171; *Pinford v. Shillingford* (1877), 25 W. R. 425. *Mentd.* *Swainson v. Swainson* (1856), 6 De G. M. & G. 618; *Re Tomlinson*, *Tomlinson v. Andrew*, [1898] 1 Ch. 232.

—**Liabilities not presently due.**—*See* Sub-sect. 2, A., *post*.

Right of retainer—In respect of debt due to executor.]—*See* Part IV., Sect. 4, *ante*.

In respect of funeral expenses.—*See* BURIAL, Vol. VII., p. 523, Nos. 20–27.

SUB-SECT. 2.—IN RESPECT OF LIABILITIES NOT PRESENTLY DUE.**A. In General.****6370. Right of representative to be indemnified.]**

—Exor. claiming to retain out of the residue certain parts of the property, to protect himself against a future contingent demand in respect of covenants entered into by testator, for payment of rent & repairs of an estate held by him under lease from a corpn., though there was no existing breach of covenant nor arrears of rent, in respect of which he was liable: on a bill by the residuary legatee for the property so retained, ordered, that the funds in question be made over to pltf., on his giving a sufficient indemnity to the exor., the terms of such indemnity to be settled before the master.—*SIMMONS v. BOLLAND* (1817), 3 Mer. 547; 36 E. R. 210.

—*Consd.* *Fletcher v. Stevenson* (1841), 3 Hare, 1; *Allen* (1855), 20 Beav. 1. *Reid*. *Smith v. Day* (1837), 2 M. & W. 684; *Cochrane v. Robinson* (1840), 10 L. J. Ch. 109; *King v. Malcott* (1852), 16 Jur. 237; *Atkinson v. Atkinson* (1853), 23 L. T. O. S. 102, 11; *Co. v. Hymers* (1856), 22 Beav. 367; *v. Eckett* (1856), 22 Beav. 367.

—An administrator is entitled to be indemnified by the estate for costs incurred as administrator in actions either pending against deceased & carried on after his death, or which were instituted after his death.—*Re McKAIE'S ESTATE* (1895), 26 N. S. R. (16 R. & G.) 214.—*CAN.*

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o. Right of representative to be indemnified—Against what liabilities—In respect of covenants in leases.—An exor. liable to further contingent demands in respect of covenants entered into by testator for payment of rent

6371. —.]—In an administration suit, it appeared that testator & his surviving partners were lessees of certain iron works & premises for a term of years, of which eleven were unexpired, & as such lessees, were subject to covenants for rent, repairs, insurance, etc.; & that, by the articles of partnership, the exors. of a deceased partner might elect to become partners in the concern, or to withdraw the capital of deceased therefrom:—*Held*: although the exors. had elected not to become partners, & no breach of the covenants appeared to have happened, yet, as such covenants, if broken, might leave the estate of testator liable to demands sufficient to absorb it, the interest as well as the principal of the residuary estate must be retained to answer any such possible demands, until the extent of the liability could be ascertained, or, if any part of the interest or income should be paid to the tenant for life, it could only be on security to refund the same, if required to satisfy any such future demand.—*FLETCHER v. STEVENSON* (1841), 3 Hare, 360; 13 L. J. Ch. 202; 8 Jur. 307; 67 E. R. 420.

Annotations:—*Consd.* *Dean v. Allen* (1855), 20 Beav. 1; *Waller v. Barrett* (1857), 21 Beav. 413; *Dodson v. Sammell* (1861), 1 Drew. & Sm. 575; *Re King*, *Mellor v. South Australian Land Mortgage & Agency Co.*, [1907] 1 Ch. 72. *Reid*. *Hickling v. Boyer* (1851), 3 Mac. & G. 635; *Re Nixon*, *Gray v. Bell*, [1904] 1 Ch. 638. *Mentd.* *Varlo v. Faden* (1859), 1 De G. F. & J. 211; *Re Dawson*, *Arathoon v. Dawson*, [1906] 2 Ch. 211.

6372. — After assent to specific bequest.]

An exor., who has assented unconditionally to a specific bequest of testator's leasehold estates, is not entitled to an indemnity out of testator's general estate in respect of his covenants contained in the lease.—*SHADBOLT v. WOODFALL* (1815), 2 Coll. 30; 4 L. T. O. S. 491; 9 Jur. 224; 63 E. R. 622.

Annotation:—*Distd.* *Hickling v. Boyer* (1851), 3 Mac. & G. 635.

6373. — By co-executor.]

—E. bequeathed leaseholds to trustees for sale, to pay the proceeds to his widow for life, & after in trust for the children; one exor. proved; & his co-exor., the solr. of testator, finding himself involved in intricate transactions in respect of the leaseholds, proved also, & instituted a suit & claimed indemnity against liabilities in respect of the trust:—*Held*: under the circumstances, he was justified in filing the bill, & was entitled to indemnity & the costs of the suit.

Seemle: the assent of one exor. to specific bequests does not take away the right of the other to indemnity.—*TURNER v. NICHOLLS* (1853), 1 W. R. 157.

6374. — Out of general estate—Leaseholds insufficient.]—Where leaseholds have been specifically bequeathed by a testator, lessee, & they are insufficient to indemnify the exors., they, the exors., are entitled to indemnity out of the general estate against the covenants in the leases, if the specific legatee cannot give a sufficient indemnity.—*GARRATT v. LANCEFIELD* (1856), 27 L. T. O. S. 12; 2 Jur. N. S. 177.

Against what liabilities—In respect of

of promises specifically devised, is entitled to a sufficient indemnity to be given by the legatee.—*WILDRIDGE v. M'KANE* (1828), 1 Mol. 122.—*IR.*

p. — In respect of shares.]—Testator bequeathed his residuary estate, including certain fully paid up

covenants in leases.]—See Nos. 6370–6374, ante; Nos. 6375–6377, 6382, 6384, 6386, post.

On sale of leaseholds.]—See Sub-sect. 2, B, post.

In respect of shares.]—See Nos. 6378, 6381, 6385, post.

6375. — Loss of right—Executors divesting themselves of representative character.]—(1) Where leaseholds were devised to three trustees & exors., & one of them having died, the two surviving trustees & exors., one of whom had never acted as exor., under an order of the ct. assigned the leasehold in trust for themselves & a newly appointed trustee:—*Held*: by such assignments the leaseholds vested in them *quâ* trustees & not *quâ* exors., & they were not entitled to an indemnity upon assigning them to the person entitled under the will.

(2) Where an exor. fairly represents everything to the ct., a decree directing him to deal with the property must operate as an indemnity to him.

(3) Law of Property Amendment Act, 1859 (c. 35), is retrospective in its operation.—SMITH v. SMITH (1861), 1 Drew. & Sm. 384; 4 L. T. 44; 7 Jur. N. S. 652; 0 W. R. 406; 62 E. R. 426.

Annotations:—As to (2) Consd. Re King, Mellor v. South Australian Land Mortgage & Agency Co., [1907] 1 Ch. 73. As to (3) Refd. Dodson v. Sammell (1861), 30 L. J. Ch. 799. Generally, Mentd. Lys v. Lys (1869), 17 W. R. 394.

6376. What amounts to indemnity—Order of court authorising distribution—Whether further indemnity allowed.]—(1) Where an estate is administered & the residue is paid over under an order of the ct., the exor. will be protected, & a creditor will not afterwards be allowed to sue him at law.

(2) The exors. of a lessee held entitled to no further indemnity against the covenants than the personal indemnity of the residuary legatees.—DEAN v. ALLEN (1855), 20 Beav. 1; 52 E. R. 502; sub nom. DEER v. ALLEN, 3 W. R. 294.

Annotations:—As to (1) Consd. Waller v. Barrett (1857), 24 Beav. 413; Dodson v. Sammell (1861), 1 Drew. & Sm. 575; Re King, Mellor v. South Australian Land Mortgage & Agency Co., [1907] 1 Ch. 72. Refd. Debney v. Eckett (1858), 4 Jur. N. S. 805; Re Lawley, Jackson v. Leighton, [1911] 2 Ch. 530.

6377. — — —.]—(1) An exor. fairly stating the facts, & paying over the assets under the direction of the ct., in an administration suit, is fully indemnified against all existing or contingent demands on the estate.

(2) Exors. held, under the circumstances, entitled to no further indemnity against the leasehold covenants of testator than the recognisance of the parties beneficially entitled to his estate.—WALLER v. BARRETT (1857), 24 Beav. 413; 27 L. J. Ch. 214; 30 L. T. O. S. 216; 4 Jur. N. S. 128; 53 E. R. 417.

Annotations:—As to (1) Consd. Dodson v. Sammell (1861), 1 Drew. & Sm. 575; Williams v. Headland (1864), 4 Giff. 505; Re King, Mellor v. South Australian Land Mortgage & Agency Co., [1907] 1 Ch. 73. Refd. Re Lawley, Jackson v. Leighton, [1911] 2 Ch. 530.

6378. — — —.]—Exors. held entitled to no indemnity against liability in respect of shares in a banking co. specifically bequeathed, the order of the ct., in an administration suit,

being of itself a perfect indemnity to them.—ADDAMS v. FERICK (1859), 26 Beav. 381; 28 L. J. Ch. 594; 53 E. R. 946.

Annotation:—Mentd. Day v. Day (1860), 1 Drew. & Sm. 261.

6379. — — —.]—SMITH v. SMITH, No. 6375, ante.

6380. — — —.]—(1) In an administration suit, instituted before Law of Property Amendment Act, 1859 (c. 35), a fund was set apart as an indemnity to the exors. in respect of any possible breaches of covenant by their testator in regard to his leasehold property. After the passing of the Act the party entitled to the residuary estate petitioned for payment out of ct. of the indemnity fund under the Act. The ct. being of opinion that the Act was not retrospective, that petition was dismissed. It being subsequently held that the Act was retrospective, a petition of re-hearing was presented with the same object as the original petition:—*Held*: the decree of the ct. in an administration suit, where an exor. acted *bonâ fide*, was a complete indemnity to him, & it was not necessary to set apart an indemnity fund, & an order would be made according to the prayer.

(2) Law of Property Amendment Act, 1859 (c. 35), s. 27, is retrospective in its operation.—DODSON v. SAMMELL (1861), 1 Drew. & Sm. 575; 30 L. J. Ch. 799; 25 J. P. 629; 8 Jur. N. S. 584; 9 W. R. 887; 62 E. R. 498; previous proceedings (1860), 29 L. J. Ch. 335.

Annotations:—As to (1) Consd. Re Nixon, Gray v. Bell, [1904] 1 Ch. 638; Re King, Mellor v. South Australian Land Mortgage & Agency Co., [1907] 1 Ch. 73. Refd. Re Lawley, Jackson v. Leighton, [1911] 2 Ch. 530. As to (2) Refd. Bennett v. Lytton, Re Sanford's Trust (1860), 2 John. & H. 155; Smith v. Smith (1861), 4 L. T. 44. Generally, Mentd. Hardy v. Fothergill (1888), 13 App. Cas. 351.

6381. — — —.]—Where in an administration suit exors. claimed to be allowed to retain part of the residuary estate as an indemnity against any personal liability that might arise in respect of mining shares, part of testator's estate at the time of his death, but since sold, though not registered in the name of the purchaser:—*Held*: the exors. were sufficiently indemnified by the order of the ct., & it was only necessary that the residuary legatee should undertake to be answerable for any claim that might arise.—WILLIAMS v. HEADLAND (1864), 4 Giff. 505; 3 New Rep. 412; 34 L. J. Ch. 20; 9 L. T. 824; 10 Jur. N. S. 384; 12 W. R. 367; 66 E. R. 806.

Annotation:—Appld. Ross v. Tatham (1869), 38 L. J. Ch. 577.

6382. — — —.]—On a petition by residuary legatees for payment out of ct. of their legacy, the exors. applied to have part of the funds set apart to indemnify them against a breach of covenant committed by testator as lessec. No action had been taken by the lessor on the breach, nor had he made any claim under a decree made in a suit for the administration of testator's estate:—*Held*: under the circumstances the lessor had lost all remedy against the exors., who therefore required no indemnification against the breach of covenant.—ROSS v. TATHAM (1869), 38 L. J. Ch. 577; 21 L. T. 351; 17 W. R. 960.

shares in a co. on which there existed a contingent liability, to his daughter. Upon the execution by the legatee of an indemnity to the exor. & the consent of the co. to such transfer, the

exor. was ordered to transfer the shares & the remainder of the residuary estate to the legatee.—CHISHOLM v. GILCHRIST (1902), 2 S. R. N. S. W. 84; 19 N. S. W. N. 140.—AUS.

q. — — —.]—MACKENZIE v. BLOMFIELD (1904), 5 S. R. N. S. W. 209.—AUS.

r. — — — In respect of advances made to executors—To meet

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6383. — — — Whether retention of assets allowed.]—WILLIAMS *v.* HEADLAND, No. 6381, *ante*.

6384. — — — Privity of estate between executors & lessors.]—On making an order for the distribution of the estate of a testator amongst his residuary legatees the ct. will not set aside any part of his assets to indemnify his exors. against possible liabilities which may arise in respect of leases formerly held by him, unless there is privity of estate between the exors. & the lessors.—*Re* NIXON, GRAY *v.* BELL, [1904] 1 Ch. 638; 73 L. J. Ch. 446; 48 Sol. Jo. 396.

Annotation:—Consd. Re King, Mellor *v.* South Australian Land Mortgage & Agency Co., [1907] 1 Ch. 72.

6385. — — —.]—The exors. of a testator whose estate comprised shares of £10 each in a limited co., of which only £4 had been called up, took out a summons for a declaration that they were entitled to distribute the estate among the residuary legatees notwithstanding the possible future liability on the shares. The beneficiaries & the co. were made defts.:—*Held*: it was not the practice of the ct. to retain funds in ct. for the protection of a contingent future creditor, & it was unnecessary to do so for the protection of the exors., for they were sufficiently protected by the order of the ct. in the administration of an estate.—*Re* KING, MELLOR *v.* SOUTH AUSTRALIAN LAND MORTGAGE & AGENCY CO., [1907] 1 Ch. 72; 76 L. J. Ch. 44; 95 L. T. 724; 51 Sol. Jo. 48.

Annotation:—Mentd. Re Blow, St. Bartholomew's Hospital *v.* Cambden, [1914] 1 Ch. 233.

6386. Payment out of court of indemnity fund—When ordered.]—Where there was an indemnity fund in ct. for the protection of exors. against the rents & covenants of certain leases which had formed part of their testator's estate. The ct., on being satisfied that the risk was very small & that no claim had been made for twenty-one years, ordered the whole fund to be paid out, notwithstanding that some of the leases had about fifty years to run.—CROOK *v.* HENDRY, HENDRY *v.* CROOK, JAYNE *v.* CROOK (1878), 26 W. R. 325.

B. On Sale of Leaseholds.

6387. Before Law of Property Amendment Act, 1859 (c. 35), s. 27—Right of representative to be indemnified.]—Leasehold estates of a testator were sold under a decree for carrying the trusts of the will into execution. The exor. & trustee of the will had never been in possession of the estates:—*Held*: nevertheless, he was entitled to be indemnified in respect of the rents & covenants.—COCHRANE *v.* ROBINSON (1840), 11 Sim. 378; 10 L. J. Ch. 109; 5 Jur. 4; 59 E. R. 919.

Annotation:—Reid. Hickling v. Boyer (1851), 3 Mac. & G. 635.

6388. — — —.]—Testator held long leaseholds, some as original lessee & others as assignee. They were sold in the suit:—*Held*: the exors. were entitled to be indemnified against the eventual breaches of the covenants, either by a retainer in ct. of a part of the assets, or by a security of the legatees to refund.—DOBSON *v.*

CARPENTER (1850), 12 Beav. 370; 50 E. R. 1103.

Annotation:—Reid. King v. Malcott (1852), 16 Jur. 237.

6389. — — —.]—Exors. of the assignee of leaseholds held, after an assignment by them, entitled to have a fund set apart for their indemnity; but refused as to valuable leaseholds at small rents, of which testator was original lessee.—BREWER *v.* POCOCK (1857), 23 Beav. 310; 53 E. R. 122.

6390. — — —.]—GARRATT *v.* LANCEFIELD, No. 6374, *ante*.

6391. Since Law of Property Amendment Act, 1859 (c. 35), s. 27—Whether Act retrospective.]—DODSON *v.* SAMMELL, No. 6380, *ante*.

6392. — — —.]—On the sale of a leasehold before the passing of Law of Property Amendment Act, 1859 (c. 35), the purchaser covenanted to indemnify the vendor against the covenants of the lease. He bequeathed the leasehold to his widow & appointed her his extrix.:—*Held*: the Act applied, & the exors. of the widow were at liberty to distribute her estate without setting apart any fund to provide against the liability under the covenants.—*Re* GREEN (1860), 2 De G. F. & J. 121; 45 E. R. 568.

6393. — — —.]—SMITH *v.* SMITH, No. 6375, *ante*.

6394. — — —.]—A fund set apart in 1857 to answer liabilities of an intestate's estate in respect of leasehold covenants was distributed in 1865 amongst the next of kin, it appearing that all the leases had either been sold or surrendered, & above statute having passed in the meantime.—REILLY *v.* REILLY (1865), 34 Beav. 406; 55 E. R. 691.

6395. — — — Payment out of court of indemnity fund—Ground landlord—Necessity for consent of.]—Where an indemnity fund is set apart by the ct. in respect of leasehold property belonging to testator, it is done for the security of the ground landlord, & not for the protection of the exors.; & the parties beneficially interested are not entitled to have it paid out under above Act, without the consent of the ground landlord.—BUNTING *v.* MARRIOTT (1861), 7 Jur. N. S. 565; 9 W. R. 264.

Annotation:—N.F. Sawdon v. Marriott (1873), 28 L. T.

6396. — — — Necessity for service of petition on.]—Where a petition is presented for payment out of ct. of a fund set apart to indemnify exors., on the sale of their testator's leaseholds, it is not necessary to serve the ground landlord.—SOWDON *v.* MARRIOTT (1873), 28 L. T. 867; 21 W. R. 808.

6397. — — — Who is a "purchaser"—Assignee paid for taking over lease.]—An assignment by an exor. of his testator's leasehold property to an assignee who is paid money for taking over the lease & indemnifying the exor. is not an assignment to a "purchaser" within above Act.

The word "purchaser" in this sect. means a person who buys the lease & pays a price in money for it.—*Re* LAWLEY, JACKSON *v.* LEIGHTON, [1911] 2 Ch. 530; 81 L. J. Ch. 97; 105 L. T. 571; 56 Sol. Jo. 13.

*payments due on mortgage.]—*A person had advanced sums to the exors. for the purpose of meeting periodical payments

in respect of a building society mtge. on the estate:—*Held*: the exors. were entitled to be indemnified out of the

estate in respect of such advances.—FENTON *v.* HORNE (1889), 7 N. Z. L. R. 627.—N.Z.

SUB-SECT. 3.—REPRESENTATIVE CARRYING ON TESTATOR'S BUSINESS.

6398. Representative acting under will.]—The exor. or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, & thus become creditors of the fund to which the exor. or trustee has a right to resort (TURNER, L.J.).—*Re BEATER, Ex p. EDMONDS* (1862), 4 De G. F. & J. 488; 45 E. R. 1273; *sub nom. Re BEATER, DENNANT & RUSS, Ex p. COSTER'S EXECUTORS*, 31 L. J. Bcy. 15; 8 Jur. N. S. 629; *sub nom. Re COSTER, BEATER & Co., Ex p. COSTER'S EXECUTORS*, 6 L. T. 199; 10 W. R. 372, L. JJ.

Annotations:—*Consd. Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548. *Refd. Re Dixon, Ex p. Gordon* (1874), 10 Ch. App. 161, n.; *Strickland v. Symons* (1883), 22 Ch. D. 666. *Mentd. Re Lovell, Ex p. Lovell* (1865), 13 L. T. 451.

6399. — Testator's estate insolvent.]—An exor. who in winding up testator's affairs, & acting in pursuance of the will, & according to testator's course of business, gave a promissory note for a trade debt of testator's:—*Held*: not entitled to be indemnified in full in respect of the promissory note out of testator's estate, which was insufficient to pay his debts.—*LUCAS v. WILLIAMS* (No. 2) (1862), 4 De G. F. & J. 439; 10 W. R. 677; 45 E. R. 1254, L. JJ.

Annotation:—*Refd. Re Gorton, Dowse v. Gorton* (1889), 60 L. T. 305.

6400. — Manager's salary—Executors empowered by will to employ co-executor as salaried manager.]—A testator appointed three persons as exors. & trustees of his will & gave to them his business & the premises where it was carried on upon trust to carry on the same for such period as they might think fit; & he gave power to the trustees to employ one or more of them at a salary to manage the business. One of the exors. & trustees having been appointed by the others of them to manage the business at a salary which was duly paid to him, they claimed to be entitled, in an action brought for the administration of the estate, to be allowed that remuneration. It was anticipated that the estate would prove to be insolvent:—*Held*: the allowance claimed could not be made to the exors. & trustees as against creditors of the estate.—*Re SALMEN, SALMEN v. BERNSTEIN* (1912), 107 L. T. 108; 56 Sol. Jo. 632, C. A.

6401. —.]—*Re JOHNSON, SHEARMAN v. ROBINSON*, No. 6022, *ante*.

6402. — Effect of default—In payment of money—In rendering accounts.]—*Re KIDD, KIDD v. KIDD*, No. 6024, *ante*.

6403. — Of co-executor.]—*Re FRITH, NEWTON v. ROLFE*, No. 6025, *ante*.

6404. — Without assent of certain creditors—Priority of non-assenting creditors.]—*Re EAST,*

LONDON COUNTY & WESTMINSTER BANKING CO., LTD. v. EAST, No. 6016, *ante*.

With assent of creditors.]—*See* Nos. 6405–6409, *post*.

6405. Representative acting with assent of creditors—Right to indemnity in priority to testator's creditors—Whether indemnity limited.]—A testator's business was carried on for about three years by his exors. after his death in accordance with the provisions of the will & with the assent of testator's creditors, in the interest of the creditors as well as of the beneficiaries, & was properly carried on:—*Held*: the exors. were entitled, in priority to claims by testator's creditors, to be indemnified out of testator's estate against the liabilities which they had properly incurred, & the indemnity was not limited to that portion of the assets which had come into existence or changed its form since testator's death.—*DOWSE v. GORTON*, [1891] A. C. 190; 60 L. J. Ch. 745; 64 L. T. 809; 40 W. R. 17, H. L.; *varying S. C. sub nom. Re GORTON, DOWSE v. GORTON* (1889), 40 Ch. D. 536, C. A.

Annotations:—*Appld. Re Owen, Frisby, Dyke v. Owen* (1892), 66 L. T. 718; *Re Brooke, Brooke v. Brooke*, [1894] 2 Ch. 600. *Distd. Re Millard, Ex p. Yates* (1895), 72 L. T. 823. *Consd. Re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342; *Re East, London County & Westminster Banking Co. v. East* (1914), 111 L. T. 101. *Distd. Re Oxley, Hornby v. Oxley*, [1914] 1 Ch. 604. *Refd. Re Bach, Walker v. Bach, Lloyd's Bank v. Bach*, [1892] W. N. 108; *Re Kidd, Kidd v. Kidd* (1894), 42 W. R. 571; *Re Raybould, Raybould v. Turner*, [1900] 1 Ch. 199; *Jennings v. Mather*, [1901] 1 K. B. 108; *Re Salmen, Salmen v. Bernstein* (1912), 107 L. T. 108. *Mentd. Re Blundell, Blundell v. Blundell* (1890), 59 L. J. Ch. 269; *Nutter v. Holland* (1894), 71 L. T. 508; *Re Newland, Bush v. Summers*, [1904] W. N. 181; *Watling v. Lewis*, [1911] 1 Ch. 414; *Re Reynolds, Ex p. White*, [1915] 2 K. B. 186.

6406. — No authority in will to carry on business—Appointment of receiver & manager in administration suit.]—The principle of *Dowse v. Gorton*, No. 6405, *ante*, that an exor. carrying on a testator's business with the assent, either express or implied, of testator's creditor's is entitled, in priority to testator's creditors to be indemnified out of the estate against the liabilities properly incurred by him in carrying on the business, is applicable where a receiver & manager has been appointed in an administration action to carry on the business in succession to the exor., & whether the will does or does not contain a power to carry on the business.—*Re BROOKE, BROOKE v. BROOKE*, [1894] 2 Ch. 600; 64 L. J. Ch. 21; 71 L. T. 398; 8 R. 444.

Annotations:—*Dbtd. Re Oxley, Hornby v. Oxley*, [1914] 1 Ch. 604. *Mentd. West London Syndicate v. I. R. Comrs.*, [1898] 2 Q. B. 507.

6407. — Business carried on for representative's own benefit.]—The sole extrix. of a testator, who was also his sole legatee, carried on his business for about six months after testator's death. No authority to carry on the business was contained in the will, but the creditors of testator assented to its being carried on by the extrix. An order was afterwards made by the

PART V. SECT. 7, SUB-SECT. 3.

6405 i. Representative acting with assent of creditors—Right to indemnity in priority to testator's creditors.]—As a general rule the indemnity will only be ordered as against unsecured creditors, except where the assent of the secured creditors is given to the continuation of the business, & where consent is given there will be no

distinction made between secured & unsecured creditors, except, however, that the exors. must look first to the property on which there is no security before they can look to the property covered by the security.—*WRIGHT v. BEATTY* (1909), 2 Alta. L. R. 89.—CAN.

6405 ii. —.]—Where considerable liabilities were incurred by the exors. in carrying on the business, &

the assets were insufficient to pay both the creditors of testator & the creditors of exors:—*Held*: testator's creditors must be taken to have assented to the carrying on of the business, & the exors. were entitled, in priority to testator's creditors, to be indemnified out of the assets in hand against the liabilities incurred by them in carrying on the business.—*Re HODGES, HODGES v. HODGES*, [1899] 1 I. R. 480.—IR.

7.—*Indemnity: Sub-sect. 3. Sects. 8 & 9.]*

ct. that deceased's estate should be administered in bkpcy. The extrix. was held to have carried on the business for the purpose of properly realising the estate, & was entitled to an indemnity for debts incurred by her in carrying on the business, & her creditors, in respect of such debts, should have been paid in priority to creditors of deceased:—*Held*: the extrix. was not entitled to an indemnity, on the ground that the business was carried on by her, not for the purpose of winding up the estate, but for her own maintenance & benefit, & there was no evidence of such a consent by the creditors of testator as would make her their agent in carrying on the business.—*Re MILLARD, Ex p. YATES* (1895), 72 L. T. 823.

Annotation:—*Consd. Re Oxley, Hornby v. Oxley*, [1914] 1 Ch. 604

6408. — Right to indemnity in priority to trade debts.—A testator by his will directed his exors. to carry on his business; this they did, & incurred certain debts. A creditor of testator then commenced an administration action, & obtained judgment. The assets were insufficient to pay both the costs & expenses of the exors. & the debts incurred by them in carrying on the business. The minutes were referred to the judge to be spoken to, by order of the district registrar:—*Held*: the exors. having continued the business lawfully with the consent of the creditors, the general rule applied, & the exors. were entitled to be paid out of the assets their costs & expenses in priority to the debts incurred by them in carrying on the business.—*Re OWEN, FRISBY, DYKE & CO. v. OWEN* (1892), 66 L. T. 718; 36 Sol. Jo. 504.

6409. — What amounts to assent.—Testator, a boilermaker, who died in 1908, by his will appointed his widow & his son his exors. & devised & bequeathed all his real & personal estate to his widow absolutely. The will contained no power to the exors. to carry on the business. The widow & son continued to carry on the business as exors. until the beginning of Nov. 1912. The widow received certain weekly sums & the son was paid an ordinary salary as manager. All testator's creditors with the exception of three had been paid. In Nov. 1912, two of the three unpaid creditors obtained the ordinary creditors' decree for administration. Both pltf's. were aware that

the business was being carried on, but took no steps to interfere with it. In Dec. 1913, an application was made by subsequent creditors for a declaration that the exors. were entitled to an indemnity out of the assets for debts incurred in carrying on the business in priority to the original creditors of testator, & that appcts. & all other new creditors might have the benefit of such indemnity. On appeal:—*Held*: (1) as the exors. had carried on the business for the benefit of the widow & not under an agreement with testator's creditors, appcts. were not entitled to an indemnity out of testator's estate in priority to the persons to whom testator was indebted at his death; (2) merely standing by with knowledge that the business was being carried on & abstaining from interference with it were not of themselves sufficient to constitute the original creditors of testator persons entitled to the subsequent assets & therefore bound to give effect to the indemnity.—*Re OXLEY, HORNBY (JOHN) & SONS v. OXLEY*, [1914] 1 Ch. 604; 83 L. J. Ch. 442; 110 L. T. 626; 30 T. L. R. 327; 58 Sol. Jo. 319, C. A.

6410. Representative not acting under will or with consent of creditors.—*Re EVANS, EVANS v. EVANS*, No. 6002, *ante*.

6411. ——*Re OXLEY, HORNBY (JOHN) & SONS v. OXLEY*, No. 6109, *ante*.

SECT. 8.—MISCELLANEOUS POWERS.

To administer convict's property.—*See CRIMINAL LAW*, Vol. XIV., pp. 495, 496, Nos. 5459-5461.

6412. To bring action—Assumpsit—For copyhold fine.—*Assumpsit* lies by an exor, for a copyhold fine set by testator.—*SHUTTLEWORTH v. GARNET* (1688), 3 Lev. 261; Comb. 151; 3 Mod. Rep. 239; 1 Show. 35; Carth. 90; 83 E. R. 680.

Annotations:—*Reid. Fraser v. Mason* (1883), 11 Q. B. D. 574. *Mentd. A.-G. v. Perry* (1734), 2 Com. 481.

6413. — Debt—For relief against heir.—The exor. of a lord of a manor may bring an action of debt for a relief against the exor. of the heir.—*ST. JOHN (LORD) v. BRANDRING* (1602), Cro. Eliz. 883; 78 E. R. 1107.

6414. — To enforce contract.—*BUBB'S CASE* (1678), Freem Ch. 38; 22 E. R. 1044.

6408 i. — Right to indemnity in priority to trade debts.—Each of several exors. carrying on the business of testator has a right of indemnity against the assets, including a lien over those assets, for liabilities properly incurred.—*SAVAGE v. UNION BANK OF AUSTRALIA, LTD., WHITELAW v. UNION BANK OF AUSTRALIA, LTD.* (1906), 3 C. L. R. 1170.—AUS.

s. By order of court—Manager acting in lieu of executor—Right to be indemnified by general assets.—A manager appointed by the ct. to carry on the business of testator in the place of the exor., who had an implied power to carry it on, no particular assets being devoted by the will for that purpose, is entitled to be indemnified by the general assets against liabilities incurred by him in carrying on the business.—*O'NEILL v. M'GRORTY*, [1915] 1 I. R. 1.—IR.

t. — Receiver acting in lieu of executor—Right to indemnity in priority to executor.—The business of testator was carried on, pursuant to a direction

in his will, through the agency of his widow, & subsequently by a receiver appointed by the ct. Debts were incurred by the exors. & by the receiver in the carrying on of the business, & the assets realised were deficient:—*Held*: the receiver was entitled to indemnity in priority to the exors.—*Re HEALY, HEALY v. OLIVER*, [1918] 1 I. R. 366.—IR.

a. — No indemnity for losses prior to order.—The trade of testator had been carried on by his exors. without any authority under his will. An order of the ct. had confirmed their action as from the time of his death, & had indemnified them, as from the commencement of a suit to administer the estate, until the property should be sold. Prior to this, the exors. had borrowed money & contracted trade debts without the knowledge of the court when the order was obtained:—*Held*: notwithstanding the order confirming the carrying on of the business, the exors. were not entitled to be indemnified out of the estate to the

extent of their losses.—*FENTON v. HORNE* (1889), 7 N. Z. L. R. 627.—N.Z.

b. General rule—Executor authorised to carry on testator's business.—An exor., who has been authorised to carry on testator's business both by the will, & by the ct., & who has properly incurred liabilities to trade creditors, is entitled to an indemnity in respect of such liabilities.—*MOORE v. M'GLYNN*, [1904] 1 I. R. 334.—IR.

PART V. SECT. 8.

c. To buy in & resist payment—Attempted sale of property by executors of life tenant.—A devise of the use of a dwelling house with land attached, together with furniture & other effects therein, to occupy during the natural life of the devisee, does not enable the devisee to dispose by will of the personal property; & the exor. of testator, giving notice to the exors. of the devisee at a sale of such property may purchase & resist payment.—*DICKSON*

6415. — Ejectment.]—If an annuity be granted out of land, with power to the grantee his assigns, in case the annuity be in arrear, to enter & retain possession of the land until payment, & the grantee enter for non-payment, of the annuity, & die in possession of the land, the arrears being still unpaid:—*Semble*: the exor. of the grantee takes such an interest in the land as will entitle him to maintain an ejectment.—*DOE d. SUGDEN v. WEAVER* (1848), 2 Car. & Kir. 751, N. P.

— **Practice & procedure.]**—See Part VII., *post*.

To distrain for rent.]—See DISTRESS, Vol. XVIII., pp. 285, 286, Nos. 191-210.

To employ agents & solicitor.]—See Part VI., Sect. 6, sub-sect. 5, C. & D., *post*.

6416. To grant easement.]—Where, under a special Act persons empowered by the Lands Clauses Acts to sell & convey or release lands were empowered if they thought fit to grant easements:—*Held*: an extrix. who had no estate or interest in land, but only a power to sell it, was not empowered to grant an easement over it.—*Re BARROW-IN-FURNESS CORPN. & RAWLINSON'S CONTRACT*, [1903] 1 Ch. 339; 72 L. J. Ch. 233; 87 L. T. 724; 51 W. R. 248.

6417. To let cattle remain on land—Representative of lessee for life.]—The exors. of a lessee for life have an implied licence to let the cattle remain on the land for a convenient time.—*STODDEN v. HARVEY* (1608), Cro. Jac. 204; 79 E. R. 178.

Annotations:—*Mentd.* Bell v. Wardell (1740), Willes, 202; Davies v. Ingram (1867), 17 L. T. 33.

6418. To make agreement—For benefit of estate—Agreement not to oppose re-election of director.]—Defts. were the registered holders, as exors., of shares in a limited co. They were also, in their individual capacity, shareholders in, & directors of, the co. They entered into an agreement by which they bound themselves alike in their representative & individual capacities to vote always for the re-election of a particular director. The consideration of the agreement was a certain benefit to their testator's estate:—*Held*: the agreement was *intra vires* defts. in their individual capacity, notwithstanding the fact that they were directors of the co. & the agreement was *intra vires* defts. in their representative capacity.—*GREENWELL v. PORTER*, [1902] 1 Ch. 530; 71 L. J. Ch. 213; 86 L. T. 220; 9 Mans. 85.

SECT. 9.—OF CO-REPRESENTATIVES.

6419. General rule—Each executor has whole office in him.]—*COWPER v. COWPER* (EARL) (1732),

2 P. Wms. 720; 24 E. R. 930; *on appeal* (1736), 2 P. Wms. 755, H. L.

Annotations:—*Mentd.* Bagshaw v. Spencer (1743), 2 Atk. 570; Burgess v. Wheate (1759), 1 Edon, 177; Farr v. Newman (1792), 4 Term Rep. 621; Craufurd v. Hunter (1798), 8 Term Rep. 13; *Re Reay* (1847), 8 L. T. O. S. 476; Haywood v. Cope (1858), 25 Beav. 140; Buchanan v. Harrison (1861), 1 John. & H. 662; Dean v. Brown, [1909] 2 K. B. 573.

6420. — — — Considered as distinct person.]—A debtor to a bkpt. estate, paying the debt to one assignee, is not a discharge; he should have taken a receipt likewise from the co-assignee. Otherwise as to an exor., because they have each a power over testator's whole estate, & considered as distinct persons.—*CAN v. READ* (1749), 3 Atk. 695; 26 E. R. 1199, L. C.

Annotation:—*Reid.* Jones v. Smith (1849), 18 L. J. Ex. 145.

6421. — — —.]—*JACOMB v. HARWOOD*, No. 6030, *ante*.

6422. — — — Power of executor to act alone.]—If one of two exors. deliver a bond due to testator to a stranger, in satisfaction of his own debt & dies, an action of detinue will not lie by the surviving exor. to recover it back.—*KELSACK v. NICHOLSON* (1596), Cro. Eliz. 496; 78 E. R. 746.

6423. — — — Although others dissent.]—Two exors., one dissents, the act of the other good.—*BACON v. BELL* (1597), Toth. 87; 21 E. R. 131.

6424. — — —.]—Pltf. & W. H. administrators to J. H. empower defts. by letters of attorney to get in intestate's effects. W. H. afterwards settled the account with them, receives the balance, gives a general release, & then dies. Pltf., as surviving administrator, prays the stated accounts & releases may be set aside, as being settled without his privity. One administrator cannot release a debt so as to bind his fellow, otherwise as to an exor., for each entirely represents testator; but the release of one administrator may bar both, if releasee is accountable to them in their own right, & not as administrators. The releases here being unfairly obtained, though effectual in law, were set aside in equity.—*HUDSON v. HUDSON* (1737), 1 Atk. 460; West temp. Hard. 155; 26 E. R. 292, L. C.

Annotation:—*Consd.* Jacomb v. Harwood (1751), 2 Ves. Sen. 265.

6425. — — —.]—One exor. can do any act; not one trustee.—*Ex p. RIGBY* (1815), 19 Ves. 463; 34 E. R. 588, L. C.

6426. — — — Power of executor to bind—Co-executors personally.]—In whatever degree the act of one exor. may bind the estate of testator, he has no authority to bind personally his co-exor. (SIR JOHN CROSS).—*Re ROBINSON & FARRAND, Ex p. HOLDSWORTH* (1841), 1 Mont. D. & De G. 475, Ct. of R.

v. STREET (1844), 1 U. C. R. 180.—*CAN.*

d. To retain money to meet claims.]—The exors. retained in their hands a sum to meet claims against the estate, & were not called upon to pay it into ct.:—*Held*: the amount retained was not unreasonable, & the exors. were not chargeable with interest in respect of it.—*THOMPSON v. FAIRBAIRN* (1886), 11 P. R. 333.—*CAN.*

e. To apply assets—For maintenance of property during life tenancy.]—Testatrix gave certain land to her exors.

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upon trust, together with all furniture & personal property thereon, to the use of her husband for life & on his death to be sold:—*Held*: the exors. could not apply any moneys from the general estate for the up-keep of the property.—*Re CUPERLEY'S ESTATE*, [1919] 2 W. W. R. 495.—*CAN.*

f. — — — For benefit of infant heir.]—An exor. is not justified in paying interest & profits from a business to the widow, or to an assignee of the widow, until he is satisfied that an infant heir is being properly maintained by the mother.—*TOPLISS v. ALLEN* (1906), 26

N. Z. L. R. 17.—N.Z.

PART V. SECT. 9.

g. General rule—Power of executor to act alone—Where others have refused service.]—Where by a will more than one person are appointed exors., & all of them jointly are empowered to alienate any property for payment of debts & to borrow money for the improvement & preservation of the estate, Probate & Administration Act (V of 1881), s. 92, by reason of such direction in the will, does not disqualify one of several exors., who alone

Sect. 9.—Of co-representatives. Sect. 10.]

6427. — — — Estate—Parties interested not precluded from relying on legal title.]—There is no authority for the proposition that the acts of one of several exors. can bind the estate so as to preclude other persons interested in that estate from relying on their legal title.—*Re INGHAM, JONES v. INGHAM*, [1893] 1 Ch. 352; 62 L. J. Ch. 100; 68 L. T. 152; 41 W. R. 235; 37 Sol. Jo. 80; 3 R. 126.

To get in estate.]—See No. 3979, *ante*.

6428. To give receipt.]—Testator gave the residue of his estate to his two exors. upon certain trusts. Part of his estate consisted of a bond given by the trustees of a minor who came of age within a year after the death of testator, & the exors. then accepted his bond to them jointly, in the place of the bond given by the trustees. Ten years afterwards a part of the money was paid by the obligor to one of the obligees, who embezzled the money so paid, & gave a receipt purporting to be signed by both the obligees, but in fact signed by one only, the signature of the other being a forgery. In a suit by the other exor. & *cestuis que trust* under the will against the obligor:—*Held*: though the obligor intended to have the receipt of both obligees, the receipt of one was sufficient to discharge the obligor as the obligees were exors.—*CHARLTON v. DURHAM (EARL)* (1869), 4 Ch. App. 433; 38 L. J. Ch. 183; 20 L. T. 467; 17 W. R. 995, L. C.

Annotations:—*Consd.* Lee v. Sankey (1873), L. R. 15 Eq. 204. *Mentd.* Macbryde v. Eykyn (1871), 21 L. T. 461.

To alienate—Personalty.]—See Sect. 2, sub-sect. 2, A., *ante*.

Right to purchase.]—See Sect. 2, sub-sect. 2, B. (a) ii., *ante*.

Real estate.]—See Sect. 2, sub-sect. 3, A., *ante*.

Right to purchase.]—See Sect. 2, sub-sect. 3, B. (a) ii., *ante*.

To compromise—Claims.]—See Sect. 3, *ante*.

Of co-executors.]—See Sect. 3, sub-sect. 2, *ante*.

Debts of co-executors.]—See Sect. 3, sub-sect. 2, *ante*.

Indemnity—Assent by co-executor to specific bequest.]—See No. 6373, *ante*.

6429. To sue—Co-executor.]—*CROCKER v. HAMDEN* (1578), Toth. 74; 21 E. R. 127; *sub nom.* *CROKER v. HAMDEN*, Ch. Cas. in Ch. 118.

6430. — — — To enforce obligations.]—*COTTON v. CAUSTON* (1579), Cary, 79; 21 E. R. 42.

6431. — — —.]—One exor. may sue another in this ct., though not at law.—*ALLEN v. STORY* (1585), Toth. 86; 21 E. R. 131.

6432. — — —.]—One exor. may sue another

in this ct., though not at law.—*OKELY v. BARNARD* (1596), Toth. 86; 21 E. R. 131.

6433. — — —.]—An exor. has a remedy against his co-exor., & in the Ct. of Arches may, in the capacity of residuary legatee, maintain a suit for his share of the residue.—*GLEN v. WEBSTER & WILSON* (1754), 2 Lee, 31; 161 E. R. 253.

6434. — — — Husband of executrix—For detinue of testator's goods.]—*ANON.* (1553), Benl. 10; 73 E. R. 938.

6435. — — — Co-executor's executor—For conversion of testator's goods by co-executor.]—*WRAY v. SAPCOTE* (1579), Cary, 86; 21 E. R. 46.

6436. — — — Third party—For price of goods of testator—One executor acting as agent of others.]—A., B. & C., exors. of D., sell goods of their testator to E., the price to be paid to C. to be by him distributed among the creditors of D. The three exors. may, without a special count, maintain *indebitatus assumpsit*, or debt, against E.—*PEARSON v. PEARSON* (1833), 5 B. & Ad. 859; 2 Nev. & M. K. B. 471; 3 L. J. K. B. 62.

6437. — — — Acting as executor's agent—Agent not appointed by all executors.]—Under a written authority from two of three exors., who alone had proved the will, C. received the amount or certain rents due from the tenants of lands in which testator had a term of years, & gave a receipt for it in the name, & on account of the two:—*Held*: the three exors. could not jointly sue C. for the money, unless it were found by the jury, that the two contracted with him on account of themselves & the other exor., or generally on account of the estate, with a view to the interference of the co-exor. in case he should choose to take a part in the management of it.—*HEATH v. CHILTON* (1844), 12 M. & W. 632; 13 L. J. Ex. 225; 2 L. T. O. S. 424; 152 E. R. 1352.

Annotations:—*Reid.* *Abbott v. Parfitt* (1871), L. R. 6 Q. B. 346. *Mentd.* *Muttyholl Seal v. Dent* (1853), 5 Moo. Ind. App. 328.

— Practice & procedure in respect of actions by executors.]—See Part VII., *post*.

SECT. 10.—SURVIVORSHIP OF POWERS.

See Trustee Act, 1893 (c. 53), ss. 22, 50; Trustee Act, 1925 (c. 19), ss. 18, 68.

6438. Power to exercise power in will—To sell land.]—*BUSHELL v. NEWBY & WAKEFIELD* (1676), Cas. temp. Finch, 260; 23 E. R. 143.

6439. Power to exercise power in settlement—To appoint new trustee.]—A power contained in a settlement of real estate on trust for sale enabled one of the parties, his exors., administrators & assigns, on a vacancy to appoint a new trustee. The party so empowered died, having by his will

has obtained probate to act singly, the others having refused to accept service.—*SATYA PRASHAD PAL CHOWDHRY v. MOTILAL PAL CHOWDHRY* (1899), I. L. R. 27 Cal. 683.—*IND.*

PART V. SECT. 10.

6438 i. Power to exercise power in will—To sell land.]—Testator devised land

with power to exors. to sell & invest the proceeds, & in the clause appointing exors. added the words, to see the will carried into effect:—*Held*: this was not a bare power, but a power coupled with an interest, vested in them in the character of exors., & the surviving exor. could make a good title to the land.—*Re FORD* (1879), 7 P. R. 451.—*CAN.*

6438 ii. — — —.]—Where exors. are given express power to sell lands, whether coupled with an interest or not, such power can be exercised by a surviving exor.—*Re KOCH & WIDEMAN* (1894), 25 O. R. 262.—*CAN.*

h. — — — In general.]—When one of two co-exors. dies, the surviving exor. can exercise all the powers that

named three exors., one of whom renounced probate; & the vacancy in the trust having occurred:—*Held*: the two acting exors. had power to appoint the new trustee.—*GRANVILLE (EARL) v. M'NEILE* (1849), 7 Hare, 156; 18 L. J. Ch. 164; 13 Jur. 252; 68 E. R. 64.

6440. Whether powers personal or attached to office of executor.]—Residuary devise & bequest for such of testator's relations & kindred in such proportions, etc., as his exors. should think proper; recommending & advising his said trustees & exors. to give the greatest share to such person & persons who in their opinion & judgment should appear to them to be his nearest relations & the most deserving; declaring his intention not to control their discretion; but that everything relative to that disposition, who were his relations & the proportions, should be entirely in the discretion of the said trustees & exors., & the heirs, exors., & administrators, of the survivor of them. A trust & a power. The ground of the power being personal confidence, it is *prima facie* limited to the original trustees; not without express words passing to others, to whom by legal transmission the same character may happen to belong; & cannot be executed by the devisees & exors., for that specific purpose only, of the surviving trustee.—*COLE v. WADE* (1807), 16 Ves. 27; 33 E. R. 894.

Annotations:—*N.F. Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139. *Reid. Fordyce v. Bridges* (1818), 2 Coop. temp. Cott. 324. *Mentd. Piper v. Piper* (1834), 3 My. & K. 159; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345.

6441. — Effect of renunciation of office.]—Legacy to A. but if the exors. after-named, shall think it more for his advantage to have it placed out, & to pay him the interest, for life, as they in their discretion shall think fit, empowering them accordingly; & directing, that after his decease the said sum should be divided among his children, & for default of children, over. One of the exors. being dead, & the others having renounced:—*Held*: the legacy was absolute in the legatee, who had taken the benefit of an Insolvent Act.

The bequest is, in the first instance, absolute & unqualified; then the power is given to the exors.: but they have not exercised it: & they have renounced the only character, in which it was competent to them to exercise it (*ARDEN, M.R.*).—*KEATES v. BURTON* (1808), 14 Ves. 434; 33 E. R. 587.

Annotation:—*Folld. Re Mainwaring, Crawford v. Forshaw*, [1891] 2 Ch. 261.

6442. — —.]—Testatrix bequeathed the residue of her property “to such charitable pur-

poses as should be thereafter specified or in default according to the best judgment of M., sole exor. of her will.” She died without specifying any charity to which it was to be applied, & M. renounced probate:—*Held*: the power to M. was coupled with his office; & having renounced, he was not entitled to exercise his power of specifying the charity to which the property was to be applied.—*A.-G. v. FLETCHER* (1835), 5 L. J. Ch. 75.

Annotation:—*Folld. Re Mainwaring, Crawford v. Forshaw*, [1891] 2 Ch. 261.

6443. — —.]—Testator bequeathed a legacy to A. to be paid to her on attaining sixteen; in the event of her dying under that age “the amount to remain at the disposal of my exors. for distribution to such charities or charitable institutions as they approve of.” After bequeathing other legacies, he appointed C., F., & J. his exors. He then bequeathed legacies to several charitable institutions, & bequeathed the residue “to the above-named charitable institutions, or such others or additional as my exors. herein named may select, to be divided in such proportions as they may approve of.” C. & J. proved the will. F. renounced probate:—*Held*: F. could not act in the exercise of the power of selecting charities & distributing the residue amongst them; the power was given to the exors. in the character of exors., & the two who had proved could exercise it alone.—*Re MAINWARING, CRAWFORD v. FORSHAW*, [1891] 2 Ch. 261; 60 L. J. Ch. 683; 65 L. T. 32; 39 W. R. 484, C. A.

Annotations:—*Folld. Re Smith, Eastwick v. Smith*, [1904] 1 Ch. 139. *Apld. Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475.

6444. — —.]—Testator appointed his wife, M., his brother C., & his friend R. exors. & trustees of his will, & gave to “my said trustees” all his estate upon trust for his wife for life, “with full power to my said trustees” to sell the whole or any part of his estate & apply the proceeds for the benefit of his wife during her life:—*Held*: the power was not personal to the trustees originally named, but was annexed to the office & could be exercised by the trustees or trustee for the time being.—*Re SMITH, EASTICK v. SMITH*, [1904] 1 Ch. 139; 73 L. J. Ch. 74; 89 L. T. 604; 52 W. R. 104; 20 T. L. R. 66.

Annotations:—*Apld. Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475; *Re Hampton, Public Trustee v. Hampton* (1918), 88 L. J. Ch. 103. *Reid. Re De Sommers, Coelenbier v. De Sommers*, [1912] 2 Ch. 622; *Kennedy v. Kennedy*, [1914] A. C. 215. *Mentd. Harper v. Hedges*, [1923] 2 K. B. 314.

Devolution of representative office—Upon death.]
—See Part I., Sect. 5, sub-sect. 1, *ante*.

were vested in the exors. jointly, but no greater power.—*Re MCKAY, MCKAY v. MCKAY* (1902), 22 N. Z. L. R. 121.—N.Z.

k. — To executor of last surviving trustee—Where trustees predecease testator.]—The power of appointing new trustees given to the exor. of the last surviving & continuing

trustee by Trust Property Act, ss. 63, 64, does not extend to cases where all the trustees named in the will predecease testator.—*CHURCH OF ENGLAND PROPERTY TRUST DIOCESE OF GOULBURN v. ROSSI* (1893), 11 N. S. W. Eq. 185; 10 N. S. W. W. N. 1.—AUS.

l. — To executor of last surviving executor—To sell land.]—Testator

directed his real & personal property to be sold & the proceeds to be divided & distributed, & appointed exors. to carry out his will, both of whom died before the estate was realised:—*Held*: the exor. of the last surviving exor. had power to sell & convey the land.—*Re STEPHENSON, KINNEE v. MALLOY* (1894), 24 O. R. 395.—CAN.

Part VI.—Liability of Representative.

SECT. 1.—IN GENERAL.

6445. For acts of third party—Solicitor rendering services to estate—Before administration taken out—Claim for costs for work done.]—During a period in which there was no personal representative of the estate of a deceased testatrix, applt., acting upon the instructions of E., a relative of deceased, did work as a solr. in respect of the administration & for the benefit of the estate. Subsequently resp. P. obtained letters of administration *de bonis non*, & refused to pay applt.'s bill of costs:—*Held*: resp. was not bound, as administrator, to pay such costs.—*Re WATSON, Ex p. PHILLIPS* (1887), 19 Q. B. D. 234; 56 L. J. Q. B. 619; 57 L. T. 215; 35 W. R. 709; 3 T. L. R. 668, C. A.

Execution of deed by deceased—Presumption of due execution—Against executor.]—*See DEEDS*, Vol. XVII., p. 200, No. 107.

Liability of executor de son tort.]—*See Part I., Sect. 15, sub-sect. 4, ante.*

Liability of administrator pendente lite.]—*See Part II., Sect. 7, sub-sect. 7, E. (b), ante.*

SECT. 2.—ON CONTRACTS OF DECEASED.

SUB-SECT. 1.—NATURE AND EXTENT OF LIABILITY.

6446. Nature of liability—Dependent on liability of testator.]—Testator cannot bind his exor. where he is not bound himself.

It cannot be a debt in the exor., where it was not debt in testator; & if one covenants to pay £10, debt lies against him or his exors. (*per CUR.*).—*PERROT v. AUSTIN* (1591), Cro. Eliz. 232; 78 E. R. 488.

Annotations:—**Expld.** *Re Gibbins, Ex p. Tindal* (1832), 1 Deac. & Ch. 291. **Dbtd.** *Coope v. Crosswell* (1866), 2 Ch. App. 112. **Refd.** *Plumer v. Marchant* (1763), 3 Burr. 1380; *Powell v. Graham* (1817), 7 Taunt. 580.

6447. — Right of action against testator—Survives against executors.]—(1) Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work & labour, or property of another, or a promise of testator express or implied, the action survives against the exor.

(2) Trover does not lie against an exor. for a conversion by his testator.—*HAMBLY v. TROTT* (1776), 1 Cowp. 371; 98 E. R. 1136.

Annotations:—**As to (1) Consd.** *Powell v. Layton* (1806), 2 Bos. & P. N. R. 365; *Lansdowne v. Lansdowne* (1815), 1 Madd. 116; *Phillips v. Homfray* (1883), 24 Ch. D. 439. **Refd.** *Birch v. Wright* (1786), 1 Term Rep. 378; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578; *Peck v. Gurnoy* (1873), L. R. 6 H. L. 377. **As to (2) Consd.** *Foster v. Stewart* (1814), 3 M. & S. 191; *Monypenny v. Bristow* (1832), 2 Russ. & M. 117; *Powell v. Ross* (1837), 7 Ad. & El. 426; *Phillips v. Homfray* (1883), 24 Ch. D. 439;

PART VI. SECT. 1.

m. Fulfilment of all obligations on real estate.]—In Nova Scotia exors. & administrators not only represent deceased personally, but represent him equally in reference to the fulfilment of all obligations charged upon his real estate.—*MCLELLAN v. MCLELLAN* (1879), 13 N. S. R. (1 R. & G.) 80.—CAN.

n. Executor a clerk of trust company—Personally liable.]—Where a clerk of a trust co. is appointed exor., he is personally liable as such.—*GROVE v. MARICO BOARD OF EXECUTORS, LTD.* (1908), T. S. 11.—S. AF.

PART VI. SECT. 2, SUB-SECT. 1.

o. Nature of liability—Not per-

Phillips v. Homfray (1890), 44 Ch. D. 694. **Refd.** *Birch v. Wright* (1786), 1 Term. Rep. 378; *Bennett v. Francis* (1801), 2 Bos. & P. 550; *Pulteney v. Warren* (1801), 6 Ves. 73; *Hughes v. Thomas* (1811), 13 East, 474; *Lansdowne v. Lansdowne* (1815), 1 Madd. 116; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578; *Finlay v. Chirney* (1888), 20 Q. B. D. 494; *Quirk v. Thomas*, [1916] 1 K. B. 516.

6448. — Contract made without consideration—Revocable by testator—Not in fact revoked at death.]—Pltf.'s wife, having lent S. £100 & taken from her an I.O.U., afterwards asked S. to pay M. the £100 when due. S. agreed & pltf.'s wife tore up the I.O.U., & S. gave M. a new I.O.U. for £100 payable to M. Pltf.'s wife then died, & pltf., as the administrator of her estate, brought an action against S. & M. to recover the amount:—*Held*: there was a good equitable assignment of the £100 as there was sufficient consideration to support it, & therefore the action failed. *Semble*: the rule that for every equitable assignment there must be consideration applies only to rights of property which are not yet in existence, & though such an assignment of existing rights, if it is made without consideration, is revocable by the assignor, yet, if he dies without revoking it, it is binding on his exor.—*GERMAN v. YATES* (1915), 32 T. L. R. 52.

6449. Extent of liability—Extends to all testator's contracts—Broken in lifetime of testator.]—Exors. are responsible on all contracts of testator broken in his lifetime, & there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required (*PARKE, B.*).—*SIBONI v. KIRKMAN* (1836), 1 M. & W. 418; 2 Gale, 51, 53; Tyr. & Gr. 777; 5 L. J. Ex. 212; 150 E. R. 497; *subsequent proceedings, sub nom. KIRKMAN v. SIBONI* (1838), 4 M. & W. 339, Ex. Ch.

Annotations:—**Mentd.** *Cooper v. Slade* (1858), 6 H. L. Cas. 746; *Cross v. Williams* (1862), 6 L. T. 434.

6450. — Broken after testator's death—Except contracts demanding personal skill.]—*SIBONI v. KIRKMAN*, No. 6449, *ante*.

6451. — Representatives not mentioned in contract—Liability not thereby affected.]—Debt lies against the administrator of one who gave a bill undertaking to lay out money in goods to be shipped for pltf., but who never executed his commission: though had the money been employed, debt would not lie.

Although the exors. are not expressed in an obligation, yet the law shall charge them, because they represent the estate of testator. The law is the same of administrators; but the heir shall never be charged without express mention of heir (*SPILMAN, J.*).—*CORE'S CASE* (1536), 1 Dyer, 20 a; 73 E. R. 42.

Annotations:—**Distd.** *Brig's Case* (1623), Palm. 364. **Refd.**

sonally liable.]—Exors. are not personally liable for work done on testator's house by direction of testator.—*CUTLER v. BARBER* (1862), 1 W. & W. 128.—AUS.

p. — Contract involving exercise of testator's personal discretion.] Exors. are not liable upon a contract of their testator, involving the exercise of his personal discretion.—*BUCKLAND*

Dutton v. Poole (1678), T. Jo. 102. **Mentd.** Gumbleton v. Grafton (1600), Cro. Eliz. 781; Flewellin v. Rave (1610), 1 Bulst. 68; Isaack v. Clark (1615), 2 Bulst. 306; Ryall v. Rolle (1749), 1 Atk. 165.

6452. ———.]—The exors. of every person are implied in himself & bound without naming (LORD MACCLESFIELD, C.).—HYDE v. SKINNER (1723), 2 P. Wms. 196; 24 E. R. 697, L. C.

Annotations:—**Refd.** Foster v. Clagget (1838), 1 Will. Woll. & H. 182; Wills v. Murray (1850), 4 Exch. 843; Edwards v. Walters, [1896] 2 Ch. 157. **Mentd.** Furnival v. Crew (1744), 3 Atk. 83; Iggulden v. May (1806), 7 East, 237; Lewis v. Stephenson (1898), 67 L. J. Q. B. 296; Muller v. Trafford, [1901] 1 Ch. 54.

6453. ——— **Obligation not expressed in deed.**]—A. delivers £20 to B. to buy prunes; B. makes a deed to A. testifying the said delivery & receipt; but the said deed has not a word of promise or *teneri* or *obligari* for payment of the said sum; B. dies intestate; an action of debt may be maintained upon this deed by A. against the administrator of B. It was so adjudged & affirmed in error.—ANON. (1536), Jenk. 195; 145 E. R. 130.

6454. ——— **Debt claimed from particular fund—Fund must be solvent.**]—(1) *Assumpsit* cannot be maintained for the arrears of an annuity against exors., because there is no personal privity.

(2) In an action against an exor. for a debt due from testator out of a particular fund, it must be averred that the fund was solvent, etc.—ANON. (1672), 1 Mod. Rep. 163; 86 E. R. 802.

6455. ——— **Contract founded on authority given by deceased—Authority revoked by death—Claim against representative for commission.**]—In an action against an administratrix the first count of the declaration stated an agreement between pltf. & intestate, by which, if pltf. succeeded in selling a certain picture, intestate agreed to pay to him £100; & alleged that pltf., after the death of intestate, did succeed in selling the picture, "which sale was confirmed by deft. as administratrix." Breach, non-payment of the £100:—**Held:** the authority to sell was revoked by intestate's death, & the confirmation of the sale, as alleged in the declaration, was not a confirmation of the contract with intestate so as to make deft. liable to pay the £100.

Semble: deft., after the confirmation of the sale, was bound to remunerate pltf. on a *quantum meruit* for effecting the sale.—CAMPANARI v. WOODBURN (1854), 15 C. B. 400; 3 C. L. R. 140; 24 L. J. C. P. 13; 24 L. T. O. S. 95; 1 Jur. N. S. 17; 3 W. R. 59; 139 E. R. 480.

SUB-SECT. 2.—SIMPLE CONTRACTS.

6456. Whether action lies against executor.]—A. lends money to B. without writing. B. dies without repaying the money. No remedy lay against B.'s exor. at common law, the exor. not being chargeable on a simple contract of his testator. Of late times the other opinion prevails,

for exors. have the goods of the testator to his use & it is highly reasonable that the testator's debts should be paid & these ought to be paid before legacies.—ANON. (1460), Jenk. 144; 145 E. R. 101.

6457. ———.]—Action on the case lies against an exor. upon a simple contract of testator.—NORWOOD v. NORWOOD & READ (1557), 1 Plowd. 180; 75 E. R. 277.

Annotations:—**Distd.** Rolls v. Germin (1596), Moore, K. B. 366. **Consd.** Slade's Case (1602), 4 Co. Rep. 91 a; Pinchon's Case (1611), 9 Co. Rep. 86 b. **Refd.** Manby v. Scot (1662), 1 Keb. 383; Rudder v. Price (1791), 1 Hy. Bl. 547. **Mentd.** Edgcomb v. Dee (1670), Vaugh. 89.

6458. ———.]—Debt does not lie against an administrator upon a contract of intestate, & the ct. will abate the writ after verdict.—HUGHSON v. WEBB (1588), Cro. Eliz. 121; 78 E. R. 378.

6459. ———.]—An action of debt will not lie against an exor. upon a simple contract with testator, & the ct. shall *ex officio* abate the writ, although deft. by his pleading has admitted the contract.—GERMYN v. ROLLS (1596), Cro. Eliz. 425; 78 E. R. 666; *sub nom.* ROLLS v. GERMINE, Cro. Eliz. 459; Moore, K. B. 366.

Annotations:—**Consd.** Edgcomb v. Dee (1670), Vaugh. 89. **Refd.** Sands v. Trevilian (1630), Cro. Car. 193.

6460. ———.]—An action on the case of an *indebitatus assumpsit* lies well; for every debt implies a promise, & is a good consideration *in facto* to found an action upon. But for a debt by simple contract due by testator no *assumpsit* lies against the exors.—SLADE'S CASE (1602), 4 Co. Rep. 91 a; 76 E. R. 1072; *sub nom.* SLADE v. MORLEY, Moore, K. B. 433; Yelv. 21; *sub nom.* MORGAN v. SLADE, Moore, K. B. 667.

Annotations:—**Consd.** Pinchon's Case (1611), 9 Co. Rep. 86 b. **Distd.** Edgcomb v. Dee (1670), Vaugh. 89. **Consd.** Anon. (1672), 1 Mod. Rep. 163; Rudder v. Price (1791), 1 Hy. Bl. 547. **Refd.** Marshalsea Case (1612), 10 Co. Rep. 68 b; Mounson v. Bourn (1638), Cro. Car. 527; Perkinson v. Gifford (1639), Cro. Car. 539; London City v. Goreo (1661), 3 Keb. 684; Manby v. Scot (1662), 1 Keb. 361; Palmer v. Lawson (1667), 1 Sid. 332; Bedford v. Alcock (1749), 1 Wils. 248; Moscos v. Macferlan (1760), 2 Burr. 1005; Hitchin v. Campbell (1772), 2 Wm. Bl. 827; Ablett v. Ellis (1798), 1 Bos. & P. 249. **Mentd.** Beckwith v. Nott (1618), Cro. Jac. 504; Hickford v. Machin (1624), Win. 82; R. v. Hampden (1637), 3 State Tr. 826; Barker v. Fox (1671), 2 Keb. 811; Thomas v. Sorrell (1673), Freem. K. B. 85; Howard v. Wood (1679), Freem. K. B. 478; London City v. Wood (1701), 12 Mod. Rep. 669; Ryall v. Rowles (1750), 1 Ves. Sen. 348; Mast v. Goodson (1772), 2 Wm. Bl. 848; Stuart v. Wilkins (1778), 1 Doug. K. B. 18; Bristow v. Waddington (1806), 2 Bos. & P. N. R. 355; Powell v. Layton (1806), 2 Bos. & P. N. R. 365; Max v. Roberts (1807), 2 Bos. & P. N. R. 454; Bullock v. Dodds (1819), 2 B. & Ald. 258; Orton v. Butler (1822), 5 B. & Ald. 652; Cumming v. Bailly (1830), 6 Bing. 363; Powell v. Ancell (1841), 3 Man. & G. 171; Routledge v. Hislop (1860), 2 E. & E. 549; Cooke v. Hemming (1868), L. R. 3 C. P. 334; Colonial Bank v. Whinney (1885), 30 Ch. D. 261; Sinclair v. Brougham [1914] A. C. 398.

6461. ———.]—(1) Debt owing on simple contract remains a debt & is not absolved by testator's death; & action of debt lies against exor. for it.

(2) Forbearance is a good consideration to maintain *assumpsit* against an exor. with assets for the debt of his testator.—FISHER v. RICHARDSON (1604), Cro. Jac. 47; Yelv. 55; 80 E. R. 39.

v. M'ANDREW (1879), 5 V. L. R. 430.—AUS.

q. Extent of liability—Extends only to property received by representative.]—Under Civil Procedure Code, s. 234, the legal representative of deceased judgment-debtor is liable summarily only in respect of property

actually received by him, or taken into his disposition.—KHUSHROBHAI NASAR-VANJI v. HORMAZSHA PHIROZSHA (1887), 1 L. R. 11 Bom. 727.—IND.

PART VI. SECT. 2, SUB-SECT. 2.

r. Whether action lies against exe-

cutor—On cheque drawn by testator.]—In June or July, F. made a gift of £500 by cheque to his daughter, on the occasion of her marriage. He requested her & her husband to hold the cheque until Sept. 15 following, but in Aug. he died, & the cheque was never presented. On an action against the exors. final judgment was ordered

Sect. 2.—On contracts of deceased: Sub-sect. 2.]

6462. — Debt assigned by bankruptcy commissioners.]—Debt will not lie against an exor. or administrator upon a simple contract debt assigned by comrs. of bkpt.—*MORGAN v. GREEN* (1630), Cro. Car. 187; W. Jo. 223; 79 E. R. 763.

6463. —.]—*PALMER v. LAWSON* (1667), 1 Sid. 332; 82 E. R. 1139.

*Annotation:—***Refd.** *Lewis v. Masters* (1694), 5 Mod. Rep. 75.

6464. Promise by testator—In consideration of marriage.]—Neither debt nor *assumpsit* will lie against an exor. upon a promise of testator's in consideration of marriage.—*STUBBINGS v. ROTHERAM* (1594), Cro. Eliz. 454; 78 E. R. 693; *sub nom.* *ROTHERAM v. STIBBING*, Moore, K. B. 691, Ex. Ch.

6465. —.]—Error of a judgment in the Queen's Bench upon an *assumpsit* against an exor.; & declares, that testator, in consideration of such a marriage, assumed to pay to pltf. £20. The error assigned was, because this action lies not against an exor. for the non-performance of testator's promise. For this cause the judgment was reversed.—*SERLE v. ROSSE* (1596), Cro. Eliz. 459; 78 E. R. 697.

6466. —.]—Payment to be one year after death.]—There is a difference between a charge, which charges the heir, & which charges the exor. If testator upon a good consideration makes a promise to pay such a sum [a marriage portion in consideration of marriage] one year after his death, his exor. shall be charged with this (*CROOK, J.*).—*BERESFORD v. GOODERIDGE* (1616), 3 Bulst. 235; 81 E. R. 198.

*Annotation:—***Refd.** *Holder v. Dickeson* (1673), Freem. K. B. 95.

6467. —.]—Promise contained in letter.]—P. C. who sent his daughter out to India, & upon that occasion wrote to his friend T. there, to whose guardianship & charge he committed her, "In regard to her settlement in life I shall be naturally anxious. . . . You may assure the young gentleman she may choose that, on his marriage with her, he shall have £2,000 sterling; nor will that be all, she is & shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced & reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of." Previous to writing this letter P. C. had made a will, in which he left his daughter a lac of rupees, or about £12,000. M. made proposals of marriage, & was informed by T. of the letter written by P. C. & as it was alleged, by Miss C. of the will then existing in her favour. The marriage took place in 1826, & in 1829 M. & his wife returned to England. P. C. afterwards made another will, in which he gave all his real & personal property for the benefit of his wife, & his two sons by her, & in case of their dying without issue, he gave the whole to the issue of his daughter. Upon a bill being filed by the daughter, insisting that testator had agreed to settle a lac of rupees upon her, & that the contract was contained in the letter written by him:—**Held:** P. C. had only contracted to give his

for the amount claimed, with interest.—*SINNAMON v. HARDGRAVE* (1890), 4 Q. L. J. 16.—**AUS.**

s. —.]—For money lent to testator.] *BULL v. PLUNKET*, [1915] V. L. R.

— *Of infant—*For goods supplied to an infant trader are entitled to retake or to sue in detinue for goods supplied to him on credit. On the death of the infant the right accrues against his exors. if the goods could have been identified

daughter £2,000 which had been already paid to her, & as there was no contract in the letter to leave her in addition any specific or definite sum, the bill must be dismissed, but, under the circumstances, without costs, & the deposit was returned.—*MOORHOUSE v. COLVIN* (1852), 21 L. J. Ch. 782; 19 L. T. O. S. 370, L. JJ.

*Annotations:—***Mentd.** *Lord v. Colvin* (1860), 3 L. T. 228; *Luff v. Lord* (1864), 11 L. T. 656.

6468. —.]—On a treaty respecting the marriage of M., who was believed to have considerable expectations from his uncle, E., the guardians of the lady desired a settlement; & M. addressed a letter to E., who answered, "I have made my will, & left you my property in the county of T., which is very considerable." The guardians still refused their consent, "until a suitable settlement shall be made by Mr. E. of real estate upon the marriage, in the usual course of settlement, & until the sum of £10,000 shall be secured to the trustees of the estate" of the father of the lady, from whom M. had some time before borrowed that money, in order to become a partner in a bank. The resolution of the trustees was communicated to E., who, in Sept. 1815, wrote, "My sentiments respecting you continue unalterable; however, I shall never settle part of my property out of my power while I exist; my will has been made for some time, & I am confident that I shall never alter it to your disadvantage. I have mentioned before, & I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, & I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made." This answer was, at the desire of E., communicated to the guardians, who, in Mar. 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited, that "M. has reason to expect that he will, upon the decease of E., become entitled, by virtue of the will of E., to a certain portion of his estate & property, pursuant to the declaration of E., contained in his letter to M. of Sept. 1815." E. was made one of the trustees of the settlement, & about twelve months afterwards, he executed the deed; but there was no evidence that he knew anything of its contents beyond the fact that he was named as one of the trustees. E. afterwards devised his property to other persons:—**Held:** M. could not maintain a suit to compel the trustees under the will of E. to convey the Tipperary estate to him, for that E.'s letters did not amount to a contract to settle it on him.—*MAUNSELL v. HEDGES, WHITE, ETC.* (1854), 4 H. L. Cas. 1039; 22 L. T. O. S. 293; 10 E. R. 769, H. L.

*Annotations:—***Refd.** *Bold v. Hutchinson* (1855), 3 Eq. Rep. 743; *Alderson v. Maddison* (1880), 5 Ex. D. 293; *Re Allen, Hincks v. Allen* (1880), 49 L. J. Ch. 553. **Mentd.** *Maddison v. Alderson* (1883), 52 L. J. Q. B. 737; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

6469. —.]—A marriage was contracted in 1839 by P. with the daughter of D., on the faith, as he alleged, of representations made by D., that he would settle his E. estate & a sum of 105,000 sicca rupees on his daughter & the children of the

notwithstanding their subsequent sale in the administration of the estate.—*Re HENDERSON* (1916), 12 Tas. L. R. 40.—**AUS.**

s. —.]—For rates levied on testator's property.]—*DUNWICH SCHOOL*

marriage. In 1855, P. died, having by his will devised the E. estate to his niece, & given only £4,000 to his daughter's children. No information could be obtained of any settlement having been in existence. A bill was filed on behalf of the infant children, who claimed to be entitled to the E. estate as against the devisee, & to the sum of rupees out of testator's estate:—*Held*: the evidence being sufficient clearly to satisfy the ct. that the alleged representations were made, & that on the faith of them the marriage was contracted, pl'ts. were entitled to have the representations made good as against testator's assets, & subject to the claims of his creditors, they must be declared to be entitled to the property in question.—*PROLE v. SOADY* (1859), 2 Giff. 1; 29 L. J. Ch. 721; 1 L. T. 309; 5 Jur. N. S. 1382; 8 W. R. 131; 66 E. R. 1.

Annotations:—*Distd.* *Re Badcock, Kingdon v. Tagert* (1880), 17 Ch. D. 361. *Refd.* *M'Askie v. M'Cay* (1868), 16 W. R. 1187; *Maddison v. Alderson* (1883), 8 App. Cas. 467. *Mentd.* *Johnstone v. Mappin* (1891), 60 L. J. Ch. 241.

6470. — Marriage settlement after promise.—Upon negotiations taking place previous to a marriage, the father of the lady wrote to the gentleman's father in these words: "When my eldest daughter married, I gave her £1,000 settled on herself, with a promise of sharing with my other daughters what I may be able hereafter to leave them; & this I can do for Augusta" (the intended bride). A settlement was then prepared in the Scottish form, & executed, whereby the father assigned £1,000 to trustees, for his daughter, & also all other means & estate whatsoever which she would be entitled to succeed to on his death. The father afterwards transferred a sum of £3,333 to the trustees of his daughter, Augusta's settlement, & he made his will, whereby he gave more property to his other daughters than to Augusta. Upon a bill filed by the daughter & her husband claiming to be entitled to an equal share with the other children of testator:—*Held*: the settlement was a final instrument, & the estate of the father could not be bound by his letter, & the daughter had no right to come upon his assets for an equal
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(1862), 31 L. J. Ch. 870; 10 W. R. 765.

6471. ——Property was settled on the marriage of A. & B. on their children, as A. & B., or the survivor of them, should appoint, & in default of appointment, on the children equally, if they survived A. & B., & the issue of any who died earlier, to take their parent's share. A. on the marriage of his daughter, promised in writing that neither he nor his wife would exercise the power, & on the faith of which promise the daughter's share in the fund in default of appointment was settled; but subsequently A. & B. did execute the power:—*Held*: a child of the daughter's marriage, who was prejudiced by the appointment, was entitled, after her mother's death, to have the appointment set aside, although her claim was paramount to her mother's settlement.—*WALFORD v. GRAY* (1865), 6 New Rep. 76; 12 L. T. 437; 11 Jur. N. S. 473; 13 W. R. 761, L. C.

6472. ——The father of a lady wrote to her intended husband that he & his wife had determined to settle on their daughter £2,000, & that in addition she would have £2,000 on her

mother's death, & at least as much on her father's death. Eleven months afterwards the marriage took place; & on that occasion a formal agreement for a settlement of £2,000 was executed, the letter not being in any way referred to. The mother died sixteen years & the father died twenty-five years after the marriage. The husband then claimed from the father's estate £4,000 under the promises contained in the letter:—*Held*: the letter had, under the circumstances, been superseded by the agreement for a settlement, & claim disallowed.—*Re BADCOCK, KINGDON v. TAGERT* (1880), 17 Ch. D. 361; 43 L. T. 688; 29 W. R. 278.

6473. ——A. verbally promised to give his daughter £200, on her marriage with B., if B.'s father would give the like amount. B. told A. that his father would do so. A. then paid the £200, after which the marriage was solemnised. B.'s father paid £50 of his £200, & died leaving B. his exor. B. claimed a right to retain £150 out of his father's assets. The judge of the county ct. decided in his favour; & an appeal from that decision was dismissed, with costs.—*WILLIAMS v. WILLIAMS* (1868), 37 L. J. Ch. 854; 18 L. T. 785.

—*See, also*, *CONTRACT*, Vol. XII., pp. 220–222, Nos. 1818–1838; & Sub-sect. 5, *post*.

6474. — Collateral promise—Promise to pay another's debt.—A collateral *assumpsit* of testator binds the exor., as to pay a debt due by J. to pl'tf. if pl'tf. will forbear suing J. for one year.—*ANON.* (1583), *Jenk.* 268; 145 E. R. 192.

6475. ——*Assumpsit* lies against an exor. on the promise of his testator to pay a mere debt; & it is not necessary to aver that he has assets; for deft. may plead it in discharge.—*LEGATE v. PINCHION* (1611), *Cro. Jac.* 294; 79 E. R. 252.

6476. ——An *assumpsit* will lie against an exor. on a collateral promise made by his testator.—*BERISFORD v. WOODROFF* (1616), *Cro. Jac.* 404; 79 E. R. 345; *sub nom.* *BERESFORD v. GOODROUSE*, 1 *Roll. Rep.* 433.

Annotations:—*Mentd.* *Bokenham v. Thacker* (1688), 2 *Vent.* 74; *Booth v. Johnson* (1703), 7 *Mod. Rep.* 143.

6477. ——A promise made by a testator to re-deliver a bond, or to do any collateral act, survives against his exor.—*FAWCET v. CHARTER* (1623), *Cro. Jac.* 662; *W. Jo.* 16; 79 E. R. 573; *sub nom.* *CARTER v. FOSSETT*, *Palm.* 329, *Ex. Ch.*

Annotation:—*Mentd.* *Hambly v. Trott* (1776), 1 *Cowp.* 371.

6478. — Moral obligation—Promise of donations.—At the death of testator certain promises by him of donations to various institutions remained unredeemed:—*Held*: these promises created no contractual obligation between the parties, & therefore, there was no legal debt due from testator's estate to the institutions.—*Re CORY, KINNAIRD v. CORY* (1912), 29 *T. L. R.* 18.

—*See, also*, *CONTRACT*, Vol. XII., pp. 201, 202, Nos. 1609–1619.

6479. — That executor shall pay certain sum—Only if executor has assets.—*WILLIAMSON v.*

TRUSTEES v. McBAETH (1853), 4 *C. P.* 228.—*CAN.*

Appointed under mutual

will.—The survivor, a usufructuary & exor. under a mutual will, can be compelled to perform contracts entered

into before the death of the deceased spouse.—*KRIEL v. KRIEL* (1880), 1 *S. C.* 49.—*S. AF.*

Sect. 2.—On contracts of deceased: Sub-sects. 2 & 3.]

LOSH (1776), cited in 7 Taunt. at p. 586; 129 E. R. 234; *sub nom.* **LOSH v. WILLIAMSON**, 1 Moore, C. P. at p. 318.

Annotations:—Consd. **Rann v. Hughes** (1778), 7 Term Rep. 350, n.; **Powell v. Graham** (1817), 7 Taunt. 580.

6480. ———.]—A promise made upon good consideration by testator, that his exor. shall pay, is a sufficient consideration for an action in *assumpsit* against the exor.; & in such action, it is neither necessary to aver assets, nor a promise by the exor.—**POWELL v. GRAHAM** (1817), 7 Taunt. 580; 1 Moore, C. P. 305; 129 E. R. 232.

Annotations:—Consd. **Farhall v. Farhall** (1871), 7 Ch. App. 123. **Refd.** **Dowse v. Coxo** (1825), 3 Bing. 20. **Mentd.** **Ashby v. Ashby** (1827), 7 B. & C. 444.

6481. Redemption of pawned goods—Death of pawnee.]—In case of a pawn, he who pledges it has time to redeem it during his life; for it is a condition solely knit by him, & to be performed by him, & the death of him to whom it was pawned is no impediment of the redemption; but it is otherwise of the death of him who pawned it; for his exor. cannot redeem it, for it is a condition personal, & being generally pawned extends only to the person of him who pawned it . . . if the pawn be of a perishable nature, as corn, oil, etc., & no time of redemption limited, & the party stays till it is perished in nature & spoilt, forasmuch as there is no default in him who took the pledge, he shall have debt for his money, & the other no remedy for his pawn, for the law of this part hath dissolved the contract; for things in their nature perishable cannot be preserved (*per* CUR.).—**RATCLIFF v. DAVIS** (1610), 1 Bulst. 29; (C.J. Jac. 244; Noy, 137; Yelv. 178; 80 E. R. 733.

Annotations:—Mentd. **Ryall v. Rowles** (1750), 1 Ves. Sen. 348; **Donald v. Suckling** (1866), L. R. 1 Q. B. 585.

6482. Annuity.]—**ANON.** (1672), No. 6454, *ante*.

6483. Agreement to receive goods—In specific quantities—Up to specific date.]—Pltfs. entered into an agreement with C. to supply him with a certain quantity of slate immediately; with a certain other quantity monthly, at a fixed price; & with any further quantity monthly, that C. might require. C. engaged to receive the slate, not exceeding 200 tons per month; & the agreement was to be in force till Jan. 1, 1838.—**Held**: pltfs. might sue the administrator of C. for refusing to receive slate sent, in pursuance of the contract, after C.'s death & before Jan. 1, 1838.—**WENTWORTH v. COCK** (1839), 10 Ad. & El. 42; 2 Per. & Dav. 251; 8 L. J. Q. B. 230; 3 Jur. 340; 113 E. R. 17.

Annotations:—Consd. **Cooper v. Jarman** (1866), L. R. 3 Eq. 98. **Mentd.** **Taylor v. Caldwell** (1863), 2 New Rep. 198.

6484. Wagering contract—Estate not liable.]—The amount of a bet lost at a horse race was paid by the loser into the hands of a third party, upon the faith of a promise of the latter to pay it to the winner. The person who received the money died before he had paid it to the winner. Claim by the winner to be paid the amount out of the assets of deceased disallowed.—**BEYER v. ADAMS, Re LAW, ARKELL'S CLAIM** (1857), 26 L. J. Ch. 841; 30

L. T. O. S. 8; 3 Jur. N. S. 709; *sub nom.* **BYERS v. ADAMS, Re LAW**, 5 W. R. 795.

—**Dbtd.** **Bridger v. Savage** (1885), 15 Q. B. D. **Refd.** **Higginson v. Simpson** (1877), 41 J. P. 200.

See, generally. GAMING &

6485. Goods ordered by commanding officer—Of volunteer corps—For use of corps.]—Where orders are given by or on behalf of the commanding officer of a volunteer corps personally for goods for the use of the corps, & the goods are accordingly supplied, the commanding officer is personally liable for the price. If he dies before they have been paid for, his personal representatives are liable, & they cannot resist payment on the ground that the property in the goods so ordered & supplied has passed to the succeeding commanding officer.—**SAMUEL BROTHERS, LTD. v. WHETHERLY**, [1907] 1 K. B. 709; 76 L. J. K. B. 357; 96 L. T. 552; 23 T. L. R. 280; *affd.*, [1908] 1 K. B. 184, C. A.

6486. Contract to repurchase shares—At times convenient to purchaser.]—W. agreed to re-purchase from pltf. certain shares for £150. The agreement contained a provision that W. should re-purchase them "at such times as suit my convenience & at no other times," & a further provision that he should at the date of the agreement hand to pltf. a sum of £20, & subsequently a further sum of an unspecified amount, the £20 to be the first of the payments towards the £150. W. paid pltf. £20 & a further sum of £15, but died before paying anything more. In an action on the contract by pltf. against W.'s administratrix:—**Held**: the contract was not put an end to by the death of W., & pltf. was entitled to recover out of his assets £115, the balance of the £150.—**BARNES v. WILSON** (1913), 29 T. L. R. 639.

Consideration generally, *see* CONTRACT, Vol. XII., pp. 172–233.

SUB-SECT. 3.—COVENANTS.

6487. General rule.]—The exors. do represent the person of testator, as to the performance of covenants, by him to be by covenant performed (COKE, C.J.).—**THURSEDEN v. WARTHE'S EXECUTORS** (1613), 2 Bulst. 158; 80 E. R. 1031.

Annotation:—Refd. **Moffatt v. Laurie** (1855), 15 C. B. 583.

6488. Liability although not mentioned in deed.]—An action will lie against exors. on a covenant of their testators though they are not mentioned in the deed.

It is otherwise of heirs for an heir shall not be charged without naming him but the exor. shall (*per* CUR.).—**ANON.** (1536), 1 Dyer, 14 a; 73 E. R. 30.

6489. ———.]—Exors. are bound [on testator's bond] without naming, but not the heir (*per* CUR.).—**HUNT v. SWAIN** (1665), 1 Keb. 890; 1 Sid. 248; T. Rayn. 127; 83 E. R. 1303.

Annotation:—Mentd. **Jackson v. Pesked** (1813), 1 M. & S. 234.

6490. Binding on covenantor only—By custom.]—A covenant binds by the custom [of the City

PART VI. SECT. 2, SUB-SECT. 3.
c. Covenant to build house—Death of covenantor—Payment of cost of building.]—A. entered into a con-

tract for a lease, one of the terms being that H. should erect certain buildings. H. died before the buildings were erected:—**Held**: the cost of the buildings was payable out of H.'s

personal estate.—**Re HART** (1905), 1 Tas. L. R. 100.—**AUS.**

d. Covenant to settle property.]—A., before the marriage of his daughter

of Bristol] the covenantor, but does not extend to his exors.; & a custom shall be taken strictly (*per* CUR.).—WADE & BEMBOE'S CASE (1583), 1 Leon. 2; 74 E. R. 2.

6491. Covenant to build house—Within specified time—Death of covenantor before period expired.]—If a man be bound to build a house for another before such time, & he which is bound dies before the time, his exors. are bound to perform this (COKE, C.J.).—QUICK & HARRIS v. LUDBORROW (1615), 3 Bulst. 29; 1 Roll. Rep. 196; 81 E. R. 25.

Annotation :—*Reid*. Siboni v. Kirkman (1836), 1 M. & W. 418.

6492. —.—Pltf.'s father seised in fee of land, articles to pay J. £1,000 to build a house on the premises, & dies before the house is built. Pltf. the heir, may compel the builder to build it, & his father's exor. to pay for it.—HOLT v. HOLT (1694), 2 Vern. 322; 1 Eq. Cas. Abr. 274, pl. 11; 23 E. R. 808.

Annotation :—*Apld*. Lechmere v. Lechmere (1735), Cas. temp. Talb. 80.

6493. Covenant to supplement deficiency—Of sale price on sale of land—On notice of sale given—Notice given only to executor.]—If A. agree for himself, his exors., etc., to pay B. his proportion of the money that lands shall sell for less than such a sum, "so as B. give him notice in writing of the said sale," this amounts to a covenant; on which the exor. of A. having notice of the sale, is liable to an action, although no notice was given to his testator.—HARWOOD & BINCKS v. HILLIARD (1677), 2 Mod. Rep. 268; 3 Keb. 848; Freem. K. B. 247; 86 E. R. 1065.

Annotation :—*Consd*. Wills v. Murray (1850), 4 Exch. 843.

6494. Covenant to make marriage settlement.]—If the exor. be averred to have assets in his hands sufficient to pay the specialties [a marriage portion promised by testator] he should answer the debt (COOKE, J.).—KERCHER'S CASE (1610), Godb. 176; 78 E. R. 107, Ex. Ch.

6495. —.—WILKS v. WILKS (1713), 2 Eq. Cas. Abr. 35; 22 E. R. 30, L. C.

6496. Covenant to purchase & settle realty—Payment of interest pending settlement.]—Money upon a marriage is agreed to be laid out in land in fee, & settled on husband & wife, remainder to their sons in tail male, remainder to the husband, his heirs & assigns for ever; A covenant, that until the money be laid out in land, the interest to be paid to the persons who were to have the rents of the lands when purchased. The husband purchased several estates, but never settled any, & died intestate sans issue, leaving a considerable real estate to descend to his heir-at-law. The heir may compel the administratrix, the widow, to invest this money in the purchase of lands; & the lands descended upon him will not go in satisfaction of the covenant, except as to such as were purchased after the covenant.—LECHMERE v. LECHMERE (LADY) (1735), Cas. temp. Talb. 80; 2 Eq. Cas. Abr. 31; 25 E. R. 673, L. C.; *varying*, S. C. *sub nom*. LECHMERE v. CARLISLE (EARL) (1733), 3 P. Wms. 211.

ons :—*Consd*. Barham v. Clarendon (1852), 10 Hare. *Reid*. Sowden v. Sowden (1785), 1 Bro. C. C. 582; Cogan v. Stephens (1835), 5 L. J. Ch. 17. *Mentd*. Brown

v. Dawson (1705), Prec. Ch. 240; Wrightson v. A.-G. (1737), West temp. Hard. 187; Sanders v. Sanders (1739), West temp. Hard. 686; Deacon v. Smith (1743), 3 Atk. 323; Ellinor v. Garton (1745), 9 Mod. Rep. 480; Pulteney v. Darlington (1782), 1 Bro. C. C. 223; Devese v. Pontet (1785), 1 Cox, Eq. Cas. 188; Russell v. Smythies (1786), 1 Cox, Eq. Cas. 215; Wilson v. Piggott (1794), 2 Ves. 351; Garthshore v. Chalie (1804), 10 Ves. 1; Perry v. Phillips (1810), 17 Ves. 173; Tubbs v. Broadwood (1831), 2 Russ. & M. 487; Wrightson v. Macaulay (1845), 4 Hare, 487; Mathias v. Mathias (1858), 3 Sm. & G. 552; *Re* De Lancey (1869), L. R. 4 Exch. 345; *Re* Ffennell's Estate, Wright v. Holton, [1918] 1 Ch. 91.

6497. Covenant to pay annuity.]—The father of two illegitimate children executed a bond conditioned for the payment of an annuity of £30 for the support of them & their mother during their joint natural lives, or, in case of the death of the children, during the natural life of the mother. One of the children having died :—*Held* : the exor. of the obligor was liable on the bond for the arrears of the annuity accruing after the death of that child.—JAMES v. TALLENT (1822), 5 B. & Ald. 889; 1 Dow. & Ry. K. B. 548; 106 E. R. 1416.

6498. Covenant to pay debt—Debt paid by testator's heir—Re-imbursment from executors.]—ARMITAGE v. METCALF (1666), 1 Cas. in Ch. 74; 22 E. R. 701, L. C.

Annotations :—*Reid*. Anon. (1679), 2 Cas. in Ch. 4; Tweddell v. Tweddell (1786), 2 Bro. C. C. 101.

6499. — Out of specific fund—Fund chargeable.]—An engagement of intestate to pay money out of a growing fund, was a lien upon the administrator chargeable upon that fund.—CLARK v. ADAIR (1772), Lofft, 69; 98 E. R. 537.

6500. — Money advanced on bond.]—Relief in equity, on an instrument which had been drawn by mistake as a joint bond, & in respect of which the remedy at law was gone; the nature of the transaction implying the obligee's right to demand the consideration from the parties severally. The solvent obligor being dead, the demand available in equity both against his exor. & heir, though the real estate was liable only in default of the personalty. Though a legal obligation, & penalty may have become void at law, the condition of it is considered in equity, as an agreement to pay, regard being had to the nature of the consideration.—BISHOP v. CHURCH (1751), 2 Ves. Sen. 371; 28 E. R. 238, L. C.

Annotations :—*Reid*. Hoare v. Contencin (1779), 1 Bro. C. C. 27; Burn v. Burn (1797), 3 Ves. 573; Devaynes v. Nobles, Slocch's Case (1816), 1 Mer. 539. *Mentd*. Ball v. Storie (1823), 1 Sim. & St. 210; Devaynes v. Noble, Baring v. Noble (1831), 2 Russ. & M. 495; Beresford v. Browning, Browning v. Beresford (1875), L. R. 20 Eq. 564; Kinnaird v. Trollope (1889), 42 Ch. D. 610.

6501. — Under mortgage — Intervening surrender of mortgage security—Leasehold.]—A lessee mortgaged the demised premises, & covenanted for himself & his heirs with the mtgee., his exors., administrators & assigns, to repay the mtge. money. Afterwards, the mtgee. joined with the mtgor. in surrendering the lease, for the purpose of having a new lease granted to the latter; which they agreed should be assigned to the mtgee., by way of security, for his principal & interest; & that that arrangement should not prejudice any other security that the mtgee. might have for his debt. A new lease was granted to the mtgor., but he did not make any assignment of it in

B. to C., undertook to settle £2,000 upon them & the issue of their marriage. During A.'s lifetime he paid the interest on this amount, & by a codicil to his

will he directed that the sum should be deducted from the inheritance of his daughter :—*Held* : after the death of A., that B. was entitled to rank as a

creditor upon his estate for the sum.—PILLANS v. PORTER'S EXECUTORS (1887), 5 S. C. 420.—S. AF.

e. Covenant not to sell intoxicating

Sect. 2.—On contracts of deceased: Sub-sects. 3, 4 & 5.]

pursuance of the agreement. After his death the mtgee. assigned to A., the principal & interest due to him, & his security for them under the deed of surrender:—*Held*: the covenant in the mtge. of the original lease was not extinguished by the surrender, & the assignee was a specialty creditor of the mtgor. in respect of it.—*GREENWOOD v. TAYLOR* (1845), 14 Sim. 505; 9 Jur. 480; 60 E. R. 454.

6502. Covenant to settle property—On support of charities.]—Testator, by deed in his lifetime, covenanted with the vicar of W. for himself, his heirs, exors., & administrators, that he or they would invest a sum of money in govt. securities, in the respective corporate names of the vicar of W., the churchwardens of W., & the archdeacon of C., upon trust to apply the interest thereof to the support of a school, & to certain other charitable purposes:—*Held*: the exors. of testator were bound to perform the covenant, & they could not discharge themselves by merely showing that the parties could not, by law, take the property in their corporate characters.—*TUFNELL v. CONSTABLE* (1838), 7 Ad. & El. 798; 3 Nev. & P. K. B. 47; 1 Will. Woll. & H. 113; 7 L. J. Q. B. 106; 2 Jur. 79; 112 E. R. 670.

Annotation:—*Mentd.* *Kekewich v. Manning* (1851), 1 De G. M. & G. 176.

6503. — Unnecessary sale of property by executor.]—W., by voluntary conveyance, assigned to pltf., the exors., etc., his furniture, effects, etc., in trust, to the use of W., settlor, for his life, & at his death, in equal moieties, to the use of two nieces of W., named. Covenant by W., for himself & his heirs & exors., to do all further reasonable acts & things for further & better assigning & transferring the said furniture, etc., to pltf., on the same trusts as by pltf. or his counsel should be reasonably advised. W. was in possession of the furniture, etc., till his death. On that event, deft., his exor., became possessed, & sold the whole. Pltf. sued deft., as exor. of W., on the above covenant for further assurance, averring, in his declaration, that it was at no time necessary to sell any of W.'s chattels, to pay any debt of W., & that there were no creditors of his who could impeach the validity of the indenture, & assigning, by way of breaches, first, that deft. refused to deliver possession of the furniture to pltf.; & secondly, that deft. converted & sold the same, not alleging that he sold it in market overt:—*Held*: pltf. was entitled to recover, at least on the last breach, the value of the furniture possessed by W. from time of his executing the deed to his death & afterwards sold by deft. as his exor., though trover might have been sustained for the same cause of action.—*WARD v. AUDLAND* (1847), 16 M. & W. 862; 9 L. T. O. S. 105; 153 E. R. 1441.

Aulton v. Atkins (1856), 18 C. B. 249.
Browne's Settlement. Trusts, Horner v.
 (1916), 61 Sol. Jo. 27. *Mentd.* *Winter v. Winter*
 9 W. R. 747; *Re Harcourt, Danby v. Tucker* (1883),
 R. —; *Ridgway, Ex p. Ridgway* (1885), 15
 Q. B. D. 447; *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

6504. — Moneys appropriated to testator's own use.]—A. covenanted under hand & seal to settle a sum of stock upon certain trusts, & subsequently

appropriated this sum to his own use:—*Held*: the violation of the obligation so entered into constituted a debt by specialty in favour of the trustees against the assets of A.—*Re HAWKSWORTH, LOVELL v. SHERWIN* (1853), 2 Eq. Rep. 329; 22 L. T. O. S. 167; 2 W. R. 34.

6505. Consideration — Forbearance to declare party defaulter.]—A bond given to persons to whom the obligor had lost bets on horse-races, which he was unable to pay, in order to prevent them from taking the steps which, under the conventional code established among betting men, they were entitled to take, & which would have been followed by consequences involving the obligor in considerable pecuniary loss:—*Held*: valid, & provable against the obligor's estate.—*BUBB v. YELVERTON* (1870), L. R. 9 Eq. 471; 39 L. J. Ch. 428; 22 L. T. 258; 18 W. R. 512.

Annotations:—*Reid.* *Hyams v. Stuart King*, [1908] 2 K. B. 696. *Mentd.* *Re Deerpur, Ex p. Seaton* (1891), 64 L. T. 273; *Re Browne, Ex p. Martingell*, [1904] 2 K. B. 133; *Chapman v. Franklin* (1905), 21 T. L. R. 515; *Cooper v. Willis* (1906), 22 T. L. R. 582; *Goodson v. Grierson*, [1908] 1 K. B. 761.

6506. — Not to expose misconduct.]—To an action on a bond against deft. as exor., he pleaded that pltf. had seduced & committed adultery with the wife of deft.'s testator, between whom & pltf. it was agreed that, in consideration that deft.'s testator would not expose & make public the conduct of pltf., he would not sue on the bond. On demurrer to the plea:—*Held*: there was no valid consideration for the agreement, & the plea was bad.—*BROWN v. BRINE* (1875), 1 Ex. D. 5; 45 L. J. Q. B. 129; 33 L. T. 703; 24 W. R. 177.

—*See, also.* *CONTRACT*, Vol. XII., pp. 189–196, Nos. 1445–1567.

6507. Promise by covenantor not to sue—Verbal promise only—In consideration of promisee taking out administration.]—In covenant by A. against B. as administratrix of C., for breaches of covenant in an indenture between A. & C., B. pleaded that she took out administration at the request of A., & upon his promise that he would not charge or seek to charge her as administratrix or otherwise, with any breaches of the covenants contained in the indenture, & that no assets had come to her hands since the taking out of administration. Pltf. having replied, taking issue upon the promise:—*Held*: pltf. was entitled to judgment *non obstante veredicto*, on the ground of the insufficiency of such parol promise to bar the action.—*HARRIS v. GOODWYN* (1841), 9 Dowl. 409; 2 Man. & G. 405; Drinkwater, 73; 2 Scott, N. R. 459; 10 L. J. C. P. 62; 133 E. R. 803.

Annotation:—*Reid.* *Thames Haven Dock Co. v. Brymer* (1850), 5 Exch. 696.

Consideration generally, *see* *CONTRACT*, Vol. XII. pp. 172–234.

Covenants in leases.]—*See* Sub-sect. 12, *post*.

SUB-SECT. 4.—CONTRACTS RELATING TO ARBITRATION.

Agreement to submit to arbitration—No proviso for event of death.]—*See* *ARBITRATION*, Vol. II., pp. 393–395, Nos. 524–542.

Liquor—In contract for sale of land.]—An agreement superadded to a contract of sale of land, that the purchaser

shall not allow the sale of intoxicating liquor on the land without the permission of the vendor, is binding upon

the exor. of the purchaser.—*VILLE DUTCH REFORMED CHURCH v. BOHMAN* (1893), 10 S. C. 67.—*S. AF.*

— **Proviso for event of death.**]—See **ARBITRATION**, Vol. II., pp. 395, 396, Nos. 513–553.

6508. Performance of award—Liability of representatives for—Time of performance arriving after testator's death.]—An exor. is bound to perform an executory order in an award against his testator, although the time of performance does not happen till after his death.—**KINGUEL v. KNAPMAN** (1583), Cro. Eliz. 11; 2 Leon. 155; 78 E. R. 277.

Annotations:—**Refd.** Joyner v. Vyner (1680), T. Raym. 415. **Mentd.** Boson v. Sandford (1689), 1 Show. 101; Bradbury v. Morgan (1862), 7 L. T. 104.

6509. ———.]—Agreement between vendor & purchaser, of a copyhold estate, in which they covenant for themselves, & their representatives, to fulfil the contract & to refer the question of value. One of the parties dying, the representatives cannot annul the decision of the referee, by showing an error in his estimate or compel the acceptance of the penalty under which the agreement was secured in satisfaction of their breach of contract.—**BELCHIER v. REYNOLDS** (1751), 3 Keny. 87; 96 E. R. 1318.

SUB-SECT. 5.—AGREEMENTS TO LEAVE LEGACY.

6510. In consideration of marriage—Marriage of promisee & third party.]—An *assumpsit* lies against an exor. on a promise made by testator to leave pltf. a sum of money in consideration of marriage.—**SANDERS v. ESTERBY** (1617), Cro. Jac. 417; 79 E. R. 356; *sub nom.* **SAUNDERS v. ESTERBY**, Jenk. 336, Ex. Ch.

6511. ———.]—Articles in marriage to pay £500 with his daughter by such a time, & to secure her all his real & personal estate when he died; & afterwards he devised all his personal estate to another, which being contrary to the articles, that agreement was decreed to be performed.

Exors., defts., shall stand & be exors. in trust for pltf., that they may have the benefit of the marriage agreement (*per CUR.*).—**HARMORE v. BROOK** (1674), Cas. temp. Finch, 183; 2 Rep. Ch. 92; 23 E. R. 101.

6512. ———.]—Proposals of marriage written by the lady's brothers, acting by her father's authority, stated that "T., the father, also intends to leave a further sum of £10,000 in his will to Miss T., to be settled on her & her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject, of course, to revision; but they will be sufficient for B. to act upon." B., upon receiving the proposals, provided a jointure as required by them for his intended wife, & then married her. In the settlement, afterwards executed, there was no mention of this sum of £10,000; & it was not left by T. in his will:—**Held**: his estate was liable to the payment of the £10,000, with interest from the end of one year after his death.—**HAMMERSLEY v. DE BIEL (BARON)** (1845), 12 Cl. & Fin. 45; 8 E. R. 1312, H. L.; *affg.* S. C. *sub nom.* **DE BEIL v. THOMSON** (1841), 3 Beav. 469.

Annotations:—**Distd.** Moorhouse v. Colvin (1852), 19 L. T. O. S. 370; Maunsell v. White (1854) 4 H. L. Cas. 1039; Warden v. Jones (1857), 23 Beav. 487. **Consd.** Kay v. Crook (1857), 3 Sm. & G. 407. **Apld.** Prole v. Soady (1859), 2 Giff. 1. **Consd.** Loffus v. Maw (1862), 3 Giff. 592. **Distd.** Sands v. Soden (1862), 31 L. J. Ch. 870. **Folld.** Walford v. Gray (1865), 5 New Rep. 235; Williams v. Williams (1868), 37 L. J. Ch. 854. **Apld.** Thomson v. Simpson

(1870), L. R. 9 Eq. 497. **Consd.** Alderson v. Maddison (1880), 5 Ex. D. 293; *Re* Badcock, Kingdon v. Tagert (1880), 17 Ch. D. 361; Viret v. Viret (1880), 50 L. J. Ch. 69; Syngé v. Syngé, [1894] 1 Q. B. 466. **Refd.** Bold v. Hutchinson (1855), 20 Beav. 250; Cooper v. Wormald (1859), 27 Beav. 268; Goldicutt v. Townsend (1860), 28 Beav. 445; Loxley v. Heath (1860), 29 L. J. Ch. 313; Hargreaves v. Pennington (1864), 34 L. J. Ch. 180; Lautour v. A.-G. (1864), 5 New Rep. 102; Coverdale v. Eastwood (1872), 21 W. R. 216; Erskine v. Adeane, Bennett's Claim (No. 2) (1873), 42 L. J. Ch. 849; Coles v. Pilkington (1874), L. R. 19 Eq. 174; Dashwood v. Jernyn (1879), 12 Ch. D. 776; *Re* Allen, Hincks v. Allen (1880), 49 L. J. Ch. 553; Maddison v. Alderson (1883), 8 App. Cas. 467; *Re* Fickus, Farina v. Fickus, [1900] 1 Ch. 331; *Re* Broadwood, Edwards v. Broadwood (No. 2) (1912), 56 Sol. Jo. 703. **Mentd.** Lassence v. Tierney (1849), 1 Mac. & G. 551; Surcome v. Pinniger (1853), 3 De G. M. & G. 571; Wood v. Midgley (1854), 5 De G. M. & G. 41; Barkworth v. Young (1856), 4 Drew. 1; Stroughill v. Gulliver (1856), 27 L. T. O. S. 258; Warden v. Jones (1857), 2 De G. & J. 76; Forshaw v. Welsby (1860), 30 Beav. 243; Traill v. Baring (1864), 3 New Rep. 362; *Re* British & American Steam Navigation Co., Ward's Case (1870), L. R. 10 Eq. 659; McManus v. Cooke (1887), 35 Ch. D. 681; Johnstone v. Mappin (1891), 60 L. J. Ch. 241; Sharman v. Sharman (1892), 67 L. T. 834; *Re* Holland, Gregg v. Holland, [1902] 2 Ch. 360; *Re* Bankruptcy Notice, [1924] 2 Ch. 76.

6513. ———.]—A father, on a treaty for his eldest son's marriage, promised by letter to settle a sum of money forthwith, & to recognise his son in common with the rest of his family in the future provisions of his will. The sum of money was settled, & the marriage took place on the faith of the representation in the letter. By his will testator made a substantial provision for his son, but much less than equal to those made for his other children:—**Held**: the promise was so vague as to the amount, that consistently with it testator might have given all his property to a stranger, & the promise was satisfied by the provision in the will & codicil.—**KAY v. CROOK, KAY v. KAY** (1857), 3 Sm. & G. 407; 29 L. T. O. S. 10; 3 Jur. N. S. 104; 5 W. R. 220; 65 E. R. 715.

Annotations:—**Consd.** Laver v. Fielder (1862), 32 Beav. 1; *Re* Allen, Hicks v. Allen (1880), 49 L. J. Ch. 553. **Refd.** M'Askie v. M'Cay (1868) 16 W. R. 1187.

6514. ———.]—In 1873 a father, prior to the marriage of his daughter, in a letter to her intended husband stated: "You are of course aware that with my large family Eliza will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." The intended husband accepted the letter as giving him some rights, & the marriage took place. The father afterwards acquired a large fortune, & died in 1898. His wife predeceased him. By his will he left a legacy of £2,000 to the daughter, & gave the residue of his estate equally between six of his other seven children. The daughter & her husband claimed by virtue of the letter to be entitled to an equal eighth share of the father's estate:—**Held**: (1) the letter did not constitute a contract by the father, but was merely an expression of his intentions; (2) if it were a contract, it was an obligation to leave, not an equal eighth share, but some portion or share of his estate to the daughter, & was fulfilled by the legacy.—*Re* **FICKUS, FARINA v. FICKUS**, [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749; 48 W. R. 250; 44 Sol. Jo. 157.

6515. ———.]—The father of an intended bride, when asked by the husband to make a settlement, wrote: "I have made a will leaving V., the bride, a legacy of £5,000, & I do not intend to alter it. I shall leave the allowance of £150 as it is." The will was afterwards revoked:—**Held**: the letter followed by the marriage constituted an enforceable contract as to the £5,000, but not as

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to the £150, & B. was entitled to prove against the estate of the father for the £5,000 by way of damages.—*Re BROADWOOD, EDWARDS v. BROADWOOD* (No. 2) (1912), 56 Sol. Jo. 703, C. A.

6516. — Marriage of testator & promisee.]—Action of the case brought [against exor.] upon a promise made to the woman when she was sole, in consideration the woman would marry testator he promises that if the woman should over-live testator, that then he would leave her worth £100, & they aver that she did marry him; & after the husband died & did not leave her worth £100 & deft. pleads *non assumpsit*, & found for pltf.—*SMITH v. STAFFORD* (1618), 1 Brownl. 18; Noy, 26; Hut. 17; Hob. 216; 123 E. R. 638.

Annotations:—Folld. Clark v. Thomson (1620), Cro. Jac. 571. *Reid. Holder v. Dickeson* (1673), Freem. K. B. 95; *Cage v. Acton* (1699), 1 Ld. Raym. 515. *Mentd. Lloyd v. Lee* (1718), 1 Stra. 94.

6517. — — —.]—BROWN v. SAVAGE (1674), Cas. temp. Finch, 184; 23 E. R. 101.

—*See, also, CONTRACT, Vol. XII., pp. 220–222, Nos. 1818–1838.*

6518. Moral obligation—Repayment of money borrowed.]—A person borrowed a sum of money in the year 1807. In 1815, he stated, by parol, to the attorney of the party entitled to it, that he had made provision by his will, & had directed his exors. to pay it at his death. He died in 1825, without having made any such provision. In an action against the exor. :—*Held*: the promise was good, & the money recoverable. Neither Stat. Frauds nor Stat. Limitations applied to the case & a moral obligation to pay was a sufficient consideration for the promise.—*WELLS v. HORTON* (1826), 2 C. & P. 383, N. P.; *subsequent proceedings*, 4 Bing. 40.

—*See, also, CONTRACT, Vol. XII., pp. 201, 202, Nos. 1609–1619.*

6519. Consideration of concurring in sale—Concurrence of beneficiaries—Deceased selling as executor—Having interest in sale.]—S. being an exor. of G. & devisee of his real estate in trust for his children, induced the children to concur in the sale, & conveyance of G.'s real estate to his own brother & partner, he himself being interested in the purchase, by a verbal promise to leave them by his will as much or more than they would get under the will of G. :—*Held*: although the sale was necessary for payment of debts, & the full value was given, there was a sufficient consideration for the promise, & the estate of S. was bound to pay the children of G. a sum equal in amount to the clear residue of G.'s estate.—*RIDLEY v. RIDLEY* (1865), 34 Beav. 478; 6 New Rep. 11; 34 L. J. Ch.

PART VI. SECT. 2, SUB-SECT. 5.

6521 i. Work done in expectation of legacy.]—Testator agreed that if pltf. would supply him from time to time with money & goods, & would labour for him on his farm pltf. should be paid therefor at testator's death, & that testator would devise to pltf. testator's farm in payment. Pltf. was testator's son, & the agreement stated in the declaration was verbal, & as proved was to pay pltf. with the farm :—*Held*: no action would lie because the agreement showed that testator never intended to incur any personal liability to pltf.; it related to an interest in land, which could not be enforced.—*FRIAR v.*

WILMOT (1884), 23 N. B. R. 546.—CAN.

i. — Damages for breach of contract.]—B. promised to provide for A. who had been acting as housekeeper at a weekly wage & had, in addition, been performing nursing duties for him.

A. stayed with B. till his death, but B. made no provision for A. by will or otherwise. In an action brought by A. against the administrator of B.'s estate claiming damages for breach of contract by B. :—*Held*: pltf. was entitled to judgment.—*O'SULLIVAN v. NATIONAL TRUSTEES EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD.*, [1913] V. L. R. 173.—AUS.

462; 12 L. T. 481; 11 Jur. N. S. 475; 13 W. R. 763; 55 E. R. 720.

Annotation:—Mentd. Davey v. Shannon (1879), 4 Ex. D. 81.

6520. Consideration of establishing school—Money promised for maintenance.]—S. promised in consideration of pltf's. establishing a school at a certain place] to leave pltf's. £3,000 by will for the maintenance of the school, but subsequently left all her property to deft. :—*Held*: pltf's. were entitled to be paid £3,000 from the estate by way of damages for breach of contract.—*Re SOAMES, CHURCH SCHOOLS CO., LTD. v. SOAMES* (1897), 13 T. L. R. 439.

Consideration generally, *see* CONTRACT, Vol. XII., pp. 172–234, Nos. 1270–1936.

6521. Work done in expectation of legacy.]—Where a man does work in expectation of a legacy, he cannot sue the exor.—*OSBORN v. GUY'S HOSPITAL (GOVERNORS)* (1726), 2 Stra. 728; 93 E. R. 812.

Annotations:—Apld. Baxter v. Gray (1842), 3 Man. & G. 771. *Reid. Hulse v. Hulse* (1856), 17 C. B. 711.

6522. — — —.]—If pltf. [a stockbroker] had undertaken the several services proved without any view to a reward, but with a view to a legacy, he could not set up any demand against testator's estate, but of that the jury were to decide (*LORD KENYON, C.J.*).—*LE SAGE v. COUSSMAKER* (1794), 1 Esp. 187, N. P.

6523. — Agreement for payment by legacy only—No proof of such agreement.]—A surgeon forbore to send in his bill for medicines & attendance to a deceased patient in her lifetime, under the expectation of a legacy. On her death, finding she had left him nothing, he made a claim on her exors. :—*Held*: he was entitled to recover, no proof having been given of any understanding between the parties that he was to be paid only by a legacy.—*BAXTER v. GRAY* (1842), 3 Man. & G. 771; 4 Scott, N. R. 374; 11 L. J. C. P. 63; 133 E. R. 1349.

Annotation:—Consd. Hulse v. Hulse (1856), 17 C. B. 711.

6524. — — —.]—SHALLCROSS v. WRIGHT, No. 6545, *post*.

6525. — — —.]—Where a niece had been induced to render valuable services to her uncle on the faith of his representation that by so doing she would become entitled to the benefit of the trusts created in her favour by a codicil to his will, & testator afterwards revoked such trusts :—*Held*: he had no right to make such revocation, & the trusts in favour of the niece declared by such codicil must be performed.

Testator's representation . . . binds the property which he devised to pltf. as completely . . . as if he had bound himself in consideration of money

g. — — —.]—Where services are rendered upon the faith of a promise to leave property by will, which testator fails to perform, an action may be maintained against his representatives to recover compensation for the services in the shape of damages for breach of the previous promise.—*SMITH v. MCGUGAN* (1892), 21 A. R. 542.—CAN.

h. — Reasonable compensation awarded.]—H. K. died at a very advanced age, having been faithfully cared for during the last three years of his life by his son J. K. & his son's wife. He had promised in consideration of this attention & care to devise

not to revoke the gift, & had made the person named in his will a purchaser of the property devised (STUART, V.-C.).—*LOFFUS v. MAW* (1862), 3 Giff. 592; 32 L. J. Ch. 49; 6 L. T. 346; 8 Jur. N. S. 607; 10 W. R. 513; 66 E. R. 544.

Annotations:—*Appld.* *Coles v. Pilkington* (1874), L. R. 19 Eq. 174. *N.F.* *Maddison v. Alderson* (1883), 8 App. Cas. 467. *Refd.* *M'Askie v. M'Cay* (1868), 16 W. R. 1187. *Mentd.* *Traill v. Baring* (1864), 3 New Rep. 362.

6526. —.]—An intestate induced a woman to serve him as his housekeeper without wages for many years & to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, & afterwards signed a will, not duly attested, by which he left her the life estate:—*Held*: there was no contract, & even if there had been & although the woman had wholly performed her part by serving till intestate's death without wages, yet her service was not unequivocally & in its own nature referable to any contract, & she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land.—*MADDISON v. ALDERSON* (1883), 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 47 J. P. 821; 31 W. R. 820, H. L.; *affg.* S. C. *sub nom.* *ALDERSON v. MADDISON* (1881), 7 Q. B. D. 174, C. A.

Annotations:—*Consd.* *Humphreys v. Green* (1882), 10 Q. B. D. 148. *Appld.* *Hodson v. Heuland*, [1896] 2 Ch. 428. *Consd.* *Miller & Aldworth v. Sharp*, [1899] 1 Ch. 622. *Refd.* *A.-G. v. Hubbuck* (1884), 13 Q. B. D. 275; *Mills v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Blackburn v. Blackburn* (No. 1) (1891), 36 Sol. Jo. 27; *Davis v. Leicester Corpn.*, [1894] 2 Ch. 208; *Licenses Insee. Corpn. & Guarantee Fund v. Lawson* (1896), 12 T. L. R. 501; *Coleman v. North* (1898), 47 W. R. 57; *Isaacs v. Evans* (1899), 16 T. L. R. 113; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331; *Thursby v. Eccles* (1900), 70 L. J. Q. B. 91; *Chaproniere v. Lambert*, [1917] 2 Ch. 356; *Re Bankruptcy Notice*, [1924] 2 Ch. 76; *Kawlinson v. Ames* (1924), 69 Sol. Jo. 112. *Mentd.* *Re Beetham, Ex p. Broderick* (1886), 18 Q. B. D. 380; *Gillman, Spencer v. Carbutt* (1889), 61 L. T. 281; *Lucas v. Dixon* (1889), 22 Q. B. D. 357; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Morris v. Baron*, [1918] A. C. 1.

SUB-SECT. 6.—AGREEMENTS FOR SALE OF LAND.

See, generally, SALE OF LAND.

6527. Executor of vendor—Agreement to purchase copyholds—Purchase-money partly paid.—A. agrees with B. to purchase a copyhold for two lives; pays £200 in part, & was to pay the remainder in three months, & then to name his lives & take up his copy; a ct. is held, the three months expire, & the lives not named nor the copy taken up, & B. dies suddenly; & the manor comes to one who was not bound by this agreement. The exor. of B. decreed to repay to £200.—*AWBRY v. KEEN*

one of his houses to a son of J. K., but died intestate:—*Held*: J. K. was entitled to receive reasonable compensation for the services rendered out of H. K.'s estate.—*Re KENNEDY'S ESTATE* (1877), 11 N. S. R. (2 R. & C.) 539.—*CAN.*

k. — *Whether action lies for specific performance.*—Where a contract by testator, founded upon valuable consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of testator may be compelled to make good his obligation. But where testator, the grandfather of

pltf., promising to make provision for her by will, adopted her at the age of twelve, & maintained her, while she worked for him, for nine years, but left her nothing by his will, & paid her nothing for her services:—*Held*: the promise & the consideration were of too uncertain a character for specific performance.—*WALKER v. BOUGHNER* (1889), 18 O. R. 448.—*CAN.*

PART VI. SECT. 2, SUB-SECT. 6.

l. Option to purchase—Granted by lessor to lessee.—A. granted a lease to B. in May, 1899. The lease contained an option, whereby B. had the right to

(1687), 1 Vern. 472; 1 Eq. Cas. Abr. 28; 23 E. R. 597.

6528. — Sale of vendor pendente lite—Title of vendor declared bad—Repayment of purchase-money.—A decree was made against A. setting aside, as fraudulent, a purchase by an agent from his principal; & a reconveyance, & the usual accounts of rents & purchase-money were directed, in which an allowance was to be made for substantial repairs & lasting improvements. A. sold & conveyed part of the property, *pendente lite*, & died before the accounts were completed; a supplemental bill was filed against the purchasers, & the heir & personal representatives of A.; the bill charged that the purchasers, in case of eviction, claimed compensation out of the estate of A. The conveyances, *pendente lite*, being set aside:—*Held*: (1) the purchasers were entitled in this suit, as against their co-defts., the personal representatives of A., to an order for the repayment of their purchase-money & were entitled as against pltf. to an allowance for substantial repairs & lasting improvements, but no great relief could be given them in this suit; (2) the heir & personal representatives were proper parties to the supplemental bill.—*TREVELYAN v. WHITE* (1839), 1 Beav. 588; 48 E. R. 1069.

6529. — Specific performance decreed against.—A. having agreed to purchase a real estate, the purchase-money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, as to all the worldly goods that it had pleased God to bless him with, gave & bequeathed to his wife & two sons, all his goods, cattle, chattels, personal estate, & effects whatsoever; & in case they died without issue, etc., gave the children's share of the personal estate & effects over; testator dying before the purchase could be completed:—*Held*: the agreement ought to be specifically performed, & the words of the will, being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son & his heirs, etc.—*CAVE v. CAVE* (1762), 2 Eden, 139; 28 E. R. 849.

Annotation:—*Mentd.* *Carr v. Ellison* (1786), 2 Bro. C. C. 56.

6530. — Liability for costs of suit.—Where a person, having contracted to sell or lease an estate, dies leaving a will, which renders the institution of a suit for specific performance necessary, his estate must bear the costs.—*SANDERSON v. CHADWICK* (1863), 2 New Rep. 414.

See, generally, SPECIFIC PERFORMANCE.

— *Devolution of proceeds of sale.*—*See* Part III., Sect. 2, sub-sect. 4, *ante*.

6531. Executor of purchaser—Possession by

purchase the leased property within two years. A. died in Nov. 1899, & his widow was appointed administratrix of his estate. B. claimed his right to purchase within the limited time:—*Held*: A.'s representative was bound by the option.—*YUILL v. WHITE* (1901), 22 C. L. T. 312; 5 Terr. L. R. 275.—*CAN.*

m. Executor of vendor—No title in vendor—Verbal agreement to exchange—Whether specific performance allowed.—Pltf. lent a piano to deft.'s wife. She offered him two lots of land in exchange for it which pltf. accepted. No written agreement or memorandum was signed by any one. Deft.'s wife

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purchaser before death—No further steps to complete.]—A. verbally agreed with B., his solr., for the sale of land to B. This agreement, which was never reduced to writing, provided that B. should bear all expenses of making out the title, that possession should be at once given, & that the purchase-money should be paid at a fixed future date with interest in the meantime. B. entered into possession, but took no further steps in completion of the purchase, & before the purchase-money became due, died. In a suit by A. for specific performance against the exor. of B.:—*Held*: B., as A.'s solr., ought to have had an agreement in writing prepared & the exor. was bound to complete the purchase & pay the costs of the suit.—*BRAFIELD v. SCRIVEN* (1873), 22 W. R. 202.

SUB-SECT. 7.—CONTRACTS RELATING TO COMPANIES.

6532. Deceased promoter—Liability to repay commission received—Improper suppression of information.]—Pltf. co. was formed to purchase certain collieries & ironworks offered for sale by trustees of the late B. A contract was ultimately entered into between the trustees & C., by which they undertook to sell the property in question for about £300,000 to a co. to be formed by C. C. undertook to bring out the co., or forfeit a deposit of £20,000 in the event of his being unsuccessful. At the time of the completion of this contract another agreement was entered into by which the vendors agreed to allow C., in compensation for his services, & the risk run, a commission of £85,000 out of the purchase-money. There was an understanding between C. & the other persons engaged in the formation of the co. as to the distribution of this commission. This agreement, as to commission, was entirely omitted from the prospectus on the grounds that it was only an arrangement between the vendors & their agents. The co. was formed chiefly by deft. G.'s exertions, who, as between himself & C., undertook all the risk, provided the £20,000 deposit & stipulated to receive £65,000 out of the £85,000. The purchase was completed, & the commission paid & divided. This action was subsequently brought to make defts. jointly & severally liable to repay the commission money:—*Held*: the estate of a deceased promoter was liable to repay a sum of £500 received by him.—*BAGNALL v. CARLTON* (1877), 6 Ch. D. 371; 47 L. J. Ch. 30; 36 L. T. 653; 26 W. R. 243; *on appeal*, 6 Ch. D. 392, C. A.

Annotations:—Mentd. *Evans v. Davis* (1878), 10 Ch. D. 747; *Nant-y-glo & Blaenau Ironworks Co. v. Grave* (1878), 12 Ch. D. 738; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918; *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396; *Lydney & Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85; *Capel v. Sim's Ships Compositions Co.* (1888), 57 L. J. Ch. 713; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; *Salford Corpn. v. Lever*, [1891] 1 Q. B. 168; *Re Liberator Permanent Benefit Bldg. Soc.* (1894), 10 T. L. R. 537; *Edwards v. Hood-Barrs*, [1905] 1 Ch. 20; *Jubilee Cotton Mills v. Lewis*, [1924] A. C. 958.

died, & deft. took out letters of administration to her estate. Neither pltf. nor any one claiming under him ever entered into possession of the lots. Deft.'s wife did not own the lots, &

had no right or interest in them; they were deft.'s lots. In an action against deft. as administrator of his wife's estate:—*Held*: specific performance of the agreement made with her could not

Membership—Representatives as members.]—*COMPANIES*, Vol. IX., pp. 199, 404–409, Nos. 1239, 1240, 2591–2631.

Underwriting shares.]—*See COMPANIES*, Vol. IX., p. 184, Nos. 1165, 1166.

Contract to take shares—Liability of executors of agent.]—*See COMPANIES*, Vol. IX., pp. 260, 262, Nos. 1613, 1623.

6533. Calls on shares—Due after payment of simple contract debts—Notice to executors.]—Testator, who died in 1837, was possessed of shares in a banking co., & had executed the co.'s deed, by which he agreed to pay instalments & perform covenants. His exors. received the dividends upon the shares, & paid the simple contract debts. The banking co. failed in 1847, & upon being wound up under Winding-Up Act, the exors. were called upon for a contribution, & the assets being insufficient, a claim was made by the official manager, that the payments to simple contract creditors by the exors., should be disallowed:—*Held*: although the exors., by receiving the dividends, had implied notice of the liabilities of testator in respect of the shares, yet as the liability had not arisen till after the simple contract debts were paid, they could not now be disallowed.—*HENDERSON v. GILCHRIST* (1853), 1 Eq. Rep. 215; 22 L. J. Ch. 970; 21 L. T. O. S. 191; 17 Jur. 570; 1 W. R. 426.

Annotation:—Reid. *Re Royal Bank of Australia* (1855), 3 Sm. & G. 272.

6534. — Shares issued as fully paid up—Not in fact so paid up—Knowledge of testator's agent.]—*Re HALIFAX SUGAR REFINING Co.* (1891), 7 T. L. R. 293, C. A.

Transmission of shares—On death.]—*See COMPANIES*, Vol. IX., pp. 404–409, Nos. 2591–2631; Vol. X., pp. 1135, 1136, Nos. 8011–8014.

6535. Surrender of shares—To director on behalf of company—Company unable to purchase shares.]—Where a testator transferred his shares in a co. to a director on behalf of the co., the co. not having power to purchase the shares:—*Held*: the exors. were contributories.—*Re VALE OF NEATH & SOUTH WALES BREWERY Co., RICHMOND'S EXECUTORS' CASE* (1849), 3 De G. & Sm. 96; 13 L. T. O. S. 422; 13 Jur. 727; 64 E. R. 396.

— No provision in constitution of company.]—*See COMPANIES*, Vol. IX., p. 419, No. 2709.

Regulation & management—Service of notice of meeting.]—*See COMPANIES*, Vol. IX., p. 568, Nos. 3770, 3771.

Winding up—Liability for calls.]—*See COMPANIES*, Vol. X., p. 917, Nos. 6280, 6281.

— Unregistered companies.]—*See COMPANIES*, Vol. X., p. 1096, No. 7680.

6536. Joint stock & private banks—Liability of estate of shareholder—To judgment creditor of bank.]—A judgment creditor of a banking co. may prove his debt in this ct., against the assets of a deceased shareholder, without first obtaining the leave of a ct. of law to issue execution against testator's assets under 7 & 8 Vict. c. 113, s. 13.—*Re WALTON'S ESTATE* (1857), 23 Beav. 480; 53 E. R. 189.

—.]—*See, further*, *BANKERS*, Vol. III., pp. 150, 151, 158, Nos. 189, 190, 200, 223.

be decreed.—*ADOLPH v. GOOD* (1912), 20 W. L. R. 401; 1 W. W. R. 936; 5 Sask. L. R. 106; 1 D. L. R. 750.—*CAN.*

SUB-SECT. 8.—CONTRACTS BETWEEN HUSBAND AND WIFE.

See HUSBAND & WIFE.

SUB-SECT. 9.—GUARANTEE.

See GUARANTEE.

SUB-SECT. 10.—IMPLIED OBLIGATIONS.

A. In General.

6537. General rule.]—Wherever a relation exists between two parties, which involves the performance of certain duties by one of them & the payment of reward to him by the other, the law will imply, or a jury may infer, a promise by each party to do what is to be done by him. Therefore, an action may be maintained against the exors. of an innkeeper on his implied promise to keep safely & without diminution the goods of his guest. The exors. are also liable in tort, the loss of the goods being a wrong committed within Civil Procedure Act, 1833 (c. 42), s. 2.—*MORGAN v. RAVEY* (1861), 6 H. & N. 265; 30 L. J. Ex. 131; 3 L. T. 784; 25 J. P. 376; 11 W. R. 376; 158 E. R. 109.

*Annotations:—*Consd. *Batthyany v. Walford* (1887), 36 Ch. D. 269. *Mentd.* *Baylis v. Lintott* (1873), L. R. 8 C. P. 345; *Herbert v. Markwell* (1881), 45 L. T. 649; *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11; *Robb v. Green*, [1895] 2 Q. B. 1; *Jackson v. Watson*, [1909] 2 K. B. 193.

6538. —.]—The possessor of Austrian entailed estates died domiciled in, & left property in, England. By the law of Austria the possessor is under an obligation to hand over the property to the successor in as good a state as when he received it, & is liable for deterioration, whether voluntary or permissive, unless it occurs without any fault of his, & he is entitled to compensation for improvements made by him. The successor brought a creditor's action in England against the English extrix., in which it was admitted by the parties that there was some deterioration, & also that some improvements had been made. A decree for administration was made with liberty to pltf. to take proceedings, in the cts. of the countries in which the estates were situate, to establish the amount of his claim:—*Held*: the objection that pltf.'s claim was for a tort analogous to waste, & therefore, according to English law, died with the person, & could not be enforced in an English ct., was not sustainable, for the deteriorations were not to be regarded as torts but as breaches of an obligation in the nature of an implied contract.

It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained; but if the position of the parties was such that the law of England would imply a contract from that position, then on *assumpsit* the exor. might still be held liable (*COTTON, L.J.*).—*BATTHYANY v. WALFORD* (1887), 36 Ch. D. 269; 56 L. J. Ch. 881; 35 W. R. 814; *sub nom. Re BATTHYANY-*

STRATTMANN, BATTHYANY-STRATTMANN v. WALFORD, 57 L. T. 206, C. A.

Annotations:—Mentd. *Re Piercy, Whitwham v. Piercy* (1894), 64 L. J. Ch. 249; *Harvey v. North-Eastern Marine Engineering Co.* (1902), 5 W. C. C. 30.

6539. Detention of goods by deceased.]—Defts. demurred for that they are exors. & therefore not chargeable in law to account for foods received by testator, but ordered to answer.—*BEECHER v. HASELWOOD* (1579), Ch. Cas. in Ch. 143; 21 E. R. 85.

6540. Improper receipt of Crown salary.]—The exor. of a person who has annually received a salary from the Treasury by virtue of a privy seal, but which salary was not legally due to him, although ordered by the Lord Treasurer, shall be liable to an action of account for the moneys received.—*DODINGTON'S CASE* (1597), Cro. Eliz. 545; 78 E. R. 791; *sub nom. R. v. DODDINGTON*, Moore, K. B. 475.

Annotation:—Mentd. *A.-G. v. Perry* (1734), 2 Com. 481.

6541. Funeral expenses of wife—Liability of husband's estate—Although parties living apart.]—The estate of a husband in the possession of his devisee is liable to the funeral expenses of testator's wife although she lived apart from him on a separate maintenance.—*BERTIE v. CHESTERFIELD (LORD)* (1723), 9 Mod. Rep. 31; 88 E. R. 296.

Annotation:—Mentd. *In the Goods of Spitty* (1852), 16 Jur. 92.

6542. Payment over of money received—Funds received as assignee in bankruptcy.]—The assignee under an old commission, at the time of his death, in 1818, had moneys in his hands, consisting of dividends declared, but unclaimed:—*Held*: the amount was recoverable from his representatives, by the assignees subsequently appointed.—*GREEN v. WESTON* (1837), 3 My. & Cr. 385; 7 L. J. Ch. 67; 1 Jur. 955; 40 E. R. 974, L. C.

Annotations:—Reid. *Peunell v. Deffell* (1853), 4 De G. M. & G. 372. *Mentd.* *Re Wilcocks, Ex p. Woodford* (1850), 19 L. J. Bcy. 8; *Tucker v. Hernaman* (1853), 4 De G. M. & G. 395.

6543. — Moneys received as trustee—Not as receiver—Discretion as to payment.]—Testator, in his lifetime, was appointed, by deed, by a mtgor. & mtgee., to receive the rents of the mtged. estates, & by the terms of the deed testator was, after allowing taxes & repairs, to hold the remaining rents in trust; first, to pay taxes; secondly, costs of collection; thirdly, commission; fourthly, premiums on policies of insurance; & fifthly, "in satisfaction, on Jan. 6, & July 6, of the accruing interest due on the principal moneys secured, & to pay the ultimate surplus, if any, to pltf.," with a proviso, that if on those days, Jan. 6, & July 6, testator should have rents & profits in hand, it should be lawful for him to retain the whole or part, for the purpose of paying the premium in that year on the policies. Testator did not execute the deed. There was an admitted balance at testator's death, as appeared by an account rendered by the exor.:—*Held*: testator was not a mere receiver but a trustee, & was not bound by the terms of the deed to pay the surplus existing on each Jan. 6, & July 6, but had a discretion, under the control of a ct. of equity, to keep the funds in his hands, if reasonably necessary.—

PART VI. SECT. 2, SUB-SECT. 10.—A.

n. Agreement to collect rents on party's death—Whether agreement to employ binding on executors.]—An

agreement that S. shall collect rents in B.'s estate after his death for a commission, & that B.'s exors. shall pay the commission on all rents collected, does not bind B.'s exors. to employ S.

The ct. will not infer an agreement to employ where a contract to do so does not appear on the face of the agreement, although both parties may have contemplated an employment.—

Sect. 2.—On contracts of deceased: Sub-sect. 10, & B.

BARTLETT v. DIMOND (1845), 14 M. & W. 49; 14 L. J. Ex. 372; 5 L. T. O. S. 56; 153 E. R. 385.
Annotation:—Mentd. Pardoe v. Price (1847), 16 M. & W. 451.

6544. Misrepresentation as to charge on land—Made to intending purchaser—Liability for difference between actual & represented charge.]—A mtgor. represented to an intending purchaser that the estate was only liable to a mtge. for £20,000 to G. & Co., an additional sum of £10,000 being secured on the mtgor.'s personal property. The whole sum had in fact been originally secured on the land, & G. & Co. denied that they had ever done anything to part from their security on the land. After the death of the mtgor., G. & Co. filed a bill of foreclosure, & obtained from the purchaser the whole £30,000:—*Held*: as between the purchaser & the exors. of the mtgor., the representations made by the mtgor. to the intending purchaser, were equivalent to a contract with him, & the personal property of the mtgor. was liable to the extent of the £10,000.—*A.-G. v. COX, PEARCE v. A.-G.* (1850), 3 H. L. Cas. 240; 10 E. R. 93.

Annotations:—Mentd. Re Oriental Commercial Bank, Ex p. Maxoudoff (1868), L. R. 6 Eq. 582; *Re Barned's Banking Co., Forwoods' Claim* (1869), 5 Ch. App. 18; *Re Morrish, Ex p. Hart Dyke* (1882), 22 Ch. D. 410; *Lybbe v. Hart* (1885), 29 Ch. D. 8; *Shaw v. Lomas* (1888), 59 L. T. 477; *Revill v. Bethell*, [1918] 1 K. B. 638.

6545. Inevitable damage & expense caused to third party—Infectious disease in house of third party—Destruction of goods.]—(1) Testator, while on a visit, died of a malignant fever. The furniture was by the advice of the medical advisers destroyed, & the friend was obliged to remove from his house:—*Held*: testator's estate was liable for the damage.

(2) A physician attended testator for many years, without having obtained any remuneration. He stated that testator had promised to pay him for his services, or leave him an equivalent. He did neither:—*Held*: the physician had no claim against the estate, & a payment made to him by the exor. was disallowed.—*SHALLCROSS v. WRIGHT* (1850), 12 Beav. 558; 19 L. J. Ch. 443; 16 L. T. O. S. 257; 14 Jur. 1037; 50 E. R. 1174.

Annotation:—As to (2) Rejd. Re Itownson, Field v. White (1885), 29 Ch. D. 358.

6546. Support of bastard child—By mother—Death of mother.]—The obligation on a woman to support her bastard child is a mere personal one in case of her dying intestate, no action for the of the

v. TEMPLE (1863), 4 B. & S. 491; 3 New Rep. 34; 33 L. J. Q. B. 1; 9 L. T. 256; 28 J. P. 71; 9 Jur. N. S. 1239; 12 W. R. 9; 122 E. R. 544.

Annotation:—Rejd. Re Harrington, Wilder v. Turner (1908), 99 L. T. 723.

6547. Maintenance of lunatic—Arrears.]—W., a lunatic not so found, was maintained by the guardians of the S. Union in a pauper lunatic asylum from 1882 until her death in 1898. In 1894, W. became entitled to a share of a fund, & in 1895, a person was appointed to exercise the powers of a committee of W., but the fund

was not in fact paid into ct. to the credit of W. until after W.'s death. In 1895 the guardians gave notice to the Master in Lunacy of their claim in respect of the past & future maintenance of W. After the death of W. this action was commenced by the guardians against the administratrix of W., claiming arrears of maintenance:—*Held*: (1) the expenses of maintenance was a debt of the lunatic; (2) arrears of maintenance could only be recovered in respect of six years prior to the commencement of the action.—*Re WATSON, STAMFORD GUARDIANS v. BARTLETT*, [1899] 1 Ch. 72; 68 L. J. Ch. 21; 79 L. T. 462; 47 W. R. 359.

Annotations:—As to (1) Folld. Wandsworth Union v. Worthington, [1906] 1 K. B. 420. *As to (2) Distd. Wandsworth Union v. Worthington*, [1906] 1 K. B. 420.

6548. ———.]—A lunatic not so found by inquisition was maintained in a pauper lunatic asylum by the guardians of a union from 1876 until her death in 1904 at an annual cost of about £21. The lunatic was entitled to property producing about £8 per annum. By an order in lunacy a receiver was appointed of this income of the lunatic, & was directed to apply the same in & for the maintenance & benefit of the lunatic. Pursuant to this order the receiver paid the income to the guardians from 1887 to 1903 for the maintenance of the lunatic, & the guardians in their books appropriated each payment of the receiver as a payment on account of the arrears of maintenance due to them at the date of each payment. At the death of the lunatic considerable arrears of maintenance were due to the guardians, & in an action by them against the administratrix of the lunatic for these arrears the administratrix contended that the guardians were only entitled to six years' arrears prior to the date of the writ:—*Held*: under the circumstances the payment by the receiver took the case out of Stat. Limitations, & the guardians were entitled to payment of all the arrears due to them.—*WANDSWORTH UNION v. WORTHINGTON*, [1906] 1 K. B. 420; 75 L. J. K. B. 285; 95 L. T. 331; 70 J. P. 191; 54 W. R. 422; 22 T. L. R. 284; 50 Sol. Jo. 273; 4 L. G. R. 320.

———.]—*See, generally, LUNATICS.*

6549. Undertaking to pay for building alteration.]—A testator promised to defray the cost of certain alterations in a chapel in which he was interested, provided the total expense did not exceed a certain amount. Estimates were obtained & submitted to testator, & thereafter the provost of the chapel entered into a formal contract for the work. Testator died after some of the work had been executed, but before a contract for the remainder had been entered into:—*Held*: testator's estate was liable for the cost of so much only of the work in respect of which a contract had been entered into before testator's death.—*Re MOUNTGARRET (VISCOUNT), INGILBY v. TALBOT* (1913), 29 T. L. R. 325.

B. Breaches of Trust.

(a) In General.

generally, TRUSTS & TRUSTEES.

6550. Liability though no benefit derived from

SENIOR v. SCAIFE (1884), 3 N. Z. L. R. 69 (S. C.).—N.Z.

*o. Maintenance of destitute son.]—*Under Destitute Persons Act, 1894, an order may be made against the exors. of the father of a destitute

person for maintenance out of the estate, although no order has been made against the father whilst living. But such an order cannot be made without evidence that there are assets in the hands of the exors.—*SMILKY v. MURRAY* (1897), 16 N. Z. L. R. 327.—N.Z.

PART VI SECT. 2, SUB-SECT. 10.—B. (a).

*p. Improper dealings with trust property—Liability of firm to which money paid.]—*M. & C. were trustees of a settlement on a married woman.

breach.]—Settlement of a renewable lease in trust out of the rents & profits to pay the fines & charges of renewing; & subject thereto, for husband & wife successively for life; remainder to the first son at twenty-one. The trustees, not having renewed in the lives of the tenants for life, answerable, as for a breach of trust, though not deriving any benefit from it; liable therefore, with the assets of the tenants for life, with reference to their enjoyment, & the occupying tenant having purchased the husband's life interest, to procure a renewal for the son: the trustees indemnified against the expense by an application of the assets of the tenants for life in the first instance; but the occupying tenant not charged in their favour. —*MONTFORT (LORD) v. CADOGAN (LORD)* (1810), 17 Ves. 485; 34 E. R. 188; *varied* (1816), 2 Mer. 3, L. C.

*Annotations:—***Consd.** *Shaftesbury v. Marlborough* (1833), 2 My. & K. 111. **Refd.** *Jones v. Jones* (1846), 7 L. T. O. S. 157; *Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Hughes v. Wells* (1852), 9 Haro, 749; *Jenkins v. Robertson* (1853), 1 Eq. Rep. 123; *Richardson v. Jenkins* (1853), 1 Drew. 477; *Holland v. Holland* (1869), 4 Ch. App. 449, n.; *Isaac v. Wall* (1877), 46 L. J. Ch. 576; *Re Parkers, Ex p. Sheppard* (1887), 19 Q. B. D. 84.

6551. Loss occasioned happening after trustee's death—Continuing liability on representatives.]—In 1806, a husband at Calcutta, being desirous of making a provision for his wife & the issue of the marriage, entered into a bond to A. for payment to him of £10,000; & he, at the same time, conveyed an estate in the East Indies to A., upon trust to sell it, & to raise the £10,000, or so much of it as the estate would produce: & it was provided by the deed of conveyance that as soon as A., his exors., etc., should have realised the net & clear sum of £10,000 by means of the sale or of the bond, & should, at the request & direction of the husband & wife, or the survivor, in writing, first made for that purpose, have remitted the same to England, to B., C., & D., in the best, & as to him, his exors., etc., should seem the most eligible manner, he should stand discharged of the trusts, & should not be answerable for the payment of the bills in which the same should be remitted: & it was declared that B., C., & D. should invest the money in govt. or real security, upon trust for the husband for life; with remainder for the wife for life; with remainder for the children of the marriage; & that A., until the sale, should be seized of the premises, & after the sale & until the moneys should be remitted, should be interested in the proceeds, upon the same trusts as were before declared concerning the £10,000 to be remitted to the trustees. The property was sold in the year 1811 for 145,000 sicca rupees, & the purchase-money was, in 1813, received by A.'s house of business in Calcutta, who were the agents of the husband, & who then, by the direction of A., set apart 80,000 sicca rupees, being then equal in value to £10,000 sterling, & carried the same to the account of A. & another person, as trustees of the settlement, & held the remainder of the purchase-money to answer the husband's drafts. In 1818 A. retired from the house of business. In 1825 he died. In 1826 the husband requested the surviving partners of A. to invest the 80,000 sicca rupees in a note of the East India Co., which they did, in the names of their firm. In 1827 the

husband died. In 1832 the wife required A.'s exors., who were in England, to procure a remittance of the £10,000 to England; whereupon they directed the house of business to transmit that amount in bills, payable to B. & D., C. being dead. The house of business thereupon sold the note of the East India Co., & drew a bill upon their correspondents in London, payable to A.'s exors.: but, before the bill became due, both the house in Calcutta & their correspondents in London had failed, & the bill was never paid. Except as before mentioned, no request was ever made by the husband & wife, or the survivor, to remit the money. Upon a bill by the children of the marriage against A.'s exors.:—*Held*: A.'s estate was liable to make good the sum of £10,000 sterling.—*BACON v. CLARK* (1836), 3 My. & Cr. 294; 40 E. R. 938, L. C.

*Annotation:—***Consd.** *Lander v. Weston* (1855), 1 Drew. 389.

6552. ———.]—(1) A testator, who died in 1841, directed his trustees to sell his real estate, & gave them some discretion therein. Instead of selling, they mortgaged, & retained the estate:—*Held*: they had committed a breach of trust, & the estate having become depreciated they were liable for the loss.

(2) Where a loss occasioned by a breach of trust does not happen until after the death of the trustee, his assets are equally liable.

(3) Two deceased trustees having committed a breach of trust by mortgaging, instead of selling testator's real estate, & accounts of the estate being necessary:—*Held*: notwithstanding the 32nd General Order of Aug. 1841, a suit could not be maintained to charge the estate of one trustee, & take the accounts, in the absence of the representative of the other.—*DEVAYNES v. ROBINSON* (1857), 24 Beav. 86; 27 L. J. Ch. 157; 29 L. T. O. S. 244; 3 Jur. N. S. 707; 5 W. R. 509; 53 E. R. 289.

*Annotations:—***As to** (1) **Consd.** *Grayburn v. Clarkson* (1868), 3 Ch. App. 605. **Refd.** *Darke v. Williamson* (1858), 22 J. P. 705. **As to** (3) **Refd.** *Smurthwaite v. Hannay* (1894), 6 R. 299.

6553. ———.]—Where a loss has been occasioned by wilful default, since the duty of the trustee was to do that act which he has omitted to do, he by omitting to do the act has been guilty of a breach of trust for the consequences of which he is liable though they do not develop themselves until long after (*PAGE WOOD, L.J.*).—*GRAYBURN v. CLARKSON* (1868), 3 Ch. App. 605; 37 L. J. Ch. 550; 18 L. T. 494; 16 W. R. 716, L. J.

*Annotations:—***Refd.** *Sculthorpe v. Tipper* (1871), L. R. 13 Eq. 232; *Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991.

6554. No knowledge of breach of trust—Funds distributed among beneficiaries—Admission of assets sufficient to answer breach.]—The exors. of a deceased trustee, having admitted the receipt of assets which would have been sufficient to answer a particular breach of trust committed by their testator, besides his other debts:—*Held*: they were chargeable with the loss occasioned by such breach of trust, although they had paid all his debts of which they had any

C. for some years acted, alone, but at his death M. made inquiries as to the money & found that it had been permitted by C. to get into debt's hands, & had been by him mixed up with partnership moneys & employed in

deft. firm's business. On bill by M. against debt. alone:—*Held*: the members of debt's firm were jointly & severally liable, & neither his partner nor the representative of C., the deceased trustee, was a necessary

party.—*MACKEY v. CAUGHEY* (1875), 1 V. L. R. 56.—**AUS.**

q. Loss occasioned by carelessness—Extent of representative's liability.]—Deft. was sole extrix. of

Sect. 2.—On contracts of deceased: Sub-sect. 10, B. (a) & (b).]

knowledge out of the assets, & had distributed the whole surplus among the residuary legatees many years before, & at a time when they had no notice of the breach of trust, or of any claim in respect of it.—**KNATCHBULL v. FEARNHEAD** (1837), 3 My. & Cr. 122; 1 Jur. 687; 40 E. R. 871, L. C.

Annotations:—*Apld.* **Egg v. Devey** (1847), 16 L. J. Ch. 509. *Consd.* **Cambray v. Draper** (1852), 20 L. T. O. S. 14. *Folld.* **Newcastle, etc., Banking Co. v. Hymers** (1856), 22 Beav. 367. *Apld.* **Story v. Gape** (1856), 2 Jur. N. S. 706. *Consd.* **Waller v. Barrett** (1857), 24 Beav. 413. *Apld.* **Taylor v. Taylor** (1870), L. R. 10 Eq. 477. *Refd.* **Low v. Carter** (1839), 1 Beav. 426; **Turner v. Nicholls** (1853), 1 W. R. 157; **Dean v. Allen** (1855), 20 Beav. 1; **Turquand v. Kirby** (1867), L. R. 4 Eq. 123.

6555. Breach by joint trustees—Estates of both liable—Assets of one estate only admitted—Right of contribution from other estate.]—By the decree, the estates of two deceased trustees were declared severally liable to replace a fund. The representatives of one only admitted assets, & the decree directed payment by them, & an account of the estate of the other. The whole being paid by the former:—*Held*: their right to contribution against the estate of the latter constituted a mere simple contract, although as against both estates, the demand was a specialty debt.—**PRIESTMAN v. TINDALL** (1857), 24 Beav. 244; 53 E. R. 351.

Annotation:—*Refd.* **Robinson v. Harkin**, [1896] 2 Ch. 415.

6556. Improper dealings with trust property—Improper payments to life tenant.]—Trustees of stock sold it & lent the money to the tenant for life on improper security. One of them died, & the survivor received the money lent, & invested it in a different security, & shortly afterwards sold it out & again lent it to the tenant for life: the fund was lost:—*Held*: the original breach of trust was not cured, & the estate of deceased trustee was liable for the whole fund.—**LANDER v. WESTON** (1855), 3 Drew. 389; 25 L. J. Ch. 235; 26 L. T. O. S. 254; 2 Jur. N. S. 58; 4 W. R. 158; 61 E. R. 951.

6557. ———.]—Where a fund to which a married woman was entitled for her life, in remainder expectant on her husband's death, was paid over to her husband, with her written consent, by a person who had notice of her interest in the fund. On a bill filed after the husband's death, which occurred nearly nineteen years afterwards:—*Held*: (1) the wife & her trustee were entitled to have an annuity, payable to the wife during her life & equivalent to the interest of the money so improperly paid, raised out of the real assets of the person by whom such payment had been made, without praying for a decree on behalf of all the other creditors; (2) the right of the trustee of the settlement to sue was not barred by Stat. Limitations.—**CRESSWELL v. DEWELL** (1863), 4 Giff. 460; 3 New Rep. 148; 10 L. T. 22; 10 Jur. N. S. 354; 12 W. R. 123; 66 E. R. 787.

6558. ——— Appointed fund paid back to appointer.]—The donee of a power appointed the whole trust fund to her daughter, one of the objects. The money was paid by the trustee at the daughter's written request of even date with the appointment to the mother's banking account;

the daughter was married soon after, & her husband received a portion only of the fund:—*Held*: the representatives of the trustee were liable to replace the trust fund.—**MACKECHNIE v. MARJORI-BANKS** (1870), 39 L. J. Ch. 604; 22 L. T. 841; 18 W. R. 993.

6559. ——— Fraudulent conveyance—By cestui que trust to trustee.]—Pltf. having been induced by the fraud & undue influence of L., her agent & trustee, to execute deeds by which, without any consideration, she conveyed all her property to him absolutely, filed a bill against his exor. to set them aside. Her former solr., who prepared & had the custody of the deeds, was joined as a deft. for purposes of discovery, & costs were prayed against him, as well as the exor., on the ground of neglect of duty. The bill also charged him with fraud, which, however, was not proved. Throughout the litigation he acted as the solr. of the deft. exor. A decree was made, setting aside the deeds with costs against L.'s estate, & the solr. was ordered to pay the whole costs of the suit, in case L.'s estate proved insufficient to pay them.—**BAKER v. LOADER** (1872), L. R. 16 Eq. 49; 42 L. J. Ch. 113; 21 W. R. 167.

Annotations:—*Refd.* **Clark v. Girdwood** (1877), 7 Ch. D. 9; **Phosphate Sewage Co. v. Hartmont** (1877), 5 Ch. D. 394; **Welman v. Welman** (1880), 15 Ch. D. 570.

6560. ——— Unauthorised investment.]—The two trustees of a marriage settlement invested trust moneys in partly paid up bank shares upon which there was considerable liability for uncalled up capital & which were unauthorised by the provisions of the settlement. The shares were transferred to them jointly & they were registered in the books of the banking co. as joint holders of the shares. In 1897 one of the trustees died, & the survivor was afterwards registered as the holder of the shares. In 1899 the co. effected a reduction of its shares. In 1899 the co. effected a reduction of its share capital & of the liability on its shares, & in 1901 went into voluntary liquidation, when the surviving trustee was called upon to pay a considerable sum to discharge the liability for uncalled up capital, due upon the shares, which he paid accordingly. In an action by him against the representatives of his late co-trustee claiming contribution from the estate of deceased, to the extent of half of the sum he had paid to the liquidators, the representatives admitted assets, but repudiated any liability to contribute to the relief of the surviving trustee, who had retained the shares for four years after the death of their testator, & had given them no notice of the investment. It was proved at the trial that after 1896 there was no market for the shares:—*Held*: the representatives of deceased trustee were bound to contribute out of his estate half the sum the surviving trustee had paid to the liquidators.—**JACKSON v. DICKINSON**, [1903] 1 Ch. 947; 72 L. J. Ch. 761; 88 L. T. 507; 19 T. L. R. 350.

6561. Deceased acting as constructive trustee—Property of infant—Improperly sold by father.]—According to the law of Peru a father is entitled to administer the estate of his infant child, & to receive for his own benefit the income during the child's minority. A father during the infancy of his daughter sold, as it was alleged, improperly,

her husband, who was the trustee of J. No proper books of account had been kept by deceased, & the taking of accounts in J.'s estate was attended with difficulty & delay. The liability

exceeded the whole of the assets in deft.'s hands as extrix. & deft. paid over the whole of her husband's estate:—*Held*: deft. was only bound to answer for her husband's liability to the

extent of assets received by her, & then only when such assets were ascertained by the taking of accounts.—**ALBERTSON v. ABBOTT**, [1921] N. Z. L. R. 773.—N.Z.

a part of her property for much less than it proved to be worth. After his death the daughter claimed compensation out of his estate for the loss occasioned by this disadvantageous sale:—*Held*: the father stood in such a fiduciary position towards the daughter that the rule *actio personalis moritur cum persona* did not apply to the demand, & as the sale had been made without justification, the father's estate must account for the amount which would have been received from the property had it been retained in specie.—*CONCHA v. MURRIETA, DE MORA v. CONCHA* (1889), 40 Ch. D. 543; 60 L. T. 798, C. A.; *reversd.* on the facts, *sub nom.* *CONCHA v. CONCHA*, [1892] A. C. 670, H. L.

Annotations:—*Mentd.* *Re De Nicols, De Nicols v. Curlier* (1898), 67 L. J. Ch. 419; *Perlak Petroleum Maatschappij v. Deen*, [1924] 1 K. B. 111.

6562. — Wife's property seized by husband—To his own use.]—A legacy of £300 to which a married woman was entitled for her separate use, was paid to her, less duty on her separate receipt in 1876. Her husband, knowing it was a legacy to her, got possession of the money, & retained it until his death in Dec. 1894, & though she continued from time to time to ask him for it, she never took any proceedings to recover it from him. The evidence disclosed that the husband had received the proceeds of other legacies which had been left to his wife, which he was entitled to *jure mariti*, as they were not for her separate use, & came to her prior to Married Women's Property Act, 1882 (c. 75), & that he had made her an allowance of £100 a year during his life, & left her an annuity of £350 by his will. After her husband's death the widow brought an action against his exors. to recover the amount of the legacy, less duty, & interest:—*Held*: (1) even assuming that the husband was not aware that the legacy was for his wife's separate use, he had notice of the will which was sufficient to put him on inquiry, & he became therefore, & continued to be, a trustee of the money for his wife until his death, so that Stat. Limitations did not apply; (2) Trustee Act, 1888 (c. 59), s. 8, did not enable Stat. Limitations to be pleaded, because the husband retained the money & never accounted for it, or gave it up, & there was no acquiescence by the wife.—*Re WASSSELL, WASSSELL v. LEGGATT*, [1896] 1 Ch. 554; 65 L. J. Ch. 240; 74 L. T. 99; 44 W. R. 298; 12 T. L. R. 208; 40 Sol. Jo. 276.

6563. — Stockbroker & client.]—One F., who carried on business as an outside stockbroker, induced a client to enter into transactions by fraudulent statements that he was buying for her when in fact he was himself selling to her. None of the transactions were genuine purchases or sales, as F. never intended to deliver, & the client never intended to accept, delivery of the stocks. In the result the client incurred a considerable loss. In an action for the administration of F.'s estate:—*Held*: the client's exor. was entitled to prove against F.'s estate for the amount which the client had placed in F.'s hands, because the transactions were induced by fraud, & because F. was in a fiduciary position & the representatives of a deceased trustee were never allowed to say that they could not pay a *cestui que trust* the amount which their testator ought to have paid.—*Re FRANKLYN, FRANKLYN v. FRANKLYN* (1913), 30 T. L. R. 187, C. A.

6564. — Settled chattels—Lost or injured.]—Testatrix specifically bequeathed her jewellery &

lace to her daughter, with remainder in the event, which happened, of her daughter dying childless to testatrix's son, & appointed them her exor. & extrix. On testatrix's death in 1895, the daughter took possession of the jewellery & lace. She died in 1913, when some of the articles were found to have been broken up by her & others were missing. The son made a claim for compensation out of the daughter's estate, which her exor. resisted on the ground that the claim was based on tort & merely personal:—*Held*: as the possessor of the articles the daughter was in the position of trustee or bailee for the remainderman, & he was, therefore, entitled to recover by way of compensation out of the estate the amount necessary to restore or replace the articles.—*Re SWAN, WITHAM v. SWAN*, [1915] 1 Ch. 829; 84 L. J. Ch. 590; 113 L. T. 42; 31 T. L. R. 266.

— *Company directors.]—See Sect. 3, subsect. 4, post.*

(b) The Action for Breach of Trust.

6565. Whether lapse of time bar to action—Long period of time—Reopening of accounts.]—*WESTERN v. CARTWRIGHT* (1725), Cas. temp. King, 34; 25 E. R. 207, L. C.

Annotation:—*Reid. Hercy v. Dinwoody* (1793), 4 Bro. C. C. 257.

6566. — — —.]—Testator devised his real estates to trustees upon trust for sale on any of his brother's children attaining twenty-one, the rents in the meantime & the proceeds of the sale to be invested & divided among such children of his brother as therein directed. Testator died in 1822. In 1849, pltf., testator's nephew, attained twenty-one. The property was sold, & the proceeds & accumulations were invested. Before the sale the rents were received by the trustees, one of whom died in 1836, another in 1844, & the survivor in 1851. In 1859, pltf. filed a bill against the representatives of the several deceased trustees, alleging that they had neglected to receive certain rents, which, from their wilful neglect & default, had been lost to the estate, & praying for an account of rents so neglected to be received from testator's death till the sale in 1849, & for payment of the amount that should be found due. There was no charge of fraud against the deceased trustees. It appeared from the bill of costs of the solr. employed by the trustees, which were produced in evidence, that pltf. was present when the trustees' accounts were settled & allowed. Pltf. denied all knowledge of the solr. in question, & stated that he was not till lately aware of the default of the trustees:—*Held*: the ct. could not, after such a lapse of time, entertain such a suit against the representatives of the deceased trustees.—*BRIGHT v. LEGERTON* (1861), 2 De G. F. & J. 606; 30 L. J. Ch. 338; 3 L. T. 713; 7 Jur. N. S. 559; 9 W. R. 239; 45 E. R. 755, L. C.

Annotations:—*Consd. Carey v. Cuthbert* (1873), 22 W. R. 249. *Reid. Re Cross, Harston v. Terison* (1882), 20 Ch. D. 109; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. *Mentd. Smith v. Blakey* (1867), L. R. 2 Q. B. 326; *Massey v. Allen* (1879), 13 Ch. D. 558.

6567. — — —.]—Where under the usual decree for an account of testator's debts a claim is made in respect of a debt the amount of which is not ascertained, the master ought to take the necessary accounts for ascertaining the amount.

Testator was in the situation of a trustee for the creditors of bkpts. How then can the lapse of time, either in his lifetime, or since his death,

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affect the debt (SHADWELL, V.-C.).—BAKER v. MARTIN (1832), 5 Sim. 380; 58 E. R. 378.

Annotation:—Folld. Brittlebank v. Goodwin (1868), L. R. 5 Eq. 545.

6568. ———.]—A marriage settlement of 1807, executed by all parties, contained a recital of the transfer of a sum of stock into the name of trustees. The stock never was transferred. The trustees died, one in 1827, the other in 1840. The person who ought to have transferred the stock became bkpt. in 1848, & died in 1851, only a fourth part dividend being got in under his bkpcy.:—*Held*: a bill filed in 1855 by a child of the marriage, who had attained twenty-one years in 1839, was not too late, & the estates of the two trustees were declared to be jointly & severally liable.—STORY v. GAPE (1856), 2 Jur. N. S. 706.

Annotation:—Folld. Brittlebank v. Goodwin (1868), L. R. 5 Eq. 545.

6569. ——— Statute of Limitations.]—G. by his will bequeathed all his property to H. upon the trusts thereafter mentioned. He then bequeathed his leaseholds to H. for life, & after her death he gave part of them to B. for life with remainder to G. the younger absolutely, & gave the residue of his property to G. absolutely, & appointed H. his extrix. G. the younger survived testator, & died intestate in Mar., 1838. H. took out administration to his estate in May, 1838, & died in 1841, appointing B. her extrix., who thus became the representative of testator as well as of H. B. afterwards took out administration to G. the younger. One of the next of kin to G. the younger, in Dec. 1858, filed a bill against B. for the administration of the estate of G. the younger:—*Held*: B. could not avail herself of any defence founded on Stat. Limitations, but an account of the rents of the leaseholds received by B., which was not limited to six years before the filing of the bill, & an account of the personal estate of G. the younger, received by H. & B. respectively, had been rightly directed against B.

A demand against the assets of a deceased trustee or personal representative for a breach of trust or misappropriation committed by him is not barred by the lapse of six years after his death (TURNER, L.J.).—OBEE v. BISHOP (1859), 1 De G. F. & J. 137; 29 L. J. Ch. 148; 1 L. T. 151; 6 Jur. N. S. 132; 8 W. R. 102; 45 E. R. 311, L. JJ.

Annotations:—Folld. Brittlebank v. Goodwin (1868), L. R. 5 Eq. 545. Consd. British Mutual Investment Co. v. Smart (1875), 10 Ch. App. 569 n. Distd. Metropolitan Bank v. Heiron (1880), 5 Ex. D. 319. Apld. Re Blake, Blake v. Power (1889), 60 L. T. 663. Reid. Re Marsden, Bowden v. Layland, Gibbs v. Layland (1884), 26 Ch. D. 783.

6570. ———.]—CRESSWELL v. DEWELL, No. 6557, ante.

6571. ———.]—The analogy of Stat. Limitations cannot be set up by an exor. in answer to a claim founded on a breach of trust by his testator.—BRITTLEBANK v. GOODWIN (1868), L. R. 5 Eq. 545; 37 L. J. Ch. 377; 16 W. R. 696.

Annotations:—Consd. British Mutual Investment Co. v. Smart (1875), 10 Ch. App. 569 n. Distd. Metropolitan Bank v. Heiron (1880), 5 Ex. D. 319. Folld. Re Burge, Gillard v. Lawrenson (1887), 57 L. T. 364. Reid. Re Mackay, Mackay v. Gould, [1906] 1 Ch. 25.

6572. ———.]—A *cestui que trust* under a will brought an action against the administratrix

& the heir-at-law of the sole trustee, who had died intestate, to make his estate liable for the loss which had accrued to the trust estate owing to a breach of trust committed by him. Stat. Limitations were not pleaded & at the trial an account was directed on the footing of the liability of the heir. He raised the defence of the statute on the further consideration:—*Held*: (1) that the statute should have been pleaded; & (2) the heir-at-law could not, on the principle of *Brittlebank v. Goodwin*, No. 6571, ante, set up the statute in answer to a claim arising out of a breach of trust committed by the person whose estate had descended to him.—*Re* BURGE, GILLARD v. LAWRENSEN (1887), 57 L. T. 364; 52 J. P. 20.

6573. ——— Trustee Act, 1888 (c. 59), s. 8.]—*Re* WASSELL, WASSELL v. LEGGATT, No. 6562, ante.

6574. ———.]—*Re* TUFNELL, BYNG v. TUFNELL (1902), 18 T. L. R. 705.

See, further, LIMITATION OF ACTIONS.

6575. Defence to action—Acquiescence in breach by one beneficiary—Implied agreement not to sue by other.]—B., an exor. of his father's will, sold out certain stock, & employed it in his business; but he afterwards replaced it in full. C., his sister, was entitled to a life interest in part of the stock, with remainder to such of her children as should be living at her decease. On the death of B., E., a son of C., threatened to take proceedings against the representatives of B., to make his estate liable for the breach of trust in so using the stock, whereupon C., who by her will had given certain benefits to E., made a codicil thereto, & thereby declared her full approbation of B.'s conduct as regarded the trusts of his father's will, & prohibited every person entitled to any benefit under her will from setting up any claim on account of any error or irregularity in the execution of those trusts; & she authorised her exors. & trustees to give & receive such releases & discharges as might be proper for effecting the objects of such declaration & prohibition. On the death of C., E. received the legacy given him by his mother, & signed the ordinary legacy receipt for it, but did not give a release, & afterwards instituted the threatened suit:—*Held*: having accepted the gift under his mother's will, he was only entitled to have the common account, but not to make any claim against the estate of B. in respect of the employment of his testator's assets in his trade; & so much of the bill as sought to establish that claim was dismissed with costs.—EGG v. DEVEY (1847), 10 Beav. 444; 16 L. J. Ch. 509; 10 L. T. O. S. 243; 11 Jur. 1023; 50 E. R. 653.

6576. ——— No assets available—Particulars of receipts & payments unnecessary.]—A bill being filed against the representative of a deceased trustee to make his estate liable for an alleged breach of trust, debts answered that after payment of debts, funeral, & testamentary expenses, there would not be sufficient to answer the demand. On exceptions to this answer:—*Held*: it being a bill against a deceased person it was not necessary that debts should go into particulars, & a general account of the receipts & payments was sufficient.—CULL v. INGLES (1868), 37 L. J. Ch. 385; 19 L. T. 183; 16 W. R. 477.

6577. Joinder of parties—Estate of joint trustee charged—Joinder of representative of co-trustee.]—DEVAYNES v. ROBINSON, No. 6552, ante.

6578. — Alternative to appointment & joinder of new trustees.]—An action for breach of trust was brought by a beneficiary under a settlement against, as sole defts., the exors. of one of the two trustees, but not the surviving trustee, of the settlement. The surviving trustee was also dead, & no new trustees of the settlement had been appointed, although the person in whom the power to appoint was vested was prepared to exercise it:—*Held*: the representatives of the surviving trustee must be added as defts., or new trustees of the settlement must be appointed & added as defts.—*Re* JORDAN, HAYWARD v. HAMILTON, [1904] 1 Ch. 260; 73 L. J. Ch. 128; 90 L. T. 223; 52 W. R. 150; 48 Sol. Jo. 142.

6579. — Surviving trustee charged—Representative of deceased trustee not necessary party—Except in special circumstances.]—In an action for a general account against a surviving exor. & trustee it is not, in the absence of special circumstances, necessary for pltf. to make the representative of a deceased trustee or exor. a party, unless deft. requires such representative to be added, & the circumstances of the case render it advisable that he should be so added.—*Re* HARRISON, SMITH v. ALLEN, [1891] 2 Ch. 349; 60 L. J. Ch. 287; 64 L. T. 442.

Annotation:—*Consd.* *Re* Jordan, Hayward v. Hamilton, [1904] 1 Ch. 260.

C. Ecclesiastical Dilapidations.

6580. Representatives of deceased incumbent liable.]—As to the second [question] that the action [to compel exors. of a deceased vicar to pay money for rebuilding a vicarage-house] will not lie against the exors. it is contrary to all the rules laid down concerning dilapidations & the constant practice in relation to suits of this sort: for both in the ecclesiastical & temporal cts., since these suits have been retained here, multitudes of suits . . . have been against the exors. or administrators, & have been always holden to be good, because it is not considered as a tort in testator, but as a duty which he ought to have performed, & therefore his representatives, so far as he left assets, shall be equally liable as himself (WILLES, C.J.).—*SOLLERS v. LAWRENCE* (1743), Willes, 413; 125 E. R. 1243.

Annotations:—*Refd.* *Mason v. Lambert* (1848), 12 Q. B. 795; *Ross v. Adcock* (1868), L. R. 3 C. P. 655; *Batthyany v. Walford* (1887), 36 Ch. D. 269; *Re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583. *Mentd.* *Finlay v. Chirney* (1888), 20 Q. B. D. 494.

6581. —.]—The exors. of a deceased incumbent are not bound to put the rectory house into a finished state of repair, but are only bound to restore what is actually in decay, & to make such repairs as are absolutely necessary for the preservation of the premises.—*PERCIVAL v. COOKE* (1826), 2 C. & P. 460, N. P.

Annotation:—*Refd.* *Bunbury v. Hewson* (1849), 3 Exch. 558.

6582. —.]—The principle, whether against the predecessor in his lifetime, or his personal representative after his death, is this: that the maintenance of the houses, buildings, & other premises belonging to the benefice is a duty which the law casts on the incumbent because

he enjoys the benefit (LORD DENMAN, C.J.).—*MASON v. LAMBERT* (1848), 12 Q. B. 795; 17 L. J. Q. B. 366; 12 L. T. O. S. 311; 12 Jur. 1045; 116 E. R. 1069.

Annotations:—*Refd.* *Gleaves v. Parfitt* (1860), 7 C. B. N. S. 838; *Re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583. *Mentd.* *Wallis v. Birks* (1870), L. R. 5 C. P. 222.

6583. —.]—The exors. of a deceased rector are not liable in an action on the case for dilapidations, by reason of such rector having pulled down a barn belonging & adjoining to the rectory, & erected another at the distance of a mile & a half on a more convenient site, & on rectory land, without obtaining a faculty or licence from the bishop for that purpose. Nor are they liable for dilapidations in respect of buildings which are not parcel of the freehold.

Where gravel pits had been opened on rectory land, & gravel taken therefrom by the surveyors of the highways for the purpose of their repair, without sloping down the ground:—*Held*: the exors. were liable in respect of so much of the gravel as was dug out & sold generally by the rector himself, such digging & sale being equivalent to an opening of gravel pits.—*HUNTLEY v. RUSSELL* (1849), 13 Q. B. 572; 18 L. J. Q. B. 239; 13 L. T. O. S. 526; 13 J. P. 567; 13 Jur. 837; 116 E. R. 1381.

Annotations:—*Refd.* *Ross v. Adcock* (1868), L. R. 3 C. P. 655; *Eccel. Comrs. v. Wodehouse*, [1895] 1 Ch. 552.

6584. —.]—Where the bishop has, under Ecclesiastical Dilapidations Act, 1871 (c. 43), s. 34, made an order stating the cost of the repairs for which the exors. of a late incumbent are liable, the sum so stated is under sect. 36 a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors.—*Re* MONK, WAYMAN v. MONK (1887), 35 Ch. D. 583; 56 L. J. Ch. 809; 56 L. T. 856; 52 J. P. 198; 35 W. R. 691; 3 T. L. R. 552.

6585. — Prebendary—Residence not appropriated to prebend.]—SAND'S CASE (1682), Skin. 121; 90 E. R. 57.

Annotations:—*Consd.* *Doe d. Butcher v. Musgrave* (1840), 1 Man. & G. 625. *Refd.* *Radcliffe v. D'Oyly* (1788), 2 Term. Rep. 630; *Gleaves v. Parfitt* (1860), 7 C. B. N. S. 838; *Ford v. Harington* (1869), 1 Hop. & Colt. 331.

6586. — Successive incumbents—Within short interval—Contribution between representatives.]—A., being vicar of S., died, leaving the vicarage premises out of repair, & was succeeded by B., who died within a short time, also leaving the premises out of repair. C., on succeeding B., compelled the extrix. of B. to make good the dilapidations then existing; & thereupon, B.'s extrix. brought an action against the exor. of A., to recover the amount so paid to C. On demurrer to the declaration:—*Held*: the right of B. against A. did not die with him, but it survived to his representative, who might recover in the present action such a portion of the sum paid to C. as was requisite to make good the dilapidations occurring in the time of A., & existing at his death.—*BUNBURY v. HEWSON* (1849), 3 Exch. 558; 18 L. J. Ex. 258; 13 J. P. 571; 154 E. R. 967.

6587. — Vicar choral.]—A vicar-choral in a cathedral church, who succeeds or is appointed

PART VI. SECT. 2, SUB-SECT. 10.—C.

*r. Representative of deceased incumbent liable—Where wilful default.]—*Where the deanery gate-house was,

with the assent of the dean & chapter, removed by the late dean without any faculty:—*Held*: such removal was waste, & the necessary expense of

rebuilding it was charged against the dean's exor.—*Re* ST. PATRICK'S, DUBLIN, DEANERY-HOUSE DILAPIDATIONS (1864), 17 Ir. Jur. 38.—IR.

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to a house of his predecessor in the vicar-choralship, is within the custom of ecclesiastical dilapidations, & therefore his representatives may be sued for the amount due in respect thereof at his death.—*GLEAVES v. PARFITT* (1860), 7 C. B. N. S. 838; 29 L. J. C. P. 216; 8 Jur. N. S. 805; 141 E. R. 1045.

Annotations:—*Refd.* *Bridgewater v. Durant* (1861), 11 C. B. N. S. 7; *Ford v. Harrington* (1869), L. R. 5 C. P. 282.

What constitutes dilapidations.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 507, Nos. 3648–3653.

Nature of liability.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 507, Nos. 3654, 3655.

Procedure to ascertain.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 508, 509, Nos. 3669–3674.

Measure of liability.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 509, Nos. 3675–3687.

Recovery by legal proceedings.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 509, 510, Nos. 3688–3695.

On exchange of livings.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 510, Nos. 3696–3699.

Other cases.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 510, Nos. 3700–3702.

D. Obligations arising out of Legal Proceedings.

See Attorneys & Solicitors Act, 1870 (c. 28), s. 19; R. S. C., Ord. 17, rr. 1–10.

6588. Costs.]—If the person either having to pay or to receive them [costs] dies before the amount is ascertained by taxation, the obligation to pay & the right to receive is equally gone (*MALINS, V.-C.*).—*TROUP v. TROUP* (1868), 37 L. J. Ch. 390; 18 L. T. 178; 16 W. R. 573.

Annotation:—*Mentd.* *Turner v. L. & S. W. Ry.* (1874), L. R. 17 Eq. 561.

6589. — Adjudged against deceased.]—Exors. to pay costs adjudged against testator, because he had assets.—*ENGLEFIELD v. ROTHERSTROP (INHABITANTS)* (1631), Toth. 86; 21 E. R. 131.

6590. — Of taxation of bill of costs—Delivered by deceased attorney.]—The extrix. of an attorney pays no costs though a sixth part of the bill is taken off.—*WESTON v. POOL* (1736), 2 Stra. 1056; 93 E. R. 1030.

6591. — — —.]—A bill of costs delivered by a solr was taxed after his death & more than a sixth part was deducted:—*Held*: his extrix. was not liable to pay the costs of taxation.—*MILLER v. —* (1825), 4 L. J. O. S. Ch. 71.

6592. — — —.]—Where the administrators of an attorney send in their intestate's bill & a judge's order is made to tax it & more than one-sixth is taken off by the master, the administrators are not bound to pay the costs of taxation, although they consented to the judge's order being made.—*PRIESTLEY v. GRAY* (1840), 9 Dowl. 154; Woll. 17.

6593. — — — Delivered to deceased testator.]—An extrix. who procures the bill of her testator's

attorney to be taxed, is liable, in the discretion of the ct., for the costs of the taxation, when less than a sixth is taken off; & it is not sufficient to induce the ct. to exercise its discretion in her favour, that the taxation is procured in order to get possession of documents on which the attorney has a lien.—*JEFFERSON v. WARRINGTON* (1840), 7 M. & W. 137; 8 Dowl. 880; H. & W. 2; Woll. 55; 10 L. J. Ex. 79; 4 Jur. 993; 151 E. R. 711.

6594. — Of appeal—Death of appellant—Before appeal heard.]—A person was charged before justices with being drunk on a highway while in charge of motor-car. He pleaded guilty & was sentenced to fourteen days' imprisonment. He gave notice of appeal to quarter sessions & entered into a recognisance to appear & prosecute the appeal. Before the quarter sessions were held at which the appeal would have been heard applt. died. Counsel appeared at quarter sessions & informed the ct. that applt. had died, & he also made a statement that applt. would have been able to put a different complexion on the case if he had been alive. The quarter sessions made an order that the appeal should be dismissed with costs to be paid by the personal representatives of applt.:—*Held*: the personal representatives had not become parties to the proceedings & there was no jurisdiction to order them to pay the costs.—*R. v. SPOKES, Ex p. BUCKLEY* (1912), 107 L. T. 290; 76 J. P. 354; 28 T. L. R. 420; 23 Cox, C. C. 140, D. C.

6595. — Matrimonial causes—Order for costs against husband — Liability limited to fund lodged in court.]—Where a husband, resp. in divorce proceedings, died on the eve of the trial, an order for the wife's costs, limited to the amount lodged in ct., was afterwards made against the husband's exors.—*CUNNINGHAM v. CUNNINGHAM* (1897), 77 L. T. 405.

Annotations:—*Distd.* *Maconochie v. Maconochie, Maconochie v. Maconochie & Blake* (1916), 86 L. J. P. 10; *Coleman v. Coleman & Simpson*, [1920] P. 71.

6596. — — — No taxation or order for security applied for.]—Upon the death of a husband, a party in a consolidated matrimonial suit, the causes of action being purely personal, the suit abates; & the Divorce Div. has no jurisdiction to entertain an application against the legal representative of the deceased husband in respect of taxation & payment of the wife's costs of suit, where no taxation or order for security of those costs had been applied for or made by the wife against the husband during his lifetime.—*MACONOCHE v. MACONOCHE, MACONOCHE v. MACONOCHE & BLAKE*, [1916] P. 326; 86 L. J. P. 10; 115 L. T. 790; 33 T. L. R. 50; 61 Sol. Jo. 57.

Annotation:—*Foll'd.* *Coleman v. Coleman & Simpson*, [1920] P. 71.

6597. — — —.]—Where in a suit brought by husband for divorce an order has been made that the husband shall pay his wife's taxed costs & pay into ct., or give security for money towards her future costs, & the husband dies before the order has been obeyed, the ct. has no jurisdiction to enforce payment against his exors. In such a case, the suit is at an end & there is nothing in the Divorce Act or in the practice of the ct. to enable it to be revived or petitioner's

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s. Costs—Bill in Parliament.]—Where special debts, contemplated

defraying themselves personally the costs & expenses incidental to the promotion of a Bill in Parliament & no portion of the rates or corporate

funds had been, or were intended to be, applied to such purposes, & certain of special debts, died before the hearing, & common orders to revive were

exors. to be brought before the ct.—**COLEMAN v. COLEMAN & SIMPSON**, [1920] P. 71; 89 L. J. P. 107; 122 L. T. 804; 36 T. L. R. 255.

6598. ——— Order for costs against co-respondent.]—On the hearing of a petition for divorce by a husband against his wife the jury assessed damages against co-resp. at £1,500. A decree *nisi* was pronounced, & co-resp. was ordered "within one month from the service of the order to lodge in ct. the sum of £1,500." Within a month of the order co-resp. died without having paid the money into ct. On an application by petitioner for an order against the exors. of co-resp. to pay the damages & costs out of the assets of his testator:—*Held*: there was no provision in the Divorce Act or Rules enabling the exor. of a co-resp. to be brought before the ct., the action was a personal action & the cause of action did not survive & there was no remedy against the exor. in the Divorce Ct., & no order for payment could be enforced against the exor. in that ct.—**BRYDGES v. BRYDGES & WOOD**, [1909] P. 187; 78 L. J. P. 97; 100 L. T. 744; 25 T. L. R. 505, C. A.

Annotations:—*Apld.* **Coleman v. Coleman & Simpson**, [1920] P. 71. *Refd.* **Ranson v. Platt**, [1911] 2 K. B. 291.

———.]—*See, generally*, HUSBAND & WIFE.

6599. Damages—Against co-respondent—Divorce suit.—**BRYDGES v. BRYDGES & WOOD**, No. 6598, *ante*.

6600. Alimony—Decree against husband—Arrears due at death—Liability of estate of solvent.—Where an order has been made against a husband for judicial separation & for payment of alimony, his widow may recover against his estate, if solvent, any arrears of alimony due at his death.—*Re* **STILLWELL, BRODRICK v. STILLWELL**, [1916] 1 Ch. 365; 85 L. J. Ch. 314; 114 L. T. 604; 32 T. L. R. 285; 60 Sol. Jo. 322.

Annotations:—*Apld.* *Re* **Naters, Ainger v. Naters** (1919), 88 L. J. Ch. 521. *Refd.* **Maconachie v. Maconachie**, **Maconachie v. Maconachie & Blake** (1916), 33 T. L. R. 50.

6601. ———.]—Where a separation order has been made by justices under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), against a husband & also an order for maintenance, his widow may recover against his estate arrears of maintenance due under the order at his death.—**FIRMAN v. ROYAL**, [1925] 1 K. B. 681; 94 L. J. K. B. 649; 133 L. T. 48.

See, generally, HUSBAND & WIFE.

E. Settled Freeholds—Liability for Waste.

See, generally, REAL PROPERTY.

6602. Liability of representative of tenant for life—General rule.—(1) By the decree in 1870 it was declared that H. & F. & the estate of their deceased partner were liable to pltfs. for minerals taken by them under pltfs' farm, & that H. & F. were liable to compensate pltfs. for user of all roads & passages under the farm, & inquiries were directed: as to the quantity of minerals taken & their value; what quantities of minerals had been carried by defts. through the roads or passages under the farm; what, upon the result of the second inquiry, ought to be paid by defts. as wayleave for the user of the roads & passages; whether the farm, & the mineral property of pltfs. under

it, had sustained any & what damage by reason of the way in which defts. had worked under the farm. Pending these inquiries F. died, & his extrix. moved to stay proceedings under the second, third, fourth inquiries. It was adjudged that the fourth inquiry must be stayed, but that as the estate of F. had derived profit from the trespasses to which the second & third inquiries related, it was liable after his death, & that those inquiries must be prosecuted. On appeal:—*Held*: proceedings under the second & third inquiries must also be stayed, for, apart from cases of breach of contract, a remedy for a wrongful act done by a deceased person could not be pursued against his estate, unless property or the proceeds or value of property belonging to another person had been appropriated by the deceased person & added to his estate.

(2) Where there is nothing among the assets of deceased that in law or equity belongs to pltf. or the damages that have been done to him are unliquidated & uncertain, the exors. of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, & an indirect benefit may have been reaped thereby (**BOWEN, L.J.**).

(3) The produce, proceeds, or value of waste, equitable or legal, committed by the tenant for life can be followed into the hands of his exors. & retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste, permissive or voluntary, as such, lies against the exor. of tenant for life (**BOWEN, L.J.**).—**PHILLIPS v. HOMFRAY**, **HOMFRAY v. PHILLIPS** (1883), 24 Ch. D. 439; 52 L. J. Ch. 833; 49 L. T. 5; 32 W. R. 6, C. A.; *on appeal, sub nom.* **PHILLIPS v. FOTHERGILL** (1886), 11 App. Cas. 466, II. L.

Annotations:—*As to* (1) *Consd.* **Batthyany v. Walford** (1887), 36 Ch. D. 269. *Refd.* **Finlay v. Chirney** (1888), 20 Q. B. D. 494; **Concha v. Murrieta**, **De Mora v. Concha** (1889), 40 Ch. D. 543; **Peebles v. Oswaldtwistle U. D. C.** (1896), 65 L. J. Q. B. 499; **Ellis v. Wadeson**, [1899] 1 Q. B. 714; **Jackson v. Watson**, [1909] 2 K. B. 193; **Quirk v. Thomas**, [1915] 1 K. B. 798; **Gelpel v. Peach**, [1917] 2 Ch. 108. *As to* (2) *Refd.* *Re* **Duncan, Terry v. Sweeting**, [1899] 1 Ch. 387. *Generally, Mentd.* **The Duke of Buccleuch**, [1892] P. 201; **R. v. Spokes**, *Ex p.* **Buckley** (1912), 107 L. T. 290; **A.-G. v. De Keyser's Royal Hotel**, [1920] A. C. 508.

6603. ———.]—**ANON.** (1531), Bro. N. C. 189; 73 E. R. 929.

6604. ——— **Equitable waste.**—**ORMONDE (MARQUIS) v. KYNERSLEY** (1820), 5 Madd. 369; 56 E. R. 936.

Annotations:—*Refd.* **Kingham v. Lee** (1846), 15 Sim. 396; **Powys v. Blagrove** (1854), Kay, 495.

6605. ———.]—If a tenant for life, unimpeachable of waste commits equitable waste, the produce of such equitable waste belongs to the person having the first vested estate of inheritance, though such estate be expectant on the determination or failure of intervening life estates & contingent estates tail, & a bill for an account of the produce of such equitable waste cannot be maintained against the exor. of the deceased tenant for life, who committed the waste by the persons who, upon his death, became tenants for life in possession.—**ORMOND v. KYNERSLEY**, **BUTLER v. KYNERSLEY** (1830), 7 L. J. O. S. Ch. 150; 8 L. J. O. S. Ch. 67, L. C.

Annotation:—*Refd.* **Honywood v. Honwood** (1874), L. R. 18 Eq. 306.

obtained against their representatives:—*Held*: there was no survivorship of | liability, & the representatives of | **SOLICITOR-GENERAL v. DUBLIN CORPN.** |
defts. were not liable for the costs.— (1877), 1 L. R. Ir. 166.—**IR.**

Sect. 2.—On contracts of deceased: Sub-sect. 10, E. & F.]

6606. — Tenant without impeachment of waste.]—Account against the representative of tenant for life, without impeachment of waste, of dilapidations permitted by him in & about the mansion-house refused.—**LANSDOWNE (MARQUIS) v. LANSDOWNE (DOWAGER MARCHIONESS)** (1820), 1 Jac. & W. 522; 37 E. R. 467.

*Annotations:—*Consd. **Powys v. Blagrove** (1854), Kay, 495. Refd. **Phillips v. Homfray**, **Homfray v. Phillips** (1883), 52 L. J. Ch. 833.

6607. — Where profit accrues from waste—To estate of tenant for life.]—**PHILLIPS v. HOMFRAY**, **HOMFRAY v. PHILLIPS**, No. 6602 *ante*.

6608. — Where no express duty to repair imposed.]—The estate of a legal tenant for life is not liable for permissive waste. A legal tenant for life of land, upon whom no express duty to repair was imposed by the will under which her estate was derived, died leaving the buildings upon the land in a dilapidated condition. In the administration of her estate the remainderman in fee claimed from her exor. compensation by way of damages for permissive waste:—*Held*: the claim could not be sustained.—*Re* **CARTWRIGHT, AVIS v. NEWMAN** (1889), 41 Ch. D. 532; 58 L. J. Ch. 590; 60 L. T. 891; 37 W. R. 612; 5 T. L. R. 482.

*Annotations:—*Apld. *Re* **Parry & Hopkin**, [1900] 1 Ch. 160. Refd. *Re* **Freman, Dimond v. Newburn**, [1898] 1 Ch. 28.

6609. — Where express duty to repair imposed.]—A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon & enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the exor. of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by Civil Procedure Act, 1833 (c. 42), s. 2, which gives a right of action against the exor. of a person deceased in respect of wrongs committed by testator to another in respect of his property:—*Held*: an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, & consequently lay under the above-mentioned statute against her exor. after her death.—**WOODHOUSE v. WALKER** (1880), 5 Q. B. D. 404; 49 L. J. Q. B. 609; 42 L. T. 770; 44 J. P. 666; 28 W. R. 765.

*Annotations:—*Folld. *Re* **Williamos, Andrew v. Williamos** (1884), 52 L. T. 41. Consd. **Blackmore v. White**, [1899] 1 Q. B. 293; **Jay v. Jay**, [1924] 1 K. B. 826. *As to* (2) *Consd.* **Jay v. Jay**, [1924] 1 K. B. 826.

6610. — —.]—Where a testator gives successive interests, & adds to them a direction that the person who takes shall do a particular thing, & the devisee accepts the estate, there is a personal liability, capable of being enforced in equity, to perform the directions imposed by testator. A testator gave his real estate to trustees upon trust for his widow for life, with remainder over, in events which happened, to A. for life, & in events which happened, to B. for life, with remainders to his children, if any, in tail, with remainders over. The will contained a direction that each tenant for life or in tail of any of the hereditaments should, during her or

his estate keep the buildings thereon in substantial repair; & if any such person should neglect to effect such repairs within six months after being thereunto requested by the trustees, the trustees should be at liberty to effect such repairs. The widow of testator was in possession of the hereditaments until her death in June, 1883. Her will was proved in Feb. 1884. She had omitted to repair the buildings. More than six months after her death, but within six months after probate of her will, a claim was carried in against her estate, in an administration action, in respect of the omission to repair, claimants being the trustees of the will & the then equitable tenant for life:—*Held*: (1) the estate of the deceased tenant for life was liable for such omission to repair; (2) the claim was properly made by the trustees of the will, & the remedy being in equity, Civil Procedure Act, 1833 (c. 42), s. 2, did not apply.—*Re* **WILLIAMES, ANDREW v. WILLIAMES** (1885), 54 L. T. 105, C. A.

*Annotations:—**As to* (1) *Consd.* **Blackmore v. White**, [1899] 1 Q. B. 293; **Jay v. Jay**, [1924] 1 K. B. 826. *As to* (2) *Consd.* **Jay v. Jay**, [1924] 1 K. B. 826.

6611. — —.]—A testator devised to his wife for life two freehold houses with the buildings, land, & appurtenances thereto belonging, "she keeping the same in good & tenantable repair." Testator directed the property to be sold by his trustees after the death of his wife, the proceeds to be held upon the trusts mentioned in his will. After the death of testator his widow entered into possession of the property & continued therein until the date of her own death. It was then discovered that the property was in a dilapidated condition, & particularly the out-buildings adjoining one of the houses, consisting of greenhouses & conservatories formerly used in the business of a fruit grower, in whose possession such house was before testator purchased it. An originating summons was accordingly taken out by the trustees of the will, asking that what sum the representative of testator's widow was liable to pay by reason of the property not having been kept by her in good & tenantable repair might be determined. Evidence was adduced to show that the greenhouses were wholly neglected & in complete disrepair at the time testator purchased; that he never intended to put the same into repair, but had thought of having them pulled down. It was, therefore contended that the estate of testator's widow was not liable in respect of the repairs required to such greenhouses:—*Held*: the fact that testator did not himself keep the greenhouses in good & tenantable repair could not be regarded as an excuse for his widow not doing so, having regard to the express direction contained in the will, & therefore, her estate was liable for the amount of the repairs required.—*Re* **BRADBROOK, LOCK v. WILLIS** (1887), 56 L. T. 106.

6612. — Effect of Civil Procedure Act, 1833 (c. 42), s. 2.]—**WOODHOUSE v. WALKER**, No. 6609, *ante*.

6613. — —.]—*Re* **WILLIAMES, ANDREW v. WILLIAMES**, No. 6610, *ante*.

See Administration of Estates Act, 1925 (c. 23), s. 26.

6614. Account as to waste directed—Accurate amount impossible to compute—Arbitrary report by master—Accepted by court.]—Where a wrong has been committed, the wrongdoer must suffer from the impossibility of accurately ascertaining

the amount of damage. Therefore, where an account of the equitable waste committed by a tenant for life was directed to be taken against his exors., which it was found impossible to take accurately, & the master has arbitrarily charged the exors., his report was supported.—*LEEDS (DUKE) v. AMHERST (EARL)* (1850), 20 Beav. 239; 15 L. T. O. S. 129; 52 E. R. 595.

F. Settled Leaseholds.

6615. Liability of tenant for life—As against representatives of deceased—Repair.]—Testator gave leaseholds, some of which were held on short terms, to two trustees, one of whom was his wife, upon trust for his wife for life & after her death upon trust that the whole should be sold, & the proceeds divided between four persons; & he authorised his trustees, provided they should deem it advisable, to sell his short leaseholds & invest the proceeds & allow his wife to receive the income during her life. The leaseholds were in a bad state of repair at the death of testator; the widow kept them up in the same state of repair but declined to do more than this. The remaindermen applied for an order to oblige the tenant for life to maintain the leaseholds in such a state of repair as to satisfy the covenants in the leases, so as to avoid a forfeiture, or else to concur in selling the short leaseholds:—*Held*: there was no obligation on the tenant for life to put the premises in such a state of repair as to comply with the terms of the leases.—*Re COURTIER, COLES v. COURTIER, COURTIER v. COLES* (1886), 34 Ch. D. 136; 56 L. J. Ch. 350; 55 L. T. 574; 51 J. P. 117; 35 W. R. 85, C. A.

Annotations:—*Foll.* *Re Baring Jeune v. Baring*, [1893] 1 Ch. 61. *Expld. & Distd.* *Re Redding, Thompson v. Redding*, [1897] 1 Ch. 876. *Foll.* *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232. *Consd.* *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Gjers, Cooper v. Gjers*, [1899] 2 Ch. 54. *Reid.* *Debney v. Eckett* (1894), 71 L. T. 659; *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319.

6616. ——— Rent & other covenants.]—Testator, being possessed of a leasehold house held by him for a term of sixty-one years, renewable every fourteen years on fines for renewal, & under covenants to pay the rent, repair & insure, bequeathed the house to trustees, in trust for his widow for life, with remainder in his trust for his son for life, with remainders over; & he bequeathed his residuary estate to his trustees upon trust out of the income to pay all the costs, charges, & expenses of carrying into execution the trusts of his will, & subject thereto, to hold such residuary estate upon trusts for his children in settled shares:—*Held*: (1) neither tenant for life was under any obligation to pay the rent, repair, or insure, or to pay the fines or expenses of renewal; (2) the rent & the expenses of repair & insurance, during the respective lives of the tenants for life, were payable out of the income of the residuary estate, & the fines & expenses of renewal were distributable among the beneficiaries of the house according to their enjoyment, such enjoyment to be ascertained by actuarial valuation.—*Re BARING, JEUNE v. BARING*, [1893] 1 Ch. 61; 62 L. J. Ch. 50; 67 L. T. 702; 41 W. R. 87; 9 T. L. R. 7; 3 R. 37.

Annotations:—*As to* (1) *Consd.* *Re Redding, Thompson v. Redding*, [1897] 1 Ch. 876. *Foll.* *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232. *Consd.* *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821. *Expld.* *Re Gjers, Cooper v. Gjers*, [1899] 2 Ch. 54. *As to* (2) *Apld.* *Debney v. Eckett* (1894), 71 L. T. 659. *Generally, Mentd.* *Re Wix, Hardy v. Lemon*, [1916] 1 Ch. 279.

6617. ———.]—Testator directed

his exors. & trustees to arrange his affairs & manage his estate, & to retain certain leaseholds & let them on lease at fair rentals, & pay the income derived therefrom to his wife for life for the benefit of herself & her children, & after her decease to divide the whole of his estate equally between his children. On the construction of the will:—*Held*: the “income derived” from the leaseholds meant the net income, i.e., the amount of the rents after deducting all proper outgoings, & consequently ground-rents, current repairs, & other outgoings in respect of the leaseholds must be borne by the tenant for life.—*Re REDDING, THOMPSON v. REDDING*, [1897] 1 Ch. 876; 66 L. J. Ch. 460; 76 L. T. 339; *sub nom.* *Re RIDDING, THOMPSON v. RIDDING*, 45 W. R. 457; 41 Sol. Jo. 405.

Annotations:—*Consd.* *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Gjers, Cooper v. Gjers*, [1899] 2 Ch. 54.

6618. ——— Covenants generally.]—Testator who died possessed of a leasehold house held by him on a repairing lease bequeathed it directly, without the intervention of trustees, to his niece for life, & after her death to other persons absolutely, & appointed exors.:—*Held*: the niece, the tenant for life, was not bound to perform any of the covenants in the lease.—*Re TOMLINSON, TOMLINSON v. ANDREW*, [1898] 1 Ch. 232; 67 L. J. Ch. 97; 78 L. T. 12; 46 W. R. 299; 42 Sol. Jo. 114.

Annotations:—*Consd.* *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Gjers, Cooper v. Gjers*, [1899] 2 Ch. 54.

6619. ———.]—Tenant for life of leaseholds, specifically bequeathed by the will of a testator who was assignee of the lease under which the property is held, is bound, during the continuance of her interest, as between herself & testator's estate, to pay the rent reserved by the lease, & perform the covenants & conditions contained in it.—*Re GJERS, COOPER v. GJERS*, [1899] 2 Ch. 54; 68 L. J. Ch. 442; 80 L. T. 689; 47 W. R. 535; 43 Sol. Jo. 497.

6620. ——— Repairs at commencement of interest—Breaches arising before testator's death.]—Equitable tenant for life of leaseholds under a will is bound, during the continuance of his interest, as between himself & his testator's estate, to perform the tenant's continuing obligations under the lease; but he is not liable for repairs necessary at the commencement of his interest, or in respect of breaches of covenant which had arisen before testator's death.—*Re BETTY, BETTY v. A.-G.*, [1899] 1 Ch. 821; 68 L. J. Ch. 435; 80 L. T. 675.

Annotations:—*Foll.* *Re Gjers, Cooper v. Gjers*, [1899] 2 Ch. 54. *Distd.* *Re Parry & Hopkin*, [1900] 1 Ch. 160.

6621. ——— Premises destroyed—Liability to rebuild & pay rent in meanwhile.]—Testator directed his trustees to allow A. to occupy a mill, etc., so long as he should think proper so to do, “he nevertheless keeping” the premises “in good & tenantable repair, & paying” a rent of £100. A. accepted the gift, but the premises were afterwards totally destroyed by accidental fire:—*Held*: A. was bound to reinstate them, & was liable for the rent in the meanwhile, & he could not escape from the liability to rebuild, by declining any longer to retain them.—*GREGG v. COATES, HODGSON v. COATES* (1856), 23 Beav. 33; 2 Jur. N. S. 964; 4 W. R. 735; 53 E. R. 13.

Annotations:—*Apld.* *Re Williams, Andrew v. Williams* (1885), 54 L. T. 105. *Consd.* *Re Bradbrook, Lock v. Willis* (1887), 56 L. T. 106. *Reid.* *Woodhouse v. Walker* (1880), 5 Q. B. D. 404; *Batthyany v. Walford* (1880), 33 Ch. D. 624.

Sect. 2.—On contracts of deceased: Sub-sect. 10, F. & G.; sub-sects. 11 & 12, A.]

6622. Representatives of tenant for life—Liability to remainderman—Repairs—Not effected during life tenancy.]—The estate of a tenant for life of leaseholds is not liable to the remainderman in respect of permissive waste, although there may have been a breach of covenants to repair during the continuance of the life tenancy.—*Re PARRY & HOPKIN*, [1900] 1 Ch. 160; 69 L. J. Ch. 190; 81 L. T. 807; 64 J. P. 137; 48 W. R. 345.

G. Solicitor and Client.

See, generally, SOLICITORS.

6623. Representatives of deceased solicitor—Liability for professional negligence.]—The extrix. of an attorney is liable in case for the negligence of her testator, in not making due inquiry into the validity of a security upon which his client proposes to advance money.—*WILSON v. TUCKER* (1822), 3 Stark. 154; Dow. & Ry. N. P. 30, N. P.

Annotations:—Appld. Davies v. Hood (1903), 88 L. T. 19. *Mentd. Re Keeping & Gloag* (1888), 58 L. T. 679.

6624. ———.]—Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solrs., F. at their bankers. The funds were afterwards advanced on a mtge. of house property in a new neighbourhood, & of inadequate value. At that date there were no trustees of the settlement, & the mtge. was taken in the names of S. & two other persons who were then proposed, & shortly afterwards appointed new trustees, & never repudiated the transaction. S. was the member of his firm who acted for them in all the matters, & for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment for their bill of costs out of the funds. The mtge. proved to be an insufficient security, & in an action against the trustees it was held that they were jointly & severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make the firm of solrs. liable for the loss of the funds on the ground of negligence, though S.'s partners had not had any personal knowledge of the property at the time when the mtge. transaction was completed:

Held: the liability extended to the estate of a member of the firm since deceased.—BLYTH v. FLADGATE, MORGAN v. BLYTH, SMITH v. BLYTH, [1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546; 39 W. R. 422; 7 T. L. R. 29.

Annotations:—Mentd. Mara v. Browne, [1895] 2 Ch. 69; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536.

6625. ———.]—An action by a client for damages for the alleged negligence of a solr. while acting upon the client's retainer does not die with the solr., but survives & may be maintained against the personal representative of the deceased ——— *v. HOOD* (1903), 88 L. T. 19; 19

Representatives of deceased client—Liability for costs due from deceased.]—In an action by an exor. to administer the estate of his testator, a firm of solrs. carried in a claim for the sum of 3s. 1d. as the balance due to them upon certain bills of costs delivered by them to testator more than twelve months before his death, to which bills testator had made no objection in his

lifetime, & in respect of which he had paid £200 on account. The exor. alleged that some of the charges were unreasonable. The chief clerk after looking at the bills determined to refer them to the taxing master, & claimants objecting to this, the case was adjourned into ct.:—*Held: although, as no special circumstances were alleged, a taxation under Solicitor's Act, 1843 (c. 73), could not be ordered, & the retaining the bill for twelve months without objection was prima facie evidence of its being reasonable, the exor. was not estopped from disputing any of the items, & it ought to be referred to the taxing master to inquire & state whether any & which of the particular items to which the exor. objected were fair & proper to be allowed, & to what amount respectively.—Re PARK, COLE v. PARK* (1889), 41 Ch. D. 326; 58 L. J. Ch. 547; 61 L. T. 173; 37 W. R. 742.

Annotations:—Reid. Jones v. Whitehouse, [1918] 2 K. B. 61. *Mentd. Re Miller, Chapman v. Miller* (1889), 60 L. T. 634; *Lumsden v. Shipcote Land Co.* (1906), 75 L. J. K. B. 665; *Re Foss, Bilbrough, Plaskitt & Foss*, [1912] 2 Ch. 161; *Re Osborn & Osborn*, [1913] 3 K. B. 862; *Re Palace Restaurants*, [1914] 1 Ch. 492.

SUB-SECT. 11.—JOINT, SEVERAL, AND JOINT AND SEVERAL CONTRACTS.

See, generally, BONDS, Vol. VII., pp. 192–194, Nos. 320–338; CONTRACT, Vol. XII., pp. 24–39, Nos. 28–190.

6627. Several liability—Covenant to account for money received.]—*PRIMROSE v. BROMLEY* (1739), 1 Atk. 89; cited 2 Ves. Sen. 102; 26 E. R. 58, L. C.

6628. ——— Acknowledgment of debt by executor.]—Where persons are jointly & severally bound as co-obligors upon a bond & one dies, the joint obligation upon the bond does not pass to the exor. of the deceased co-obligor, even though the bond purports to bind the exors. of each of the co-obligors. The liability that passes to such exor. is the several liability only, & therefore an acknowledgment by such exor. of the existence of the debt is an acknowledgment of the several liability only, & is not an acknowledgment as against the other co-obligors within Civil Procedure Act, 1833 (c. 42), s. 5, & does not take the case out of sect. 2 of that statute as against them. The obligors of a bond bound themselves jointly & severally for the repayment of a sum of money advanced with interest. One of them, the principal debtor, died, & his exor. made an acknowledgment of the debt. The deceased co-obligor had been in the habit of sending the half-yearly interest by cheques enclosed in letters, the person who received these letters stated in evidence that the letters had been destroyed, but said that they contained, in addition to the cheques, acknowledgments of the existence of the bond, & it was accepted that they contained such acknowledgments:—*Held: the acknowledgment by the exor. was not an acknowledgment as against the other co-obligors, & did not prevent the statute running in their favour.—READ v. PRICE*, [1909] 1 K. B. 577; 78 L. J. K. B. 504; 100 L. T. 457; 25 T. L. R. 283; *affd.*, [1909] 2 K. B. 724, C. A.

———.]—*See, also, BONDS, Vol. VII., pp. 192, 193, 243, Nos. 320–323, 857.*

6629. Joint liability—Release of executor of

obligor—No defence to co-obligors.]—Where a bond has been given for the payment of money on a certain day by A., B., & C. jointly, & it does not appear on the face of the bond that B. & C. are only sureties, it is no defence in an action on the bond against B. & C. after A.'s death to plead that A. was the principal, & that pltf. had released A.'s exor. before bringing the action.—*ASHBEE v. PIDDUCK* (1836), 1 M. & W. 564; 2 Gale, 116; Tyr. & Gr. 1016; 5 L. J. Ex. 251; 150 E. R. 559. *Annotation:—Mentd. Husband v. Davis* (1851), 10 C. B. 645.

6630. — Does not pass to executor—Although named in contract.]—*READ v. PRICE*, No. 6628, *ante*.

—.]—*See, also*, BONDS, Vol. VII., pp. 193, 241, 242, Nos. 324–327, 838–848; CONTRACT, Vol. XII., pp. 34, 35, Nos. 117–129.

Joint & several liability.]—*See* BONDS, Vol. VII., pp. 193, 194, 242, Nos. 328–338, 849–856; CONTRACT, Vol. XII., p. 39, Nos. 172–189.

Constructive contracts—Liability for contribution.]—*See* CONTRACT, Vol. XII., p. 537, Nos. 4462, 4463.

— **Amount of contribution.]—***See* CONTRACT, Vol. XII., p. 538, Nos. 4471–4473.

SUB-SECT. 12.—LEASES.

A. Representative of Lessor.

6631. Covenants by lessor—To pay quit rent.]—A covenant that the lessor shall pay quit rents during the term does not extend to his exors.—*INGERY v. HYDE'S EXECUTORS* (1555), 2 Dyer, 114 a; 73 E. R. 250.

Annotation:—Reid. Hyde v. Windsor (1596), Cro. Eliz. 457.

6632. — Breach by assignee of reversion.]—*BURMAN v. ASTON* (1664), 1 Lev. 144; 83 E. R. 340; *sub nom. BOARMAN v. ARTON*, 1 Keb. 775; *sub nom. BOURMAN v. ACTON*, 1 Keb. 806.

6633. — Covenant operating at end of term—Death of lessor before termination—Liability de bonis testatoris.]—In an action of covenant upon a demise of bleach works & articles, matters, & things, mentioned in the indenture, which the lessee was authorised to replace, the declaration alleged that in case a valuation at the end of the term should exceed a certain sum it was agreed that the lessor, his heirs, exors., administrators, or assigns should pay the difference; that during the term the lessor died, having by his will appointed deft. his exor., & having devised the several reversions in the demised premises & articles, matters, & things to deft.; & that deft. had not paid the amount of the difference between the value, etc., of the articles, matters, & things. The jury having found for pltf.:—*Held*: the covenant did not run with the land, & the judgment ought to be against the deft. as exor., as to damages & costs *de bonis testatoris et si non*, as to costs *de bonis propriis*.—*GORTON v. GREGORY* (1862), 3 B. & S. 90; 6 L. T. 656; 122 E. R. 35; *sub nom. GARTON v. GREGORY*, 31 L. J. Q. B. 302; *sub nom. GREGORY*

v. GORTON, 10 W. R. 713, Ex. Ch.; *subsequent proceedings, sub nom. COWARD v. GREGORY* (1866), L. R. 2 C. P. 153.

6634. — Lessor being tenant for life—Breach by assignees of remaindermen.]—Pltfs. were the exors. of one Bath & defts. the exors. of one Bowles, & the action was brought for the balance of compensation for certain crops, etc., pursuant to a covenant in a lease granted by Bowles to Bath. Bowles was tenant for life, & under the powers of Settled Land Acts granted the lease, & by its terms it was provided: "the lessor hereby for himself & his assigns covenants with the lessee that he will pay the tithe rentcharge on the premises, also that he the lessor or his assigns or the succeeding tenants will at the expiration or sooner determination of the term take & pay for the growing crops & manure then upon the demised premises & the unexhausted tillages & dressings according to the custom of the country at a fair valuation." After certain other provisions the lease proceeded: "provided also that in the event of the lessor or his assigns at any time or times & from time to time desiring during the term to resume possession of any of the lands, but not the house, garden, building or yards, comprised in this demise for any purpose other than agriculture it shall be lawful for him & them so to do upon giving to the lessee, his exors., administrators, or assigns, or leaving upon some part of the demised premises three calendar months' notice in writing of such desire, & thereupon at the expiration of such notice a reduction of" rent should be made, "& the lessor or his assigns shall . . . pay to the lessee, his exors., administrators, or assigns, for the growing crops," etc., "& for the unexhausted tillages & dressings the like amount as he or they would be entitled to upon quitting, pursuant to the covenant of the lessor in that behalf before contained." The lessor having died, the owners of the fee simple sold a certain portion of the demises property to the C. F. E. Limited, subject to the tenancy & to the payment of compensation, etc., under the lease. Pltfs. paid rent in respect of this portion to the C. F. E. Limited, & notice having been given by the C. F. E. Limited to pltfs. that they intended to resume possession, it was agreed that the C. F. E. Limited should pay pltfs. £50 in respect of the unexhausted improvements.

The C. F. E. Limited being wound up, pltfs. could not obtain this amount, & they then sued the defts. on the covenant by Bowles in the lease:—*Held*: defts. were not liable.—*BATH v. BOWLES* (1905), 93 L. T. 801, D. C.

6635. Lessor's power to lease void.]—E. being tenant for life under a deed of settlement, with a power to lease under certain restrictions, grants leases not in conformity with the power & dies, leaving by will the residue of his personalty to J., his son, the next remainderman under the settlement. J. having called upon the exors. to pay the residue, they require an indemnity against the contingent claims of the tenants in case of eviction, & upon the refusal of J. to give such indemnity, he files a bill against them for an account & payment of the residue:—*Held*: as J. had the power to disturb the leases, he was bound either

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t. Covenants by lessor—To pay valuation of buildings—Right of assignee to sue executors.]—Where lessor cove-

nanted with lessee that he would at the expiration of the term pay him, his heirs, or assigns, a valuation for his buildings on the land devised:—*Held*: the assignee of the term & of all claims

under the covenants in the lease could, as the assignee of a chose in action, sue the exors. in his own name.—*Re HAISLEY* (1879), 44 U. C. R. 345.—CAN.

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to confirm them, or to give the indemnity required, & the exor. had a right to hold the residue till he obtained the confirmation or indemnity.—**VERNON v. EGMONT** (1827), 1 Bli. N. S. 554; 4 E. R. 979, H. L.

Annotations:—*Consd.* **Cochrane v. Robinson** (1840), 10 L. J. Ch. 109. *Refd.* **Marshall v. Holloway** (1832), 5 Sim. 196; **Blount v. Hipkins** (1834), 4 L. J. Ch. 13; **Mellish v. Vallins** (1862), 31 L. J. Ch. 592.

6636. —.—Pltf. being in occupation of premises under a lease from J., which would expire on Dec. 4, 1864, obtained from J. a reversionary lease for twenty-one years & twenty-one days, to commence from Dec. 4, 1864, on payment of a premium. In Nov. 1863, J. died, & it turned out he had no power to grant this reversionary lease. F., who was entitled to the premises on the death of J., refused to ratify the lease, & pltf. was obliged to accept a lease from F. to commence on Dec. 25, 1864, for seven years only, at a greater rent. Pltf. brought an action against the exor. of J. on a covenant for quiet enjoyment contained in the void lease:—*Held*: (1) on a plea that F. did not claim the premises from pltf. or threaten to oust him from the possession thereof, pltf. was entitled to judgment; (2) pltf. was not merely entitled to recover the premium & expenses of the void lease, but was entitled to recover the difference between the expenses of the void lease & the lease granted by F., & also the difference between the respective values of such leases, but that in calculating such difference in value, the transaction was not to be considered in the nature of a compulsory sale.—**LOCK v. FURZE** (1866), L. R. 1 C. P. 441; Har. & Ruth. 379; 35 L. J. C. P. 141; 15 L. T. 161; 30 J. P. 743; 14 W. R. 403, Ex. Ch.

Annotations:—*As to (2)* *Refd.* **Wigsell v. School for Indigent Blind** (1882), 8 Q. B. D. 357. *Generally, Mentd.* **Wall v. City of London Real Property Co.** (1874), 30 L. T. 53; **Wallis v. Hands**, [1893] 2 Ch. 75; **Grosvenor Hotel Co. v. Hamilton**, [1894] 2 Q. B. 836; *Re Gray*, [1901] 1 Ch. 239.

6637. Agreement to grant lease—Death of intended lessor before lease granted—Offer of lease by executor's rejected.]—(1) It was agreed between M., the lessee of certain premises, & pltf., that M. should grant him a lease, which was to contain the usual covenants, & particularly those contained in the lease under which M. held the premises, so that same in no way restricted the trade of a retailer of beer. The original lease did contain a restriction against the use of the premises by a retailer of beer:—*Held*: whether the words "so that same" referred to the original or the proposed lease, the meaning was that M. should grant a lease without the covenant in restraint of trade.

(2) The agreement was made & pltf. entered in Mar. 1853, & in Aug. his attorney sent a draft lease containing a covenant in restraint of selling beer. M. died in Sept., & pltf.'s attorney returned the draft in Nov., objecting to the covenant. A correspondence subsequently took place, & early in Mar. 1854, defts., as M.'s exors., offered a lease pursuant to the agreement; but it was not accepted:—*Held*: a reasonable time had not elapsed before testator's death for him to grant the lease, nor after it, for the exors. to do so.—**HAYWARD v. PARKE** (1855), 16 C. B. 295; 3 C. L. R. 1280; 24 L. J. C. P. 217; 25 L. T. O. S. 199; 1 Jur. N. S. 781; 139 E. R. 771.

B. Representative of Lessee.

(a) *Where Representative has not entered on Premises.*

i. In General.

6638. Executor cannot waive lease.]—**MOULE v. MOODIE** (1620), Palm. 116; 81 E. R. 1005.

6639. —.—(1) An exor. cannot waive a term of years; but if he lets it alone, & the rent exceeds the value of the land, he is chargeable in the *detinet* only for rent.

(2) It seemed an exor. could not waive his term; for if he had assets he should be charged *de bonis testatoris*, & the profits of the land are assets to the rent, & only the surplus above the rent is assets to other debts (*per CUR.*).—**BOLTON v. CANNON** (1675), Freem. K. B. 393; 1 Vent. 271; Poll. 125; 89 E. R. 292; *sub nom.* **BOULTON v. CANON**, Freem. K. B. 336; 3 Keb. 446, 466, 493.

Annotations:—*As to (1)* *Refd.* **Rubery v. Stevens** (1832), 4 B. & Ad. 241. *Generally, Mentd.* **Heydon v. Thompson** (1834), 1 Ad. & El. 210.

6640. Covenants running with the land—Breach after assignment of term.]—An assignee of a reversion who has accepted rent from the assignee of the term, may maintain covenant against the exor. of the lessee, or the assignee of the term, for a breach of covenant running with the land, committed after the assignment of the reversion & the term; but he can have only one satisfaction.—**BRETT v. CUMBERLAND** (1619), Cro. Jac. 521; 3 Bulst. 164; Godb. 276; 1 Roll Rep. 359; 2 Roll Rep. 63; 79 E. R. 446.

Annotations:—*Refd.* **Norton v. Acklane** (1640), Cro. Car. 579; **Heliar v. Caseborough** (1665), 1 Keb. 839; **Thursby v. Plant** (1669), 1 Saund. 237; **Jenkins v. Hermitage** (1674), Freem. K. B. 377; **Bally v. Wells** (1769), 3 Wils. 25. *Mentd.* **Glover v. Cope** (1690), Skin. 296; **London City v. Vanacre** (1699), 12 Mod. Rep. 269; **Rumsey v. George** (1813), 1 M. & S. 176; **M'Neillage v. Holloway** (1818), 1 B. & Ald. 218; **Lyme Regis Corp'n. v. Henley** (1834), 1 Bing. N. C. 222; **Nicholl v. Allen** (1862), 1 B. & S. 935.

6641. — Grinding corn at specified mill.]—Testator being seized in fee of certain lands, & also of a corn mill, demised the former to a tenant for three lives, covenanting for money rent, & in addition thereto that the lessee should perform certain suits & services, & amongst others, that he, his heirs & assigns should do suit to the lessor's mill by grinding there all such corn as grew upon the demised land. Testator afterwards devised the mill & also the reversion of the land to same person, who became seized upon the death of deviser. During the demise of the land, the lessee died, intestate, & his wife took out administration of his estate & effects. Covenant being brought assigning for a breach neglect to grind corn at the mill, during the lifetime of the lessee & also since his death:—*Held*: the reservation of the suit to the mill was in the nature of a rent, & the covenant to render it ran with the land, whilst the ownership of the land & the mill remained in same person, & entitled the latter to maintain an action at common law upon it against the personal representative of the lessee.—**VYVYAN v. ARTHUR** (1823), 1 B. & C. 410; 2 Dow. & Ry. K. B. 670; 107 E. R. 152; *sub nom.* **VIVYAN v. ARTHUR**, 1 L. J. O. S. K. B. 138.

Annotations:—*Refd.* **Doe d. Calvert v. Reid** (1830), 10 B. & C. 849; **Keppell v. Bailey** (1834), 2 My. & K. 517; **Norval v. Pascoe** (1864), 4 New Rep. 390; **Dewar v. Goodman**, [1909] A. C. 72. *Mentd.* **Standen v. Christmas** (1847), 16 L. J. Q. B. 265; **Rogers v. Hosegood**, [1900] 2 Ch. 388; **Dyson v. Forster**, **Dyson v. Seed**, **Quinn, Morgan, etc.**, [1909] A. C. 98; **Ricketts v. Enfield Churchwardens**, [1909] 1 Ch. 544.

6642. Covenant to insure property—Breach before death of testator.]—Testator who was, at his death, lessee of a house under a lease, in which he had covenanted to keep the house insured, appointed A., his son, his exor. Testator had effected a policy of insurance. The policy expired on Mar. 25. Testator died on Mar. 27. The house was burnt down on May 26. A. proved the will on June 17. Evidence was given that, between the death of testator & May 26, A. had received money of some of the customers of testator who had been a tradesman:—*Held*: A. was not liable in respect of the breach of the covenant.—*FRY v. FRY* (1859), 27 Beav. 144; 28 L. J. Ch. 593; 34 L. T. O. S. 51; 54 E. R. 56.

Annotation:—*Reid. Re McEacharn, Gambles v. McEacharn* (1911), 103 L. T. 900.

6643. Agreement to renew lease—Specific performance decreed.]—Specific performance of a covenant in a lease to take a renewed lease decreed against lessee's exors. who had entered & admitted assets. But the ct. will take care that the renewed lease, if not beneficial, is so framed as that no personal liability shall be incurred by the exors.—*STEPHENS v. HOTHAM* (1855), 1 K. & J. 571; 3 Eq. Rep. 571; 24 L. J. Ch. 665; 26 L. T. O. S. 37; 1 Jur. N. S. 842; 3 W. R. 340; 69 E. R. 587.

6644. — Court will protect executors—From personal liability—In renewed lease.]—*STEPHENS v. HOTHAM*, No. 6643, *ante*.

6645. — Not to detriment of interest of beneficiaries.]—Testator directed his exors. to get in & convert all his real & personal estate, & invest same upon trust from time to time pay & divide the interest & dividends to two tenants for life, with benefit of survivorship. At the death of survivor to convert the whole, & to pay & divide same amongst his nephews & nieces, naming them. Part of his personal estate consisted of leaseholds for lives, renewable on death of last nominee, under different terms of renewal, some arbitrary, some not, some of the premises contained in the leases had come under the control of the Charity Comrs., & alterations as to the terms of renewal had been made by other lessors. Considerable repairs had become necessary to certain of the houses, & dilapidations had taken place in testator's lifetime:—*Held*: (1) the exors. were bound to repair & make good the dilapidations, the amounts to be paid out of testator's general estate; (2) as to the renewals of the leases the exors. were not bound to obtain any renewal which would be prejudicial to the interests of the tenants for life with a general reference to chambers as to what contracts the exor. should enter into as to renewal or sale of testator's interest in the leases, & as to raising the necessary amount of fines, etc., as should be most beneficial for all parties interested under testator's will.—*ALDEN v. KENNERLEY* (1862), 7 L. T. 312.

6646. — Expenses of renewal—Charge on general assets.]—Part of testator's estate consisted of a leasehold house held under a lease containing a covenant on the part of the lessee to renew & pay a fine for such renewal:—*Held*: the expense of renewal must be borne by testator's general assets.—*TRAIL v. JACKSON* (1877), 46 L. J. Ch. 684; 25 W. R. 802.

6647. Liability of executor de son tort.]—In 1810 a lease for sixty-one & a quarter years was granted by the predecessors in title of plffs. to one "H., his exors., administrators, & assigns."

In 1814 H. died intestate. His widow administered to his effects, & remained possessed of the lease till her death, in 1843. After her death, G., the father of deft., who had married a daughter of H., without any administration took possession of the premises & received the rent, paying the ground rent; & he continued to do so until his death, in 1856. After the death of G., deft. received the rent of the premises, & after paying the ground rent, handed over the balance to his mother, conceiving her to be entitled to it. He also from time to time let the premises. After the death of his mother deft. continued to receive the rent of the premises, paying the ground rent, & dividing the balance between his two sisters & himself, no further administration having been taken out. He continued to do this down to the expiration of the lease, when he delivered up the premises to plffs. out of repair:—*Held*: beyond all doubt, deft. had estopped himself from denying that he was assignee. *Semble*: deft. was exor. *de son tort* of the term.—*WILLIAMS v. HEALES* (1874), L. R. 9 C. P. 177; 43 L. J. C. P. 80; 30 L. T. 20; 22 W. R. 317.

Annotations:—*Consd. Stratford-upon-Avon Corpn. v. Parker*, [1914] 2 K. B. 562. *Mentd. Justice v. James* (1898), 14 T. L. R. 385.

6648. —.]—*STRATFORD-UPON-AVON CORPN. v. PARKER*, No. 6650, *post*.

6649. Extent of liability—De bonis testatoris.]—*BOLTON v. CANNON*, No. 6639, *ante*.

6650. — No personal liability.]—If testator dies possessed of a term of years, the term vests in the exor. by operation of law, but he cannot be sued personally on the covenants contained therein; if he enters & takes possession & enjoys the beneficial occupation of the term, the entry, coupled with the legal title as exor., places him in the position of an actual assignee of the term & renders him liable on the covenants by privity of estate. . . . An exor. *de son tort* has no title to the term . . . & does not by operation of law or otherwise become entitled to the term of years which has never been assigned to him (*LUSH, J.*).—*STRATFORD-UPON-AVON CORPN. v. PARKER*, [1914] 2 K. B. 562; 83 L. J. K. B. 1309; 110 L. T. 1004; 58 Sol. Jo. 473, D. C.

—.]—*See, further*, Sub-sect. 12, B. (a) ii. & iii., *post*.

ii. Rent.

6651. Rentcharge on realty—For life of grantee—Executors of owner in fee—Liability of.]—*LORINGE'S (SIR WILLIAM) CASE* (1352), cited in 4 Co. Rep. at p. 49 b; 76 E. R. 1002; *sub nom. LEVING'S CASE*, Fitz. Nat. Brev. 121 d.

Annotations:—*Consd. Thomas v. Sylvester* (1873), L. R. 8 Q. B. 368. *Reid. Ognel's Case* (1587), 4 Co. Rep. 48 b. *Mentd. Christie v. Barker* (1884), 53 L. J. Q. B. 537; *Pertwee v. Townsend*, [1896] 2 Q. B. 129.

6652. Where rent higher than profit of land.]—If a man demises land by indenture to J. for years yielding rent, & J. dies making A. his exor., the lessor may have debt against the exor. for rent reserved, & arrear after the death of the lessee, although the exor. never entered or agreed; for the exor. represents the person of testator, & testator by the indenture was estopped & concluded during the term to pay the rent upon his own contract, & therefore, although his rent is higher than the profit of the land, yet the exor. cannot waive the land, but notwithstanding that he shall be charged with the rent (*per CUR.*).—

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HOWSE v. WEBSTER (1607), Yelv. 103; 80 E. R. 70.

*Annotations:—*Reid. **Helliar v. Casebrooke** (1665), 1 Keb. 923; **Wollaston v. Hakewill** (1841), 3 Man. & G. 297.

6653. Joint lease—Death of one lessee—Assignment of part interest by other lessee—Liability of representative for whole rent.]—If one of two lessees assign his interest, & the other die before the rent becomes due, an action of debt in the *debet et detinet* will lie against the assignees & extrix. of deceased lessee, for the whole rent.—**IPSWICH CORPN. v. MARTIN & PARKER** (1616), Cro. Jac. 411; 3 Bulst. 211; 1 Roll. Rep. 404; 79 E. R. 351.

*Annotations:—*Mentd. **Lyn v. Wyn** (1665), O. Bridg. 122; **Sackill v. Evans** (1674), Freem. K. B. 151.

6654. Representative of undertenant.]—An exor. may bring debt on a lease for rent in the *debet et detinet* against the administrator *de bonis non* of the undertenant of the term, for rent incurred in his own time.—**PRATTLE v. KING** (1681), 1 Mod. Rep. 185; Skin. 5; T. Jo. 169; 86 E. R. 817.

6655. Liability after assignment—By representative.]—**HELLIER v. CASBARD** (1665), 1 Sid. 266; 82 E. R. 1096; *sub nom.* **HELLIAR v. CASEBOROUGH**, 1 Keb. 839, 923; 1 Lev. 127.

*Annotations:—*Reid. **Pitcher v. Tovey** (1691), 4 Mod. Rep. 71; **Rubery v. Stevens** (1832), 4 B. & Ad. 241. Mentd. **Steward v. Wolveridge** (1832), 9 Bing. 60.

6656. ——— Before rent due.]—Covenant lies against the exor. of the lessee for non-payment of rent upon an express covenant, although debt. have assigned over before the rent became due.—**JENKINS v. HERMITAGE** (1674), Freem. K. B. 377; 1 Keb. 367; 89 E. R. 280.

6657. ———.]—**COGHILL v. FREELOVE** (1690), 2 Vent. 209; 3 Mod. Rep. 325; 86 E. R. 397.

6658. ———.]—Pltfs. leased A. to B. at £15 15s. *per annum*. B. died in 1844, leaving debt. his extrix. In 1864 debt. assigned her interest in A., & pltfs. were parties to the deed. Her assignees assigned part of A., & the rent was apportioned; the residue came by assignment to W. & O. Subsequently pltfs. assigned their reversion in part of A. No rent was paid by debt. or her assignees after the assignment to W. & O., who, however, had not paid rent or attorned to pltfs.:—*Held*: debt. was liable on the covenant to pay rent to pltfs. for the part reversion of A. which remained in them, & the rent was apportionable.—**SWANSEA CORPN. v. THOMAS** (1882), 10 Q. B. D. 48; 52 L. J. Q. B. 340; 47 L. T. 657; 47 J. P. 135; 31 W. R. 506.

*Annotation:—*Mentd. **Baynton v. Morgan** (1888), 21 Q. B. D. 101.

6659. ——— Premium paid by assignee.]—When exors. received a premium upon the assignment of a lease & paid the amount into their testator's estate:—*Held*: they were not personally liable for rent accrued due after the assignment in respect of the premium so paid in.—**GOODLAND v. EWING** (1883), Cab. & El. 43.

6660. ——— Acceptance of rent by lessor—From assignee.]—Covenant for rent against the exor. of a lessee, where the lessee in his lifetime had assigned his term, & the lessor had accepted the assignee for his tenant.—**ARTHUR v. VANDERPLANK** (1734), Kel. W. 167; 2 Barn. K. B. 372; 7 Mod. Rep. 198; Ridg. temp. H. 40; 25 E. R. 550.

6661. Representative of representative.]—In covenant upon an indenture of lease for non-payment of rent & non-reparation, the declaration alleged, that all the estate of the lessee, in a great part of the demised premises, came to & vested in debt. by assignment, whereupon & whereby debt. became possessed. Debt. pleaded, that the part of the premises did not come to or vest in her by assignment:—*Held*: the allegation was sustained by showing that A., an assignee of the term, demised part of the premises, the rent sued for being specifically reserved in respect of such part, to B. for a period exceeding the then remainder of the term, reserving a new rent, payable to himself, exceeding in amount that reserved by the original lease, & that debt. was the extrix. of the exor. of B.; although debt. had not entered, or done any act beyond taking probate of B.'s will. *Semble*: the new rent, so far as it exceeded the rent reserved by the original lease, would be a rent sec.—**WOLLASTON v. HAKEWILL** (1841), 3 Man. & G. 297; 3 Scott, N. R. 593; 10 L. J. C. P. 303; 133 E. R. 1157.

*Annotations:—*Consd. **Rendall v. Andraeo** (1892), 61 L. J. Q. B. 630. Reid. **Beardman v. Wilson** (1868), L. R. 4 C. P. 57.

6662. To what extent liable—So far as there are assets.]—**HELLIER v. CASBARD** (1665), 1 Sid. 266; 82 E. R. 1096; *sub nom.* **HELLIAR v. CASEBOROUGH**, 1 Keb. 839, 923; 1 Lev. 127.

*Annotations:—*Consd. **Ruberry v. Stevens** (1832), 4 B. & Ad. 241. Reid. **Pitcher v. Tovey** (1691), 4 Mod. Rep. 71. Mentd. **Steward v. Wolveridge** (1832), 9 Bing. 60.

6663. ———.]—**COGHILL v. FREELOVE** (1690), 2 Vent. 209; 3 Mod. Rep. 325; 86 E. R. 397.

6664. ———.]—The exor. of the lessee is still bound to perform the covenants in the lease so long as he has assets (*per cur.*).—**PITCHER v. TOVEY** (1692), 4 Mod. Rep. 71; 12 Mod. Rep. 23; Holt, K. B. 73; 1 Salk. 81; 1 Show. 340; 87 E. R. 268; *sub nom.* **TOVEY v. PITCHER**, Carth. 177; 2 Vent. 234; *sub nom.* **TONGUE v. PITCHER**, 3 Lev. 295.

*Annotations:—*Reid. **Cook v. Harris** (1697), 1 Ld. Raym. 367. Mentd. **Griffyn v. Griffyn** (1740), Barn. Ch. 391; **Onslow v. Corrie** (1817), 2 Madd. 330.

6665. ——— Personal liability—In respect of premium received—On assignment.]—**GOODLAND v. EWING**, No. 6659, *ante*.

6666. ——— After offer to surrender lease—Breaches accruing after offer.]—*Semble*: an offer by an exor. to a lessor to surrender to him a lease granted to his testator is an answer to an action of covenant against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer.—**REID v. TENTERDEN** (LORD) (1833), 4 Tyr. 111.

*Annotations:—*Reid. **Sleap v. Newman** (1862), 12 C. B. N. S. 116. Mentd. **Hornidge v. Wilson** (1840), 3 Per. & Dav. 641.

6667. Premises of less value than rent.]—(1) Where the residue of a term of years becomes vested in exors., & the yearly value is less than the reserved rent, the exors. are still liable in the *debet & detinet* as assignees, for so much of the rent as the premises are worth. Pltf. having declared in covenant for rent at £26 a year, debts. pleaded that they were only chargeable as exors.; that the term came to them as such, that the premises were of less yearly value than the rent of £26, viz. of no value, & that they had fully administered, etc. Replication, that the premises were of the yearly value of £26; issue thereon. At the trial the yearly value was found

by the jury to be £20 :—*Held* : the replication was, in substance, that the premises were of some value ; the issue was merely informal, & cured by verdict ; & pltf. might recover the arrears of rent at the rate fixed by the jury.

(2) If he [the exor.] accept the exorship. & enter on the demised premises, he is chargeable as assignee in an action of debt or covenant for arrears of rent due after his entry *de bonis propriis*. . . . Upon reference to the authorities it seems that . . . the exor. is chargeable personally for so much of the rent as the premises are worth (DENMAN, C.J.).—*RUBERY v. STEVENS* (1832), 4 B. & Ad. 241 ; 1 Nev. & M. K. B. 183 ; 2 L. J. K. B. 46 ; 110 E. R. 446.

Annotations :—*As to* (1) *Consd.* *Hornidge v. Wilson* (1839), 3 Per. & Dav. 641. *Reid.* *Wollaston v. Wakewill* (1841), 3 Man. & G. 297 ; *Hopwood v. Whalley* (1848), 6 C. B. 744 ; *Stephens v. Hotham* (1855), 24 L. J. Ch. 665 ; *Re Bowes, Strathmore v. Vane, Norcliffe's Claim* (1887), 37 Ch. D. 128. *As to* (2) *Consd.* *Rendall v. Andrae* (1892), 61 L. J. Q. B. 630. *Generally, Mentd.* *Thacker v. Wilson* (1835), 4 Nev. & M. K. B. 658.

iii. Repairs.

6668. Liability of representative of representative.]—*BULL v. WINTER* (1622), Palm. 314 ; 81 E. R. 1100.

6669. —.]—*WOLLASTON v. HAKEWILL*, No. 6661, *ante*.

6670. Breach of representative.]—An action is brought against an exor. of land for a term, where testator had covenanted to repair during the term, for not repairing in the time of the exor., & found against him, the judgment shall be *de bonis testatoris, de damnis, si habet* ; if not, for the costs of suit *de bonis propriis*. But where an exor. pleads *ne unques exor.*, or a false release made to himself, & it is found against him where the King has a fine ; in these two cases only the judgment shall be *de bonis testatoris, si habet* ; if not, for the whole, *de bonis propriis*.—*BRIDGMAN'S CASE* (1623), Jenk. 320 ; 145 E. R. 232 ; *sub nom.* *BRIDGMAN v. LIGHTFOOT*, Cro. Jac. 671.

Annotations :—*Reid.* *Hooper v. Summersett* (1810), Wight. 16. *Mentd.* *Pollitt v. Forrest* (1848), 11 Q. B. 962 ; *Foquet v. Moor* (1852), 7 Exch. 870 ; *Young v. Austen* (1869), L. R. 4 C. P. 553.

6671. Breach in testator's lifetime.]—*ALDEN v. KENNERLEY*, No. 6645, *ante*.

6672. Extent of liability—When limited to testator's goods.]—*BULL v. WINTER* (1622), Palm. 314 ; 81 E. R. 1100.

6673. —.]—*BRIDGMAN'S CASE*, No. 6670, *ante*.

6674. — When extending to own goods.]—*BRIDGMAN'S CASE*, No. 6670, *ante*.

PART VI. SECT. 2, SUB-SECT. 12.— B. (b) i.

a. Personal liability—After agreement to assign.]—An exor. of deceased lessee is personally liable to the lessor upon the covenants in the lease where the exor. had entered into possession of the demised premises, & such personal liability continues although the exor. has agreed to assign the lease & the lessor has accepted rent from the equitable assignee.—*ROWAND v. EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD.* (1896), 22 V. L. R. 1.—*AUS.*

b. —.]—Where testator dies in

possession of land held under a short-dated tenancy, & his exor. carries on the business on the same land for a number of years, the proper inference is that the exor. occupies under a new contract made between himself & the landlord & although he contracts expressly as exor. the liability under such contract falls on himself alone.—*RAE v. CLIFFORD* (1893), 12 N. Z. L. R. 257.—*N.Z.*

c. New lease taken by representative—Part of testator's assets.]—An administrator *cum testamento annexo*, being in possession of premises which testator held as tenant from year to year under C., took a lease from D.,

(b) Where Representative has entered on Premises.

i. In General.

6675. Personal liability—Entry & possession—Necessary before liability can attach.]—The exor. of a lessee cannot be made liable as assignee of a term without an entry & an actual taking possession by him of the demised premises : but if he enter & take possession he may be made liable as assignee, though, by proper pleading, he may limit such liability for rent to the yearly value which the premises might have yielded. *Semble* : he cannot, after entering, limit his liability under testator's covenant to repair.—*RENDALL v. ANDREA* (1892), 61 L. J. Q. B. 630 ; 8 T. L. R. 615.

Annotation :—*Reid.* *Whitehead v. Palmer*, [1908] 1 K. B. 151.

6676. — By one of two executors—Other executor not liable.]—One of two exors. of deceased tenant for a term of years entered into the demised premises :—*Held* : such entry did not enure as the entry of the two exors., so as to make them both liable in an action for use & occupation.—*NATION v. TOZER* (1834), 1 Cr. M. & R. 172 ; 4 Tyr. 561 ; 3 L. J. Ex. 234 ; 149 E. R. 1041.

Annotations :—*Consd.* *Hawkins v. Williams* (1862), 10 W. R. 692. *Reid.* *How v. Kennett* (1835), 3 Ad. & El. 659 ; *Fox v. Waters* (1840), 12 Ad. & El. 43 ; *Lowe v. Ross* (1850), 5 Exch. 553. *Mentd.* *Packer v. Gibbins* (1841), 10 L. J. Q. B. 224.

6677. — Entry & payment of rent—Acceptance of lease presumed.]—An action of *assumpsit* for the breach of an implied contract to keep premises in repair is transitory & not local.

A. demised to B. certain lands & premises for one year certain, & then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit ; & the lease contained various terms & conditions as to the management of the lands & repairing the buildings. The lessee died, & his exors. entered into the occupation of the premises, & continued to occupy & paid rent :—*Held* : they were chargeable in their personal character upon the terms contained in the original demise, their continuing to occupy, & the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract.—*BUCKWORTH v. SIMPSON* (1835), 1 Cr. M. & R. 834 ; 5 Tyr. 344 ; 1 Gale, 38 ; 4 L. J. Ex. 104 ; 149 E. R. 1317.

Annotations :—*Consd.* *Humphreys v. Franks* (1856), 18 C. B. 323. *Apld.* *Williams v. Heales* (1874), L. R. 9 C. P. 177. *Expld.* *Phillips v. Miller* (1875), L. R. 10 C. P. 420. *Reid.* *Elcott v. Johnson* (1866), L. R. 2 Q. B. 120 ; *Cornish v. Stubbs* 870, L. R. 5 C. P. 334 ; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. *Mentd.* *Brydges v. Lewis* (1842), 3 Q. B. 603 ; *Standen v. Christmas* (1847), 10 Q. B. 135 ; *Deakin v. Penniall* (1848), 2 Exch. 320 ; *Arden v. Sullivan* (1850), 14 Q. B. 832 ; *Maples v. Pepper* (1856), 18 C. B. 177 ; *Camden v. Batterbury* (1860), 7 C. B. N. S.

the head landlord, to commence from the expiration of C.'s lease :—*Held* : the lease was a graft on testator's interest, & formed part of his assets.—*M'AULEY v. CLARENDON* (1858), 8 L. Ch. R. 568 ; *Drury temp. Nap.* 433.—*IR.*

d. —.]—Part of testator's assets consisted of a holding subject to Ulster tenant-right custom ; the exor. surrendered it to the landlord's agent, & paying for the tenant-right with his own money, was declared the new tenant :—*Held* : the exor. took the holding in trust for persons entitled under the will.—*M'CRACKEN v. M'CLELLAND* (1877), 11 I. R. Eq. 172.—*IR.*

Sect. 2.—On contracts of deceased: Sub-sect. 12, B. (b) i., ii. & iii., & C.]

864; *Walker v. Gode* (1861), 6 H. & N. 594; *Smith v.*

6678. — As assignee—Privity of estate.]—STRATFORD-UPON-AVON CORPN. *v.* PARKER, No. 6650, *ante*.

ii. Rent.

6679. Liability de bonis propriis.]—An administrator may be charged as assignee in debt for rent.—BUCK *v.* BARNARD (1692), 1 Show. 348; Holt. K. B. 75; 89 E. R. 617.

6680. — After offer to surrender lease.]—A., as administrator of B., the lessee of certain premises, took possession of them on B.'s death, but paid no rent. The premises proved to be unproductive, & after eight months, A. made the lessor a verbal offer to surrender them. In an action brought against A. in his own right, for rent due after the decease of B.:—*Held*: A. was not chargeable.—REMANT *v.* BREMIDGE (1818), 8 Taunt. 191; 2 Moore, C. P. 94; 129 E. R. 357.

Annotations:—*Dbtd.* Hornidge *v.* Wilson (1840), 3 Per. & Dav. 641. *Expld. & Distd.* Hopwood *v.* Whaley (1848), 6 C. B. 744. *Dbtd.* Whitehead *v.* Palmer, [1908] 1 K. B. 151.

6681. — Extent of liability—Profits.]—If exor. of lessee for years enter into the tenements, no part of the profits, unless what is over & above the rent, shall be assets; but is received by the exor. as tertenant, & appropriated to the use of the lessor.—BUCKLEY *v.* PIRK (1710), 1 Salk. 87, 316; 10 Mod. Rep. 12; 91 E. R. 75, 279.

Annotations:—*Consd.* Wollaston *v.* Hakowill (1841), 3 Man. & G. 297. *Refd.* Lyddall *v.* Dunlapp (1742), 1 Wils. 4; Rubery *v.* Stevens (1832), 4 B. & Ad. 241; *Re* Bowes, Strathmore *v.* Vane, Norcliffe's Claim (1887), 57 L. J. Ch. 455.

6682. — — — — —.]—(1) An exor. who has occupied premises held by his testator under a lease with covenants for payment of rent & taxes & to keep the premises in repair, sued in covenant as assignee, in respect of the privity of estate, is liable on the covenant for payment of rent & taxes to the extent only of the profits; but, for a breach of the covenant to repair, he is liable to same extent that any other assignee is liable.

(2) In covenant against an administrator as assignee, who has entered upon premises demised to his intestate, for non-repair, a plea that the premises were of no value & produced no profits to the administrator is bad; *secus* where the breach is for rent.—TREMERE *v.* MORISON (1834), 1 Bing. N. C. 89; 4 Moo. & S. 603; 3 L. J. C. P. 260; 131 E. R. 1051.

Annotations:—*As to* (1) *Apld.* Sleep *v.* Newman (1862), 12 C. B. N. S. 116. *Refd.* Hornidge *v.* Wilson (1840), 11 Ad. & El. 645; Bonner *v.* Tottenham & Edmonton Permanent Investment Bldg. Soc., [1899] 1 Q. B. 161. *As to* (2) *Apld.* Sleep *v.* Newman (1862), 12 C. B. N. S. 116. *Refd.* Thacker *v.* Wilson (1835), 4 Nev. & M. K. B. 658; Rendall *v.* Andreae (1892), 61 L. J. Q. B. 630.

6683. — — — — — Derivable from exercise of reasonable diligence.]—(1) Exor. of lessee for years is, in the absence of other assets, liable, *de bonis propriis*, for the rent reserved, to the extent

to which he might, by the exercise of reasonable diligence, have derived profit from the premises.

(2) In debt, on an indenture of lease, by A., the lessor, against C. as assignee of B., the lessee, demanding £247 10s. 0d. for rent for two & three-quarter years, at the rate of £90 a year, accruing after the assignment, C. pleaded that he ought not to be charged with the rent, otherwise than as exor. of B.; that C. entered upon the premises as such exor., & that he had not at any time since the death of B., derived any profit or advantage, as such exor., or otherwise, by or from the premises; that the premises had not, since the death of B. yielded any profit whatever; that the premises did not vest in him, C., by assignment, or otherwise than as such exor.; & that he had no assets in his hands to be administered. Replication, that C. did, after his entry upon the premises, derive great profit & advantage by & from the premises, which had yielded to him profit to the amount of the rent, sought to be recovered:—*Held*: the statement in the plea must be taken as amounting to an allegation that C. could not have derived any profit from the premises.

(3) The jury having found that the premises could have been let for £60 a year, a verdict was entered for the plaintiff for £247 10s. with leave to deft. to move to reduce it to £165:—*Held*: pltf. was entitled to the latter sum only.—HOPWOOD *v.* WHALEY (1848), 6 C. B. 744; 6 Dow. & L. 342; 18 L. J. C. P. 43; 12 Jur. 1088; 136 E. R. 1440.

Annotations:—*As to* (1) *Apld.* *Re* Bowes, Strathmore *v.* Vane, Norcliffe's Claim (1887), 37 Ch. D. 128. *As to* (2) *Refd.* Rendall *v.* Andreae (1892), 61 L. J. Q. B. 630.

6684. — — — — —.]—An exor. of a lessee who after the death of his testator enters into possession of property leased to testator is personally liable to the lessor for any profit or advantage derived by him from the premises, or which by reasonable diligence he might have derived therefrom, during the time that he has been in possession, up to the full amount of the rent reserved by the lease.—*Re* BOWES, STRATHMORE (EARL) *v.* VANE, NORCLIFFE'S CLAIM (1887), 37 Ch. D. 128; 57 L. J. Ch. 455; 58 L. T. 309; 36 W. R. 393; 4 T. L. R. 20.

Annotations:—*Folld.* Whitehead *v.* Palmer, [1908] 1 K. B. 151. *Refd.* Rendall *v.* Andreae (1892), 61 L. J. Q. B. 630.

6685. — — — — — Yearly value.]—RUBERY *v.* STEVENS, No. 6667, *ante*.

6686. — — — — —.]—Although in respect of rent, the personal liability of an exor. of a lessee for years does not exceed the value of the demised premises, this qualification does not extend to a covenant for repairs. Plea by an exor., that the demised premises had yielded no profit beyond what he had paid over to the lessor, that the premises came to him only as exor., & that he offered to surrender them before the breaches occurred:—*Held*: on the authority of *Tremeere v. Morison*, No. 6682, *ante*, bad on demurrer.—SLEEP *v.* NEWMAN (1862), 12 C. B. N. S. 116; 6 L. T. 386; 142 E. R. 1087.

Annotation:—*Refd.* Rendall *v.* Andreae (1892), 61 L. J. Q. B. 630.

PART VI. SECT. 2, SUB-SECT. 12.— B. (b) ii.

e. Rents of Crown lease—Whether payable from fund for payment of debts.]—Rents of a Crown lease, which became payable after the death of testator,

were paid by his extrix., & a grant in fee simple of the land obtained by her:—*Held*: such payments were not "debts" until they actually fell due, & therefore were not payable out of the fund provided by testator for the payment of his debts.—O'NEIL *v.*

HART, [1905] V. L. R. 107.—AUS.

f. Liability of executor de son tort.]—Upon the death of A., a yearly tenant of land, B., his widow, remained in possession, & employed the produce to maintain the stock. She paid rent

6687. ———.]—RENDALL *v.* ANDREAE, No. 6675, *ante*.

6688. ———.]—The lessee of certain premises died intestate on May 24. On June 7 deft. was appointed administrator *ad colligenda bona* with power to sell the lease, & on that date he entered into possession of the premises. On June 24 a quarter's rent became due, but was not paid. On Aug. 23 pltf., the lessor, commenced an action against deft. for recovery of possession of the premises on non-payment of rent, & for rent & mesne profits. Judgment for possession was obtained under R. S. C., 1883, Ord. 14, & on Oct. 18 deft. went out of possession. The rent of the premises under the lease was £450 a year. While deft. was in possession he used reasonable diligence to find a purchaser of the lease or a tenant, but without success, & the only sum received by him in respect of the premises was £26 5s., being rent from a sub-tenant of a part of the premises:—*Held*: deft., having entered into possession, was personally liable to pltf. for rent from June 7 to Aug. 23 at the rate of £450 a year, that being the yearly value of the premises, & for mesne profits at same rate from the latter date to Oct. 18.—WHITEHEAD *v.* PALMER, [1908] 1 K. B. 151; 77 L. J. K. B. 60; 97 L. T. 909; 24 T. L. R. 41; 52 Sol. Jo. 45.

6689. ——— Full letting value.]—*Re* BOWES, STRATHMORE (EARL) *v.* VANE, NORCLIFFE'S CLAIM, No. 6684, *ante*.

6690. Liability *de bonis testatoris*—Claim waived against executor personally.]—ROYSTON *v.* CORDRYE (1677), Aleyn, 42; 82 E. R. 906.

Annotations:—*Reid*. Lyddall *v.* Dunlapp (1742), 1 Wils. 4; Hope *v.* Bague (1802), 3 East, 2.

6691. ——— Plea of no assets—Premises of less value than rent.]—In debt for rent exor. may plead no assets & that the premises are of less value than the rent.—BILLINGHURST *v.* SPEERMAN (1695), 1 Salk. 297; Holt, K. B. 306; 91 E. R. 263.

6692. Liability to distress—Landlord & Tenant Act, 1709 (c. 18).]—Where the lessee of lands dies before the expiration of the term, & his administrator continues in possession during the remainder & after the expiration of it; a distress may be taken for rent due for the whole term, the possession of the administrator being the possession of the tenant within above Act.—BRAITHWAITE *v.* COOKSEY (1790), 1 Hy. Bl. 465; 126 E. R. 269.

Annotation:—*Expld. & Distd.* Turner *v.* Barnes (1862), 2 B. & S. 435.

Defence to action for rent—Plene administravit.]—See Nos. 7618—7622, *post*.

iii. Other Covenants.

6693. Covenant to repair—Personal liability—*De bonis propriis*.]—TILNY *v.* NORRIS (1700), 1 Salk. 300; 1 Ld. Raym. 553; 91 E. R. 272.

Annotations:—*Consd.* Reid *v.* Tenterden (1833), 4 Tyr. 111; Tremere *v.* Morison (1834), 1 Bing. N. C. 89. *Reid*. Sleep *v.* Newman (1862), 12 C. B. N. S. 116.

due prior to the death of A.:—*Held*: B. was extrix. *de son tort*, & was liable for the rent due after the death of A.—ARMSTRONG *v.* M'INERHENY (1857), 7 I. C. L. R. 296; 10 Ir. Jur. 76.—IR.

G. ———.]—An exor. *de son tort* in possession of lands, held by the deceased owner for an unexpired term of years, is suable by the landlord for J.—VOL. XXIV.

rent.—FIELDING *v.* CRONIN (1885), 16 L. R. Ir. 379.—IR.

PART VI. SECT. 2, SUB-SECT. 12.—B. (b) iii.

h. Covenant to build a wall—In agreement for lease—Administrator not liable.]—An agreement for a lease contained a covenant that the lessee

6694. ——— Where surrender of lease offered.]—REID *v.* TENTERDEN (LORD), No. 6666, *ante*.

6695. ——— Not limited—Although premises yielding no profit.]—TREMERE *v.* MORISON, No. 6682, *ante*.

6696. ———.]—SLEAP *v.* NEWMAN, No. 6686, *ante*.

6697. ———.]—RENDALL *v.* ANDREAE, No. 6675, *ante*.

C. Representative of Assignee of Lease.

6698. Liability for breach of covenant—Repair—Covenant running with land.]—The administrator of the assignee of a lease is liable for a breach of the covenant to repair, although the assigns of the lessee are not mentioned in the covenant, for it runs with the land.—KEELING *v.* MORRICE (1700), 12 Mod. Rep. 371; 88 E. R. 1386.

6699. ——— Assignee of estate insolvent.]—In covenant for non-payment of rent & for non-repair, against an exor., it appeared that testator had been appointed assignee under 1 Geo. 4, c. 119, s. 7, of an insolvent's estate, which consisted of the premises held under the lease, & other property. Testator consented in writing to act as assignee, & an assignment to him from the provisional assignee was prepared, & executed by the latter, but testator did not execute the deed, although he let the premises & received rent:—*Held*: the exor. of deceased assignee was liable, as it did not appear that the Insolvent Ct. had appointed any other assignee of the insolvent's estate.—ABERCROMBIE *v.* HICKMAN (1838), 8 Ad. & El. 683; 3 Nev. & P. K. B. 676; 1 Will. Woll. & H. 534; 7 L. J. Q. B. 269; 112 E. R. 997.

6700. ———.]—WOLLASTON *v.* HAKEWILL, No. 6661, *ante*.

6701. ——— Rent.]—ABERCROMBIE *v.* HICKMAN, No. 6699, *ante*.

6702. ———.]—WOLLASTON *v.* HAKEWILL, No. 6661, *ante*.

6703. ——— Until lease surrendered or reassigned—Where rent greater than yearly value of land—Duty of representatives to surrender or reassign.]—Exors., whose testator was the assignee of a leasehold estate, of which the rent was greater than its yearly value, were ordered by the ct. to take such steps as might be necessary to relieve testator's estate from liability in respect of the rent & covenants of the lease. The exors. endeavoured to prevail upon the lessor to accept a surrender, but he refused to do so; & they took no other steps towards complying with the order:—*Held*: the exors. ought to have assigned the lease to some other person; & not having done so, they were bound themselves to exonerate testator's estate from the liabilities to which it had been subject in respect of the lease since the time at which they might have made such an assignment.—

should build a wall round the land. The lease was executed by the lessor, but not by the lessee, & did not contain the covenant:—*Held*: after the death of the lessee, a suit could not be maintained against his administrator, having assets for the specific performance of the original agreement.—BLOSSE *v.* PRENDERGAST (1862), 13 I. Ch. R. 373.—IR.

Sect. 2.—On contracts of deceased: Sub-sect. 12, C., D. & E.; sub-sects. 13 & 14, A., B. (a) & (b) i., ii., iii. & iv.]

ROWLEY v. ADAMS (1839), 4 My. & Cr. 534; 9 L. J. Ch. 34; 3 Jur. 1069; 41 E. R. 206, L. C.

*Annotations:—*Reid. *Lambarde v. Older* (1853), 23 L. J. Ch. 18. *Mentd. Re Mexican & South American Co., Lund's Case* (1859), 5 Jur. N. S. 400; *Re Consols Insee. Assocn., Benham's Case* (1865), 11 Jur. N. S. 381.

D. Settled Leaseholds.

See Sub-sect. 10, F., *ante*.

E. Specific Performance of Agreement for Lease.

6704. Court will decree—Agreement by deceased lessee.]—A. leased premises to B. for ten years; & B. covenanted not to assign the premises without A.'s consent. A. agreed to grant to C. a lease for ten years, from the end of B.'s term, subject to same covenants as were contained in B.'s lease. C. died before the lease was executed to him. A. filed a bill against C.'s exors., who admitted assets, for a specific performance of the agreement, & offered so to qualify the covenants of the lease, as that the exors. should be no further liable thereon, than they would have been on the covenants which ought to have been entered upon by testator, in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the master to settle the lease.—*PHILLIPS v. EVERARD* (1831), 5 Sim. 102; 58 E. R. 276.

*Annotation:—*Folld. *Stephens v. Hotham* (1855), 1 K. & J. 571.

6705. ——— For renewal of lease.] — *STEPHENS v. HOTHAM*, No. 6643, *ante*.

6706. ——— Agreement by deceased lessor.]—B. offered in writing to grant a lease of a coal mine upon certain terms. C. verbally accepted the offer. A draft lease was sent to him, & returned with the approval of C.'s solr. C. laid out money in driving shafts towards the coal mine through the adjoining property. Before any lease was executed, & something more than a month after the return of the draft lease B. died:—*Held*: the parol acceptance of the written offer of the lessor, coupled with the subsequent acts in the lifetime of B., entitled C. to specific performance of the agreement from the representatives of B.—*BENECKE v. CHADWICKE* (1856), 4 W. R. 687.

SUB-SECT. 13.—PARTNERSHIP.

Contracts of deceased—In respect of partnership.]—See PARTNERSHIP.

Novation—On alteration of partnership.]—PARTNERSHIP.

—.]—See, generally, CONTRACT, Vol. XII., pp. 596–606, Nos. 4956–5027.

SUB-SECT. 14.—PERSONAL CONTRACTS.

A. What are Personal Contracts.

6707. Contract not to exercise a particular trade.]—On a covenant that in consideration of a

weekly payment to A. & his exors. for a term certain, A. shall not exercise a particular trade, the exors. of A. are not bound to abstain from exercising it.—*COOKE v. COLCRAFT* (1773), 2 Wm. Bl. 856; 3 Wils. 380; 96 E. R. 505.

6708. Contract as to purchase of goods—Resumption of possession—If price not duly paid.]—An agreement between vendor & vendee of a chattel, that the former may resume the possession if the price be not duly paid, is a personal contract, not binding on alienee, or personal representative of vendee.—*HOWES v. BALL* (1827), 7 B. & C. 481; 1 Man. & Ry. K. B. 288; 6 L. J. O. S. K. B. 106; 108 E. R. 802.

*Annotations:—*Mentd. *Stainbank v. Shepard* (1853), 13 C. B. 418; *Congreve v. Evetts* (1854), 10 Exch. 298; *Castrique v. Imrie* (1861), 7 Jur. N. S. 1076; *Walker v. Clyde* (1861), 10 C. B. N. S. 381; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Sewell v. Burdick* (1884), 10 App. Cas. 74.

Contract to underwrite shares.]—See COMPANIES, Vol. IX., p. 184, Nos. 1165–1166.

See, further, Sub-sect. 14, B. (b), *post*; CONTRACT, Vol. XII., pp. 588–592, Nos. 4906–4929.

B. Effect of Death.

(a) In General.

6709. Termination of contract—No liability on representatives.]—*SIBONI v. KIRKMAN*, No. 6449, *ante*.

6710. ———.]—All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; & should he die, his exor. is not liable to an action for the breach of contract occasioned by his death (*POLLOCK, C.B.*).—*HALL v. WRIGHT* (1859), E. B. & E. 765; 29 L. J. Q. B. 43; 1 L. T. 230; 6 Jur. N. S. 193; 8 W. R. 160; 120 E. R. 695, Ex. Ch.; *revsq.* (1858), E. B. & E. 746.

*Annotations:—*Mentd. *Brown v. Royal Insee.* (1859), 1 E. & E. 853; *Beachey v. Brown* (1860), E. B. & E. 796; *Baker v. Cartwright* (1861), 30 L. J. C. P. 364; *Parkins v. Scott* (1862), 1 H. & C. 153; *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Cavell v. Prince* (1866), 4 H. & C. 368; *Boast v. Firth* (1868), L. R. 4 C. P. 1; *Frost v. Knight* (1870), L. R. 5 Exch. 322; *Robinson v. Davison* (1871), L. R. 6 Exch. 269; *Turner v. Goldsmith* (1891), 60 L. J. Q. B. 247; *Hick v. Raymond & Reid*, [1893] A. C. 22; *Nickoll v. Ashton, Edridge* (1900), 5 Com. Cas. 252; *Krell v. Henry*, [1903] 2 K. B. 740; *Jefferson v. Paskell*, [1916] 1 K. B. 57; *Gamble v. Sales* (1920), 36 T. L. R. 427.

6711. ——— Death of either party.]—In contracts for personal services, it is an implied condition that the death of either party shall dissolve the contract. A. was hired by P. to serve as farm bailiff, at weekly wages, with other advantages, & a residence in a farm house; the service to be determinable by a six months' notice or payment of six months' wages. P. died:—*Held*: P.'s personal representative was not bound to continue A. in her service, or pay him six months' wages.—*FARROW v. WILSON* (1869), L. R. 4 C. P. 744; 38 L. J. C. P. 326; 20 L. T. 810; 18 W. R. 43.

See, further, CONTRACT, Vol. XII., pp. 592–594, Nos. 4924, 4926, 4927, 4934–4948.

PART VI. SECT. 2, SUB-SECT. 14.—A.

k. Services rendered.]—Pltf. sued to recover against the estate of deceased

for services rendered at the request of deceased in going to O. for the purpose of securing the transfer of a relative of deceased from the Air Force, overseas,

to the home defence forces:—*Held*: pltf. was entitled to recover for the services rendered.—*Re MACDONALD'S ESTATE* (1924), 56 N. S. R. 451.—CAN.

(b) Particular Contracts.

i. Agency.

Death of principal.]—See AGENCY, Vol. I., pp. 541, 690, 691, Nos. 1948, 2991-3003.

Death of agent.]—See AGENCY, Vol. I., pp. 523, 691, Nos. 1830, 3004, 3005.

ii. Breach of Promise of Marriage.

6712. Liability in action—Only on proof of special damage—What amounts to special damage.]—An action for breach of promise of marriage where no special damage is alleged does not survive against the personal representatives of the promisor. The special damage which would cause the right of action to survive must be damage to the property & not to the person of the promisee, & must be within the contemplation of both parties at the date of the promise, & the action can be brought against the exors. for such special damage only, & not for general damages.—FINLAY v. CHIRNEY (1888), 20 Q. B. D. 494; 57 L. J. Q. B. 247; 58 L. T. 664; 52 J. P. 324; 36 W. R. 534; 4 T. L. R. 322, C. A.

Annotations:—Consd. Davies v. Hood (1903), 88 L. T. 19; Quirk v. Thomas, [1916] 1 K. B. 516. Refd. United Collieries v. Simpson, [1909] A. C. 383. Mentd. Admiralty Comra. v. S.S. Amerika, [1917] A. C. 38.

6713. ———.]—(1) Pltf. brought an action for breach of promise of marriage against the exor. of the promisor in which she claimed as special damage loss suffered by her through having given up a profitable business at the request of deceased & in consideration of his promise to marry her. The jury having found a verdict for pltf.:—Held: pltf. was not entitled to maintain the action.

(2) Assuming . . . that an action for breach of promise of marriage will lie against the exor. of a deceased promisor to recover special damage occurring to the estate of pltf. by reason of the breach of promise, no such damage was alleged or proved in this case, & therefore the action fails, & the principal appeal must be dismissed (PHILLIMORE, L.J.).—QUIRK v. THOMAS, [1916] 1 K. B. 516; 85 L. J. K. B. 519; 114 L. T. 308; 32 T. L. R. 197; 60 Sol. Jo. 174, C. A.

Annotations:—Generally, Mentd. Yorke v. Yorkshire Insee., [1918] 1 K. B. 662; The Adams (1919), 88 L. J. P. 129; Jackson v. Anglo-American Oil Co., [1923] 2 K. B. 601.

iii. Building Contracts.

See BUILDING CONTRACTS, Vol. VII., p. 420, Nos. 346-349; CONTRACT, Vol. XII., p. 594, No. 4944.

iv. Master and Servant.

See, generally, MASTER & SERVANT.

6714. Apprentices—Liability of master's representatives—To teach trade.]—In covenant to

instruct an apprentice, or cause him to be instructed in the trade of a saddler, & to find him meat, drink & lodging, during the term; pltf. showed testator's death, & that such a day he was turned out of doors by deft. & sic conventionem fregit in hoc, viz. not instructing him, & not finding meat & drink: to which deft. demurred, because that was a personal covenant, & discharged by death, & could not be assigned, as being no custom. But all the ct. inclined, had it been only to instruct, it had been discharged; & being complex to instruct & find meat was not; & if it were, yet the breach was sufficiently assigned, if either part were true, as here, in turning him out. Judgment for pltf.—WADSWORTH v. GUY (1664), 1 Keb. 820; 1 Sid. 216; 83 E. R. 1263.

Annotations:—Refd. R. v. Prat (1692), 12 Mod. Rep. 27; R. v. Peck (1698), 1 Salk. 65; Baxter v. Burfield (1747), 2 Stra. 1266.

6715. ———.]—Exors. bound by covenant of apprenticeship.—WALKER v. HULL (1665), 1 Lev. 177; 83 E. R. 357.

Annotations:—Refd. R. v. Peck (1698), 1 Salk. 65; Baxter v. Burfield (1747), 2 Stra. 1266.

6716. ——— For maintenance.]—WADSWORTH v. GUY, No. 6714, ante.

6717. ———.]—The master of an apprentice in husbandry dies, the justices at the sessions order his exors. to keep him, quashed; & said, perhaps covenant might lie against the exors.—R. v. PRAT (1692), 12 Mod. Rep. 27; 88 E. R. 1142.

6718. ——— For return of premium.]—The master received £250 with an apprentice, & died within two years; decreed, that the exors. shall pay back the money as a debt upon simple contract after debts on specialties are paid.—SOAM v. BOWDEN (1678), Cas. temp. Finch, 396; 23 E. R. 216.

Annotations:—Refd. Webb v. England (1860), 29 Beav. 44; Whincup v. Hughes (1871), L. R. 6 C. P. 78; Ferns v. Carr (1885), 54 L. J. Ch. 478. Mentd. Churchill v. Bertrand (1842), 3 Q. B. 568.

6719. ———.]—The sessions cannot order an administrator to refund any part of the fee which the intestate had received with his apprentice.—R. v. STANDISH (1707), 11 Mod. Rep. 110; 88 E. R. 931.

———.]—See, further, CONTRACT, Vol. XII., pp. 593, 594, Nos. 4937-4941; INFANTS; MASTER & SERVANT.

Articled clerks.]—See CONTRACT, Vol. XII., p. 594, Nos. 4942, 4943; SOLICITORS.

6720. Farm bailiff—Death of employer—Con-

PART VI. SECT. 2, SUB-SECT. 14.—B. (b) ii.

1. General rule.]—An action will not lie against exor. for a breach by testator in his lifetime of a promise to marry pltf.—O'BRIEN v. JOPLIN (1882), 4 N. S. W. L. R. 14.—AUS.

m. Liability to action—Special damage.]—GREEN v. FORBES (1905), 39 I. L. T. 257.—IR.

PART VI. SECT. 2, SUB-SECT. 14.—B. (b) iv.

n. Servant beneficiary under will—Liability of master's representatives—For wages.]—Pltf. lived with deceased during the last years of his life & was treated as one of the members of his family. On Apr. 24, 1894, deceased

paid pltf. \$1,000, taking a receipt in full to that date for her services, & for any demands she might have against him. Six days later deceased executed his will & bequeathed pltf. a legacy of \$2,000 on Nov. 7 following he executed a codicil & bequeathed pltf. a further sum of \$2,000. Pltf. sued the exors. for services rendered between the date of the receipt & the date of death:—Held: the silence of pltf. coupled with the circumstances proved, afforded sufficient ground for finding that the services subsequent to the date of payment & receipt were not to be paid in wages.—SHERRY v. WADDELL (1894), 11 N. S. R. (15 R. & G.) 312.—CAN.

—.]—Claimant

came from abroad at the request of testatrix, & remained with her for a considerable period of time, performing services of an onerous character. There was no relationship between the parties:—Held: claimant was entitled to recover on a quantum meruit, & the mere fact that claimant expected the property of testatrix to be left to her, & was given a share of residue, in the absence of any understanding or agreement that she was to be remunerated in that way, was no bar to her recovery.—Re ANSLEY'S ESTATE (1907), 41 N. S. R. 527; 3 E. L. R. 234.—CAN.

p. ———.]—Re RUTHERFORD (1915), 9 O. W. N. 32; 34 O. L. R. 395.—CAN.

Sect. 2.—On contracts of deceased: Sub-sects. 15 & 16. Sect. 3: Sub-sect. 1.]

SUB-SECT. 15.—STATUTORY OBLIGATIONS.

6721. When representatives liable—Poor rate.]—Administrator not liable to pay poor's rate, for the intestate, at least not distrainable without summons.—*STEVENS v. EVANS* (1761), 2 Burr. 1152; 1 Wm. Bl. 284; 97 E. R. 761.

Annotations:—Mentd. *Underhill v. Ellicombe* (1825), M'Cle. & Yo. 450; *Jones v. Bubb* (1868), 1 Hop. & Colt. 128; *Danby v. Watson* (1877), 46 L. J. M. C. 179; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

See, generally, POOR LAW; RATES & RATING.

6722. — Employer—Under Employers' Liability Act, 1880 (c. 42).]—An action under above Act cannot be maintained against the exors. of an employer.—*GILLET v. FAIRBANK* (1887), 3 T. L. R. 618.

See, generally, MASTER & SERVANT.

6723. — Bastardy order—Death of father—Cessation of payments.]—The liability of the putative father under a bastardy order is purely personal; & if the father dies the mother has no right to claim against his estate either arrears or future payments.—*Re HARRINGTON, WILDER v. TURNER*, [1908] 2 Ch. 687; 78 L. J. Ch. 27; 99 L. T. 723; 72 J. P. 501; 25 T. L. R. 3; 52 Sol. Jo. 855; 21 Cox, C. C. 709.

Annotation:—Reid. *Re Stillwell, Brodrick v. Stillwell*, [1916] 1 Ch. 365.

SUB-SECT. 16.—OTHER CASES.

6724. Contract arising out of tort.]—Where the contract *oritur ex delicto* . . . action lies not against exor. (*TWISDEN, J.*).—*HOLE v. BRADFORD* (1662), 1 Keb. 344, 356; T. Raym. 57; 83 E. R. 984, 991; *sub nom. HOLL v. BRADFORD*, 1 Sid. 88.

Annotations:—Reid. *Hambly v. Trott* (1776), 1 Cowp. 371; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

6725. Church rates—Due from deceased parishioner.]—The exor. of a deceased parishioner cannot be cited in an ecclesiastical ct., in respect of a church rate due from his testator.—*WILLIAMS v. GEORGE & NUNN* (1843), 3 Curt. 343; 2 Notes of Cases, 85; 7 Jur. 241; 163 E. R. 751.

SECT. 3.—FOR TORTS OF DECEASED.

SUB-SECT. 1.—ACTIO PERSONALIS MORITUR CUM PERSONA.

See, generally, TORT; Civil Procedure Act, 1833 (c. 42); Administration of Estates Act, 1925, (c. 23), s. 26 (5).

PART VI. SECT. 2, SUB-SECT. 15.

q. When representative liable—Illegitimate child of deceased—Maintenance during deceased's lifetime.]—An action will lie against the representatives of a deceased father for the maintenance of his illegitimate child during his lifetime.—*MONOHAN v. OKE* (1877), 1 A. R. 268.—CAN.

PART VI. SECT. 3, SUB-SECT. 1.

r. Application of maxim — To breach of partnership duty.]—The suppression of material facts in a treaty for formation of a partnership is a breach of partnership duty & gives

rise to an action of deceit, & if the offending partner is dead the maxim *Actio personalis moritur cum persona* applies.—*WADDELL v. ROSS* (1892), 13 N. S. W. Eq. 13.—AUS.

s. — To seduction — Effect of statute.]—Where deft. died, after an action of seduction was commenced, the action was continued against his administrator:—*Held*: It. S. O. 1887, c. 110, s. 10, altered the common law to the extent necessary to entitle pltf. to maintain the action against the representative of the person who committed the wrong.—*LINCE v. FAIRCLOTH* (1891), 11 O. L. T. Occ. N. 49; 14 P. R. 253.—CAN.

6726. General rule—Representatives not liable.]—The promise of an heir in consideration of forbearance of a suit in Chancery to which he is not liable will not support an *assumpsit*.

Here it is for a personal tort for which neither exor. or heir is to answer (*per CUR.*).—*TOOLEY v. WINDHAM* (1590), Cro. Eliz. 206; 78 E. R. 463; *sub nom. TOLEY v. WINDHAM*, 2 Leon. 105.

Annotations:—Reid. *Phillips v. Homfray* (1883), 24 Ch. D. 439. **Mentd.** *Wade v. Simeon* (1846), 2 C. B. 548.

6727. — — —.]—Pltf. brought his action for damages & an injunction against the firm of T. & Co. for torts committed by the firm. The firm consisted of T. alone, who died more than six months after the commencement of action, & the action was continued against his exors.:—*Held*: T. having died more than six months after the commission of the acts complained of, no action either for damages or injunction could be maintained against his exors.; although the action had been commenced in the lifetime of testator & although the exors. continued the business in the name of the firm.

The rule at common law was this, that you could not sue exors. for a wrong committed by their testator for which you could only recover unliquidated damages (*JESSEL, M.R.*).—*KIRK v. TODD* (1882), 21 Ch. D. 484; 52 L. J. Ch. 224; 47 L. T. 676; 31 W. R. 69, C. A.

Annotations:—Folld. *Phillips v. Homfray* (1883), 24 Ch. D. 439; *Young v. Wallingford* (1883), 52 L. J. Ch. 590. **Consd.** *Re Duncan, Terry v. Sweeting*, [1899] 1 Ch. 387. **Reid.** *Jones v. Simes* (1890), 59 L. J. Ch. 351.

6728. — — —.]—*PHILLIPS v. HOMFRAY, HOMFRAY v. PHILLIPS*, No. 6602, *ante*.

6729. — — — Either at law or in equity.]—The proceeding in such a case [an action for misrepresentation in a prospectus] is like an action at law for deceit, the same principle being applicable in such a matter both at law & in equity, & is therefore of a personal character, & the estate of a deceased director not being alleged & proved to have received benefit from the deceit, his exors. cannot be made liable to compensate the person who asserts that he has been injured by it.

No case has been produced, & I assume that none can be found, in which upon a claim against testator *ex delicto*, exors. have been held liable in equity to answer for it in damages. It appears to me that it would be contrary to principle to hold that an action which in act of law would be held to die with testator, should be maintainable against exors. in a ct. of equity of concurrent jurisdiction (*LORD CHELMSFORD*).—*PEEK v. GURNEY* (1873), L. R. 6 H. L. 377; 43 L. J. Ch. 19; 22 W. R. 29, H. L.

Annotations:—Distd. *Twycross v. Grant* (1878), 4 C. P. D. 40. **Folld.** *Young v. Wallingford* (1883), 52 L. J. Ch. 590. **Consd.** *Phillips v. Homfray* (1883), 24 Ch. D. 439; *Geipel v. Peach*, [1917] 2 Ch. 108. **Reid.** *Hatchard v.*

malicious prosecution.]
—Pltf. sued R. for wrongful arrest & malicious prosecution. R. died, & pltf. substituted the deft. as his heir & representative. On appeal:—*Held*: the suit abated on the death of R., his estate having derived no benefit, but, on the other hand, suffered loss, in consequence of his wrongdoing.—*HARIDAS RAMDAS v. RAMDAS MATHURADAS* (1889), 1 L. R. 13 Bom. 677.—IND.

s. — — —.]—A. brought a suit for malicious prosecution, & died while the suit was pending. The legal representatives of A. obtained leave from the ct. to place their names upon

Mego (1887), 18 Q. B. D. 771; Quirk v. Thomas, [1915] 1 K. B. 798. *Mentd.* Pender v. Fox (1872), 20 W. R. 986; Eaglesfield v. Londonderry (1876), 4 Ch. D. 693; Phosphate Sewage Co. v. Hartmont (1876), 34 L. T. 154; Schroeder v. Mendl (1877), 37 L. T. 452; Cargill v. Bower (1878), 10 Ch. D. 502; Davies v. London & Provincial Marine Insee. (1878), 38 L. T. 478; Weir v. Bell (1878), 3 Ex. D. 238; Arkwright v. Newbold (1881), 17 Ch. D. 301; R. v. Most (1881), 50 L. J. M. C. 113; Smith v. Chadwick (1882), 20 Ch. D. 27; Edgington v. Fitzmaurice (1885), 29 Ch. D. 459; Re Southport & West Lancashire Banking Co., Fisher & Sherrington's Case (1885), 53 L. T. 832; Newbigging v. Adam (1886), 34 Ch. D. 582; Dorry v. Peek (1889), 14 App. Cas. 337; Glasier v. Rolls (1889), 42 Ch. D. 436; Lange v. Barton (1891), 7 T. L. R. 451; Salaman v. Warner (1891), 65 L. T. 132; Aaron's Heels v. Twiss, [1896] A. C. 273; Andrews v. Mockford, [1896] 1 Q. B. 372; Seaton v. Heath, Seaton v. Burnard (1899), 68 L. J. Q. B. 681; Cackett v. Keswick, [1902] 2 Ch. 456; Cavaller v. Pope, [1905] 2 K. B. 757; Chapman v. Great Central Freehold Mines (1905), 22 T. L. R. 90; Tackey v. McBain, [1912] A. C. 186; Nocton v. Ashburton, [1914] A. C. 932.

6730. ———.]—The liability of directors, promoters & others, under Cos. Act, 1908 (c. 69), s. 84 (1), to pay compensation to subscribers for shares or debentures for loss or damage sustained by untrue statements in prospectuses or reports is a liability in tort, & an action in respect of such liability does not lie against the exor. of the tortfeasor unless by the latter's tortious act property or the proceeds or value of property belonging to the person injured have been added to the tortfeasor's estate.

If the action had been one for deceit it is clear that apart from the estate of deft. being benefited by the wrong for which he was sought to be made liable, an action would not lie against his exor. (SARGANT, J.).—GEIPEL v. PEACH, [1917] 2 Ch. 108; 86 L. J. Ch. 745; 117 L. T. 84; 61 Sol. Jo. 460.

6731. Devastavit—Liability of representative of representative—Committing the devastavit.]—The exor. of an exor. shall not be charged with a *devastavit* made by the exor. of the first testator, no, not in the case of the King, because it is a personal wrong only (*per* CUR.).—TUCKE'S (SIR BRIAN) CASE (1590), 3 Leon. 241; 74 E. R. 659.

*Annotations:—*Consd. Phillips v. Homfray (1883), 24 Ch. D. 439. *Refd.* Baily v. Birtles (1662), T. Raym. 71.

6732. ———.]—The exor. or administrator of a rightful exor. or administrator shall, by 30 Car. 2, c. 7, be charged upon a *devastavit* of testator or intestate.—HOLCOMB v. PETIT (1686), 1 Mod. Rep. 113; 87 E. R. 72.

———.]—*See, also*, Sect. 4, sub-sect. 5, B., *post*.

6733. Mesne profits—In special circumstances.]—Account of mesne profits, since the title accrued, decreed against exors., upon the special ground that pltf. was prevented from recovering in ejectment by a rule of the ct. of law & by an injunction, at the instance of the occupier; who ultimately

the record in the place of A.:—*Held*: the cause of action did not survive to the legal representative as the pecuniary loss which A. suffered was not an injury to his estate.—KRISHNA BEHARI SEN v. CALCUTTA CORPN. (1904), 1 L. R. 31 Cal. 406; 8 C. W. N. 329, 745.—IND.

b. ——— *To appeals.*]—JOSIAM TIRUVENGADACHARIAR v. SWAMI IYENGAR (1910), 1 L. R. 34 Mad. 76.—IND.

c. ——— *To fraudulent misrepresentation.*]—DAVOREN v. WOOTTON, [1900] 1 L. R. 273.—IR.

d. ———.]—B. sued deft. on a promissory note given for balance of purchase-money for sale of a medical

practice. Dft. alleged that the contract had been induced by fraudulent misrepresentations. B. having died, pltf., as exor. of B., obtained leave to continue the action:—*Held*: pltf. must succeed on the claim in respect of the promissory note, & deft.'s counterclaim failed owing to the death of B., the action being one to which the maxim *Actio personalis moritur cum persona* applied.—PUBLIC TRUSTEE v. GLADSTONE, [1921] N. Z. L. R. 224.—N.Z.

e. ——— *In Scotland.*]—The maxim *Actio personalis moritur cum persona* does not hold always, if at all, in Scotland. Thus where deceased has by a fraud occasioned pecuniary loss to another person also deceased, the

failed both at law & in equity.—PULTENEY v. WARREN (1801), as reported in 6 Ves. 73, L. C.

*Annotations:—*Apld. Wright v. Chard (1860), 1 De G. F. & J. 567. *Consd.* Phillips v. Homfray (1883), 24 Ch. D. 439. *Refd.* Knight v. Bowyer (1857), 23 Beav. 609; Sawyer v. Goodwin (1867), 36 L. J. Ch. 578. *Mentd.* Cupit v. Jackson (1824), M'Cle. 495; Grant v. Grant (1830), 3 Sim. 340; Brown v. Newall (1837), 2 My. & Cr. 558; East-India Co. v. Campion (1837), 11 Bl. N. S. 158; Howell v. Howell (1837), 2 My. & Cr. 478; Attwood v. Burton, Attwood v. Bailey, Attwood v. Small (1839), 8 L. J. Ch. 145; Haig v. Homan (1841), 8 Cl. & Fin. 320; Re Franke (1851), 16 L. T. O. S. 529; Hicks v. Sallitt (1854), 3 De G. M. & G. 782; Thomas v. Thomas (1855), 1 Jur. N. S. 1160.

6734. Trover & conversion.]—FAWCET v. CHARTER (1623), Cro. Jac. 662; W. Jo. 16; 79 E. R. 573; *sub nom.* CARTER v. FOSSETT, Palm. 329, Ex. Ch.

*Annotation:—*Refd. Hambly v. Trott (1776), 1 Cowp. 371.

6735. ———.]—MASON & DAVY v. DIXON (1627), Lat. 167; Noy. 87; 82 E. R. 328.

*Annotations:—*Refd. Saunders v. Plummer (1662), O. Bridg. 223; Williams v. Carey (1695), 1 Salk. 12; Finlay v. Chirney (1888), 57 L. J. Q. B. 247.

6736. ———.]—Action for detaining money due for a cow sold by testator, to whom it was delivered to redeliver on demand, lies not against an exor.—BAILY v. BERTLEY (1662), 1 Keb. 273; T. Raym. 71; 83 E. R. 941; *sub nom.* BAYLY v. BAYLY, 1 Keb. 395.

*Annotations:—*Consd. Hambly v. Trott (1776), 1 Cowp. 371. *Refd.* Phillips v. Homfray (1883), 24 Ch. D. 439.

6737. ———.]—HAMBLY v. TROTT, No. 6447, *ante*.

6738. ———.]—In Sept. 1889, pltf. pledged a piano with the husband of deft. The same year he converted it to the knowledge of pltf. In March, 1897, he died, & pltf. then tendered the money to the present deft., his extrix. & widow, & demanded the return of the piano:—*Held*: deft. could not be liable, & as she never had possession of or any property in the piano, no action of conversion would lie against her.—HINCHCLIFFE v. SHARPE (1898), 77 L. T. 714.

See, generally, TROVER.

6739. Trespass.]—An exor. shall not be charged with a trespass committed by testator.—HOLLAND v. OWEN (1627), Toth. 87; 21 E. R. 131.

6740. ———.]—The cause of action was the taking of the coal. That might be treated in two ways, either as a trespass, for which damages might be claimed, or as giving rise to a smaller arrangement of damages, namely the proceeds of the sale of the coal which had come to the hands of defts. That latter form of action would survive as against the exors. of deceased. The greater included the less, & though the action for trespass would not survive against the exors. the claim for the proceeds was included in it & would survive. The

representative of the wrongdoer must, *in quantum lucratus*, make compensation to the representative of the injured party.—TULLOCH v. DAVIDSON (1860), 3 Macq. 783; 22 Dunl. Ct. of Sess.) 7.—SCOT.

f. ——— *To damages for adultery.*]—Pltf. sued his wife on the ground of her adultery with G. & claimed damages for such adultery from G.'s exor.:—*Held*: the claim fell within the general principle *actio personalis moritur cum persona*.—WILLENBURG v. WILLENBURG (1908), 25 S. C. 775; 18 C. T. R. 853.

g. *Effect of lapse of time—Wrongful distress.*]—An action for wrongful distress does not survive against the

Sect. 3.—For torts of deceased: Sub-sects. 1 & 2, A. & B.; sub-sect. 3.]

claim for letting down the surface would not survive (LORD ESHER, M.R.).—WRIGHT v. LEIGH (1888), 4 T. L. R. 573, C. A.

See, generally, TRESPASS.

6741. Letting down surface of ground—Through excavation of coal.]—WRIGHT v. LEIGH, No. 6740, *ante*.

6742. ———.]—A. worked a seam of coal during the years 1889, 1890, & 1891, & died in July, 1895. His exors. & trustees then carried on the business of the colliery. On Nov. 16, they granted a lease of the colliery to B. & C., who, on Nov. 20, 1895, assigned the lease & the interests under it to M. Colliery Co. In Nov. 1895, there was a subsidence injuring pltf.'s house :—*Held*: neither the exors. & trustees, nor the lessees & M. Colliery Co. were liable for the subsidence caused by the working of the seam by A.—HALL v. NORFOLK (DUKE), [1900] 2 Ch. 493; 69 L. J. Ch. 571; 82 L. T. 836; 64 J. P. 710; 48 W. R. 565; 16 T. L. R. 443; 44 Sol. Jo. 550.

6743. Permitting escape of attached person.]—MASON & DAVY v. DIXON (1627), Lat. 167; Noy, 87; 82 E. R. 328.

*Annotations:—*Reid. Saunders v. Plummer (1662), O. Bridg. 223; Williams v. Carey (1695), 1 Salk. 12. *Mentd.* Finlay v. Cherney (1888), 57 L. J. Q. B. 247.

6744. Recovery of statutory penalty—Removal of sunken ship—Humber Conservancy Act, 1852.]—Above Act enables certain comrs., when any vessel is sunk in the Humber, on neglect of the owners, to appoint a person to raise or blow up same, with powers to recover summarily the expenses from such owners. A vessel was sunk in the Humber, & on the neglect of the two owners to raise her, the comrs. appointed a person to raise or blow her up. Whilst the works were in progress, one of the part owners died, leaving two exors. The attempts to raise having failed, the vessel was blown up, & proceedings were taken against the surviving part owner & the two exors. of deceased part owner, to recover the expenses incurred in endeavouring to raise the vessel, & in blowing her up:—*Held*: (1) it was for the justices to decide whether or not these expenses were properly incurred; (2) the justices had no power to include the exors. in such order.—WILSON v. CATOR (1863), 1 New Rep. 314; 7 L. T. 676; 27 J. P. 133; 11 W. R. 337; 1 Mar. L. C. 287.

6745. ——— Repair of highway—Highways & Locomotive Amendment Act, 1878 (c. 77), s. 23.]—The proceedings which may be taken by a road authority, under above sect., to recover in a summary manner the expenses of repairing a highway caused by extraordinary traffic thereon, are in the nature of an action for a personal tort, so that such proceedings cannot be taken against the exor. of a person by whose order the extraordinary traffic was conducted.—STORY v. SHEARD, [1892] 2 Q. B. 515; 61 L. J. M. C. 178; 67 L. T. 423; 56 J. P. 760; 41 W. R. 31; 36 Sol. Jo. 559, D. C. *Annotations:—*Reid. Harvey v. North Eastern Marine

Engineering Co. (1902), 5 W. C. C. 30; Darlington v. Roscoe, [1907] 1 K. B. 219. *Mentd.* Hemsworth R. D. C. v. Micklethwait (1903), 68 J. P. 16.

———.]—*See, further, HIGHWAYS.*

6746. Damages awarded against co-respondent.]—BRYDGES v. BRYDGES & WOOD, No. 6598, *ante*.

Waste.]—See Sect. 1, sub-sect. 10, E., ante.

Tortious act of company directors.]—See Sub-sect. 4, post.

SUB-SECT. 2.—LIABILITY IN RESPECT OF INJURY TO PROPERTY BY DECEASED.

A. The Liability.

6747. General rule—Deceased's estate must directly benefit by tort—Uncertain or unliquidated damages to plaintiff insufficient—Indirect benefit to deceased insufficient.]—PHILLIPS v. HOMFRAY, HOMFRAY v. PHILLIPS, No. 6602, *ante*.

6748. ———.]—The purchaser from testator of certain worthless shares in a limited co. claimed to be entitled to prove in an administration action for damages for misrepresentation against testator's estate, & assessed his damages at £250, the price paid by him for the shares:—*Held*: where, as here, there was nothing among the assets of deceased that at law or in equity belonged to claimant, & the damages which had been done to him were unliquidated & uncertain, the exors. of the wrongdoer could not be sued merely because his estate might have benefited by the wrong complained of; the damages claimed were none the less unliquidated & uncertain from the fact that claimant might be able to prove that the measure of his damages was the amount of the purchase-money paid for the shares, & for these reasons the claim could not be allowed.—*Re* DUNCAN, TERRY v. SWEETING, [1899] 1 Ch. 387; 68 L. J. Ch. 253; 80 L. T. 322; 47 W. R. 379; 15 T. L. R. 185; 43 Sol. Jo. 244.

*Annotations:—*Reid. Quirk v. Thomas, [1915] 1 K. B. 798. *Mentd.* *Re* Law, Law v. Law (1904), 74 L. J. Ch. 169.

6749. ———.]—GEIPEL v. PEACH, No. 6730, *ante*.

6750. Profit of property appropriated—Felling timber.]—SHERINGTON'S CASE (1582), Sav. 40; 123 E. R. 1000.

*Annotations:—*Reid. Baily v. Birtles (1662), T. Raym. 71; Hambly v. Trott (1776), 1 Cowp. 371; Monypenny v. Bristow (1832), 2 Russ. & M. 117; Phillips v. Homfray (1883), 24 Ch. D. 439.

6751. ——— Digging ore.]—Lord of a manor may bring a bill for an account of ore dug, or timber cut, by deft.'s testator; otherwise of ploughing up meadow or ancient pasture, or such torts as die with the person.—WINCHESTER (BP.) v. KNIGHT (1717), 1 P. Wms. 406; 2 Eq. Cas. Abr. 226, pl. 7; 24 E. R. 447, L. C.

*Annotations:—*Reid. Jesus College v. Bloom (1745), 1 Amb. 54; Pulteney v. Warren (1801), 6 Ves. 73; Lansdowne v. Lansdowne (1815), 1 Madd. 116; Powell v. Aiken (1858), 4 K. & J. 343; Peek v. Gurney (1873), L. R. 6 H. L. 377; Phillips v. Homfray (1883), 24 Ch. D. 439; Phillips v. Homfray, [1892] 1 Ch. 465. *Mentd.* Bourne v. Taylor (1808), 10 East, 189; Salisbury v. Gladstone (1861), 9 H. L. Cas. 692; Portland v. Hill (1866), L. R. 2 Eq. 765.

exor. of deft., where deft. died more than six months after the act complained of.—BUCHNER v. DAVIS (1879), 5 V. L. R. 444.—AUS.

*h. ———.]—*R. S. N. S. 1900, c. 177, s. 2, deals with actions against

exors. for injuries done by deceased. Although the action is brought in the lifetime of deceased, if he dies before judgment there can be no recovery against the estate, if six months have elapsed between the acts complained of & the death.—MCDONALD v. DICK-

SON (1905), 40 N. S. R. 560.—CAN.

PART VI. SECT. 3, SUB-SECT. 2.—A. k. Statutory liability — Does not extend to administrator ad litem.]—R. S. O. 1897, c. 129, s. 11, does not

6752. — Receipt of rents.]—A. by an unattested will devises lands to B. B. receives the rents, & by a will, also unattested, gives the lands together with a legacy to the heir-at-law of A. The heir may receive the legacy, & also call for an account of the rents received by B.—**GARDINER v. FELL** (1819), 1 Jac. & W. 22; 1 Moo. Ind. App. 299; 2 Wils. Ch. 32; 37 E. R. 283.

Annotations:—Consd. *Phillips v. Homfray* (1883), 24 Ch. D. 439. **Mentd.** *Freeman v. Fairlie* (1828), 1 Moo. Ind. App. 305; *Lyons Corp. v. East India Co.* (1836), 1 Moo. Ind. App. 175; *Gunga Gobind Mundul v. Collector of Twenty-four Pergunnahs* (1867), 11 Moo. Ind. App. 345; *Rochefoucauld v. Boustead* (1896), 66 L. J. Ch. 74.

6753. — — —.]—The rule of law, that the title to land cannot be tried in an action, for money had & received, does not apply to cases where only the past-gone rents of lands are in question. Where a codicil in its dispositive part is applicable solely & expressly to the property previously devised by the will, it has not the effect of republishing that will, so as to carry after purchased property, notwithstanding a more general intent indicated in its recital. The widow of testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; & before the error was discovered or her right disputed she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds & an account:—**Held:** (1) the suit was maintainable for the rents received during her continuance in possession; (2) as the defence of Stat. Limitations was not raised upon the pleadings, the account should be taken from the time when pltf.'s title first accrued; (3) pltf. was not at liberty to set off the amount of such rents against payments made by the widow in her character of extrix., those payments being, by virtue of a special trust, a primary charge upon the estate, of which, subject to the widow's life interest, pltf. was devisee.—**MONYPENNY v. BRISTOW** (1832), 2 Russ. & M. 117; 1 L. J. Ch. 88; 39 E. R. 339, L. C.

Annotations:—As to (1) *Consd. Phillips v. Homfray* (1883), 24 Ch. D. 439. **Refd.** *Hughes v. Turner* (1835), 3 My. & K. 666; *Yarnold v. Wallis* (1840), 4 Y. & C. Ex. 160; *Doe d. York v. Walker* (1844), 12 M. & W. 591; *Skinner v. Ogle* (1845), 4 Notes of Cases, 74; *Hughes v. Hosking* (1856), 11 Moo. P. C. C. 1; *Re Earl's Trust* (1858), 4 K. & J. 673.

6754. — Profits from coal.]—An administrator is liable to an action for money had & received by the intestate, for coal tortiously taken by him from pltf.'s land, if the intestate has sold it & received the money; & this, although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale. Where part has been raised more than six months before the intestate's death, & part within six months, pltf. may bring trespass, under Civil Procedure Act, 1833 (c. 42), s. 2, for so much as was raised within the six months, & also money had & received for so much as was raised before; the acts being distinct, & therefore the two actions not incompatible.—**POWELL v. REES** (1837), 7 Ad. & El. 426; 2 Nev. & P. K. B. 571; Will.

give authority to maintain an action against one who is an administrator *ad litem* merely, but only against an administrator in the ordinary sense of the term.—**HUNTER v. BOYD** (1901), 22 C. L. T. 50; 3 O. L. R. 183; 1 O. W. R. 79; 2 O. W. R. 724, 1055.—**CAN.**

PART VI. SECT. 3, SUB-SECT. 3.

1. General rule.]—In the absence of fiduciary relationship no recovery can be had against the representatives of a deceased person who is charged with fraud, unless profit has accrued to the wrongdoer's estate.—**HAMILTON, PRO-**

Woll. & Dav. 680; 8 L. J. Q. B. 47; 112 E. R. 530.

Annotations:—**Refd.** *Phillips v. Homfray*, [1892] 1 Ch. 465. **Mentd.** *Bittleston v. Cooper* (1845), 14 M. & W. 399.

6755. — — —.]—**WRIGHT v. LEIGH**, No. 6740, *ante*.

6756. Indirect benefit gained — Ploughing meadow or pasture.]—**WINCHESTER (BP.) v. KNIGHT**, No. 6751, *ante*.

6757. Loss of goods—Of guest—By innkeeper—Civil Procedure Act, 1833 (c. 42), s. 2.]—**MORGAN v. RAVEY**, No. 6537, *ante*.

Waste.]—See Sect. 2, sub-sect. 10, E., *ante*.

B. Action against Representative under Civil Procedure Act, 1833.

See Civil Procedure Act, 1833 (c. 42), s. 2; & generally, LIMITATION OF ACTIONS.

6758. Within what time injury to be committed —To enable maintenance of action—Six months from deceased's death.]—**POWELL v. REES**, No. 6754, *ante*.

6759. — — —.]—**KIRK v. TODD**, No. 6727, *ante*.

6760. — — — Cause of action arising de die in diem.]—**WOODHOUSE v. WALKER**, No. 6609, *ante*.

6761. — — — Obstruction of light.]—The continuance of an obstruction to ancient lights is an "injury committed" in respect of property within above Act, giving rise to a cause of action *de die in diem*, & therefore an action in respect of the continuance of the obstruction in the lifetime of the person who caused it may be maintained against his exors. or administrators notwithstanding that the obstructing building was completed more than six calendar months before his death.—**JENKS v. CLIFDEN (VISCOUNT)**, [1897] 1 Ch. 694; 66 L. J. Ch. 338; 76 L. T. 382; 45 W. R. 424; 41 Sol. Jo. 350.

6762. Action by remainderman—Failure to fulfil obligation to repair—By tenant for life.]—The limitations imposed by sect. 2 of above Act, are not applicable to an action by remaindermen against the exors. of deceased tenant for life in respect of damage to the estate during his lifetime by reason of his failure to fulfil his obligation to repair. Such an action is not based on tort, but on the equitable principle that where a person accepts a benefit under a will on condition that he shall discharge a certain liability, he takes the benefit *cum onere*, & a ct. of equity will not apply to the equitable remedy the limitation contained in sect. 2 of above Act as to the time within which the action must be brought.—**JAY v. JAY**, [1934] 1 K. B. 826; 93 L. J. K. B. 280; 130 L. T. 667.

See, now, Administration of Estates Act, 1925 (c. 23), s. 26 (5).

SUB-SECT. 3.—MISREPRESENTATION AND FRAUD.

See, generally, MISREPRESENTATION & FRAUD.

6763. Fraudulent giving of bond.]—Upon a treaty of marriage between A. & the daughter of

VIDENT & LOAN SOCIETY v. CORNELL (1884), 4 O. R. 623.—**CAN.**

m. Fraudulent appropriation of funds —By secretary of friendly society.]—Where money comes to the secretary of a friendly society, not in the course of his official duty, but in an irregular

Sect. 3.—For torts of deceased: Sub-sects. 3 & 4.
Sect. 4: Sub-sects. 1 & 2, A.]

T., B. would not consent to the marriage, for that A. owed £200 to J. S., to remove which objection, the brother of A. proposed to get up A.'s bond & to give his own in the room of it. But privately A. gave a counter-bond to his brother, & the daughter of B. was privy to this & encouraged it. A. died, his wife took administration. The wife shall avoid this counter-bond, though party to the fraud. Also A. himself might have been relieved against this counter-bond.—*REDMAN v. REDMAN* (1685), 1 Vern. 348; 23 E. R. 514, L. C.

Annotation:—Reid. Lamlee v. Hanman (1705), 2 Vern. 499.

6764. Fraudulent appropriation of funds—Partnership.]—In an action to administer the estate of a deceased solr., an administration decree, directing the usual accounts & inquiries, was made in Apr. 1867. In Dec. 1871, an order was made that, in addition to the accounts & inquiries directed by the decree, the ordinary accounts & inquiries should be taken & made of & relating to the partnership dealings & transactions between testator & his former partners who consented to be bound. Before this order was made the partners had claimed to be creditors on the estate for a large amount, & had filed affidavits alleging that testator had fraudulently misappropriated moneys belonging to the partnership. In Feb. 1879, the then surviving partner applied by summons that an additional account might be taken of the amount in which testator's estate was indebted to the applicant for partnership moneys fraudulently retained or improperly applied by testator, & of the interest which ought to be allowed on taking the account:—*Held*: the ct. had jurisdiction to add the account asked for, & that in the circumstances it ought to be added; but added a direction that the chief clerk should at the instance & at the risk, as to costs, of the deft. certify any circumstances showing that the surviving partner participated in the moneys fraudulently withdrawn or retained by testator. *Qu.*: whether, under the order for the ordinary accounts & inquiries relating to the partnership dealings & transactions, the question of fraudulent withdrawal of moneys & the claim for interest thereon might not have been raised.—*BARBER v. MACKRELL* (1879), 12 Ch. D. 534; 41 L. T. 201; 27 W. R. 894, C. A.

Annotation:—Reid. Re Symons, Luke v. Tonkin (1882), 21 Ch. D. 757.

6765. Misrepresentation—By solicitor—Advance-ment on mortgage.]—Pltf. advanced money on a mtge. of certain property, on the faith of certain representations made to him by the solr., who negotiated the mtge. for him, that the security offered was a good one. These representations were untrue, & were known by the solr., when he made them, to be so. The misrepresentation was not discovered until after the solr.'s death, & shortly after pltf. commenced this action against the solr.'s exors. to recover the amount lent, & the arrears of interest:—*Held*: although pltf. would have had a good claim against the solr. himself if he had been alive, yet that, never having asserted it in his lifetime, he could not now, after the death of the person who was to blame for the

loss, assert it against his representatives.—*YOUNG v. WALLINGFORD* (1883), 52 L. J. Ch. 590; 48 L. T. 756; 31 W. R. 838.

6766. — By vendor of shares.]—Re DUNCAN, TERRY v. SWEETING, No. 6748, *ante*.

6767. Fraudulent transaction by stockbroker.]—Re FRANKLYN, FRANKLYN v. FRANKLYN, No. 6563, *ante*.

Tortious acts of company directors.]—See Sub-sect. 4, *post*.

SUB-SECT. 4.—TORTIOUS ACTS OF COMPANY DIRECTORS.

See Directors' Liability Act, 1890 (c. 61); Cos. (Consolidation) Act, 1908 (c. 69).

6768. Issue of prospectus—Misrepresentation.]—PEEK v. GURNEY, No. 6729, *ante*.

—Sec. also, COMPANIES, Vol. IX., pp. 129, 136, Nos. 681, 740, 741.

6769. Fraudulent transaction in shares—Artificial depression of selling price.]—J. & H. who were confidential agents of a co., conspired together to depress the selling price of the shares by a system of false accounts & concealment, in order that they might purchase them at an undervalue. By reason of this scheme fifty-five shares belonging to G. were sold much below their real value, fifteen to J. & forty to H. The exor. of G. upon discovering the frauds which had been practised filed his bill against the exor. of J. & the exors. of H. for relief in respect of all the shares:—*Held*: although J. derived no benefit from the sale of the forty shares at an undervalue, yet, as he stood in a fiduciary position towards the shareholders, & was a party to the fraud, he, as well as H., was liable to G. for the real value of the shares, & his exor. was a proper party to a suit in respect of them.—*WALSHAM v. STANTON* (1863), 1 De G. J. & Sm. 678; 3 New Rep. 56; 33 L. J. Ch. 68; 9 L. T. 357; 9 Jur. N. S. 1261; 12 W. R. 63; 46 E. R. 268, L. J. J. *Annotations:—Consd Peek v. Gurney* (1873), L. R. 8 H. L. 377. *Mentd. Bent v. Yardley* (1865), 2 Hem. & M. 602.

6770. Breach of trust.]—The estates of deceased directors who have been guilty of breaches of trust are liable for any loss occasioned by such breaches of trust.—TURQUAND v. MARSHALL (1868), L. R. 6 Eq. 112; 37 L. J. Ch. 582; 18 L. T. 385; 16 W. R. 719; *reversd.* on other grounds (1869), 4 Ch. App. 376, L. C.

Annotations:—Mentd. Re Mercantile Trading Co., Stringer's Case (1869), 4 Ch. App. 475; *Salisbury v. Met. Ry.* (1870), 22 L. T. 839; *Overend & Gurney Co. v. Gibb* (1872), L. R. 5 H. L. 480; *Parker v. Lewis* (1873), 28 L. T. 91; *Leeds Estate, Building & Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *National Bank of Wales, Cory's Case* (1898), 79 L. T. 667; *Re National Bank of Wales*, [1899] 2 Ch. 629.

6771. Contribution of co-directors—Estate of deceased director liable.]—The directors of a co. advanced moneys of the co. upon an unauthorised security, & two sums of £600 & £400 so lent were lost. The £600 formed part of a loan of £800 & the £400 formed part of a loan of £1,000 which was

way not in accordance with the constitution & bye-laws of his society, & he embezzles it, the society cannot maintain a preferential claim for it against his administrators under Friendly Societies Act, 1882, s. 13 (9); but when

a specific trust fund can be followed into the hands of the administrator as still partly existing in specie it can be recovered preferentially from him.—*LOCKE v. PUBLIC TRUSTEE* (1886), 5 N. Z. L. R. 158 (S. C.).—N.Z.

PART VI. SECT. 3, SUB-SECT. 4.

n. Misrepresentation.]—DAVIDSON v. TULLOCH (1860), 22 Dunl. (Ct. of Sess.) 7; 3 Macq. 783.—*SCOT.*

o. —.]—GORDON v. DAVIDSON

granted by the board of directors, & of which £400 was actually advanced, & repaid, & a second £400 was advanced & not repaid. In an action by the co. against one of the directors who had taken part in granting the loans, he was held liable to pay the two sums of £600 & £400 to the co., & having paid them, he sued three of his co-directors for contribution. The third deft. died after the commencement of the action, & his administrator was then made deft.:—*Held*: the liability to contribute survived against deft.'s estate.—*RAMSKILL v. EDWARDS* (1885), 31 Ch. D. 100; 55 L. J. Ch. 80; 53 L. T. O. S. 949; 34 W. R. 97; 2 T. L. R. 37.

Winding up—Misfeasance proceedings.]—*See COMPANIES*, Vol. X., p. 902, Nos. 6165, 6166.

Liability of directors generally.]—*See COMPANIES*, Vol. IX., pp. 483–516, Nos. 3168–3383.

SECT. 4.—FOR OWN ACTS.

SUB-SECT. 1.—IN GENERAL.

6772. Personal liability established—Death of co-executor—His representatives not liable.]—(1) B. having died indebted to G. for work & labour done, his exors. signed the following memorandum on the back of G.'s account: "Mr. G. having consented to wait for the payment of the within account, we, as the exors. of B. engage to pay Mr. G. interest for same, at £5 per cent., until same is settled":—*Held*: the exors. were personally liable to pay the debt & interest.

(2) Where a bill sought either to charge the surviving exors. of testator, personally, with a demand, or to have the debt paid out of the assets of testator; & the ct. decided that the surviving exors. were personally liable:—*Held*: the representatives of a deceased exor. were entitled to have the bill dismissed against them, with costs.—*BRADLY v. HEATH* (1830), 3 Sim. 543; 57 E. R. 1101.

Annotations:—*As to* (1) *Folld. Prince v. Haworth*, [1905] 2 K. B. 768. *Reid. Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

(1864), 2 Macph. (Ct. of Sess.) 758; 36 Sc. Jur. 376.—*SCOT*.

PART VI. SECT. 4, SUB-SECT. 1.

p. General rule.]—In law a very small interference or intermeddling with the estate of testator on the part of an exor. is sufficient to charge him with liability.—*AYESHABAI v. EBRAHIM* (1908), 1 L. R. 32 Bom. 364.—*IND*.

q. Representative acting in good faith.]—Where administrators in contracting to sell lands in circumstances not requiring the consent of the official guardian, made the contract of sale subject to his approval, & lost the sale by having failed to obtain such approval within the time required by the contract, but had acted throughout in good faith & to the best of their judgment:—*Held*: they were not liable to make good to the estate the deficiency resulting from a resale.—*Re FLETCHER'S ESTATE* (1895), 26 O. R. 490.—*CAN*.

r. —.]—Where, under a will the exor. has discretionary power either to sell or retain shares in a co. the exor. is not liable to make good a loss on the shares on the ground that he did not sell them if it can be shown

the discretion was exercised *bona fide* & without culpable negligence.—*DEARIN v. KOUGH* (1878), 6 Nfld. L. R. 154.—*NFLD*.

s. —.]—Where an exor. who has not exhibited culpable neglect, but has acted *bona fide*, reasonably & with an honest intention to benefit testator's estate, he is protected from liability.—*HIDDINGH v. HIDDINGH'S EXECUTORS* (1884), 2 S. C. 414.—*S. AF*.

t. Executors personally covenanting for good title.]—Where exors. conveyed land under a power of sale in the will of testator, but covenanted for themselves, their heirs, etc., in the deed, for good title:—*Held*: they were personally liable, & the grant by them as exors. could not control their express covenant.—*MCDONALD v. McDONELL* (1841), 6 O. S. 109.—*CAN*.

u. Liability on discharge.]—An exor. discharged by the ct. on his own application, remains liable for anything he has done or left undone while an exor., & is only relieved from the duties of his office from the date of the discharge.—*Ex p. AMERCHAND MADHOWJI* (1905), 1 L. R. 29 Bom. 188.—*IND*.

6773. Ratification of deceased's contract—Without knowledge of existence of contract—Sale of deceased's goods by third party—Confirmation of sale by representative.]—*CAMPANARI v. WOODBURN*, No. 6455, *ante*.

SUB-SECT. 2.—CONTRACTS.

A. In General.

6774. Promise to pay—Under arbitration award.]—Declaration, that a cause being depending in Chancery between M. & divers infants plfcs., & T. since deceased, & J. defts., it was ordered, with the consent of the attornies of the parties in the suit, that the matters in question in the suit & all disputes between M. & T. should be referred to the arbitration of W. who was to make one or more awards, & in case either of the parties should die, the death was not to abate the reference; that T. afterwards died before the making of the award; that the arbitrator awarded that the exor. of T. should pay pltf. £225 out of T.'s assets, & that being so liable, deft., exor. as aforesaid, promised to pay:—*Held*: the action lay against the exor.; the promise sufficiently appeared to have been made in his representative capacity.—*DOWSE v. COXE* (1825), 3 Bing. 20; 10 Moore, C. P. 272; 3 L. J. O. S. C. P. 127; 130 E. R. 420; *reversd.* without affecting this point *sub nom.* *BIDDELL v. DOWSE* (1827), 6 B. & C. 255.

Annotations:—*Reid. Farhall v. Farhall* (1871), 7 Ch. App. 123. *Mentd. Clarke v. Crofts* (1827), 4 Bing. 143; *Ferrer v. Owen* (1827), 7 B. & C. 427; *McDougal v. Robertson* (1827), 4 Bing. 435; *Thorp v. Cole* (1835), 2 Cr. M. & R. 367; *Wrightson v. Bywater* (1838), 6 Dowl. 359; *Faviell v. Eastern Counties Ry.* (1848), 2 Exch. 344; *Swinfen v. Swinfen* (1857), 1 C. B. N. S. 364.

6775. —.]—*BRADLY v. HEATH*, No. 6772, *ante*.

—.]—*See, further*, Sub-sect. 2, D. & E., *post*.

6776. Goods sold.]—Counts for goods sold to & work & labour done for deft. as exor. cannot be joined with a count for money found to be due on an account stated with deft. as exor.—*CORNER v. SHEW* (1838), 3 M. & W. 350; 6 Dowl. 584;

PART VI. SECT. 4, SUB-SECT. 2.—A

b. General rule.]—An exor. personally liable on his contracts if they have no relation to an obligation of testator.—*SECURITY TRUST CO., LTD. v. WISHART*, [1920] 2 W. W. R. 165; 51 D. L. R. 614.—*CAN*.

c. —.]—Exors. have no right to create as against an estate a fresh obligation for which deceased was not liable.—*JOHNSON v. LE GRANGE'S ESTATE* (1908), 25 S. C. 823.—*S. AF*.

6776 i. Goods sold.]—Defts. as exors. purchased goods of plfcs., & gave notes promising to pay, signed as extrix. & exors.:—*Held*: they were personally responsible.—*KERR v. PARSONS* (1862), 11 C. P. 513.—*CAN*.

6776 ii. —.]—A widow & children were entitled under a will to support out of testator's property, & goods were supplied for this purpose to the exors.:—*Held*: the creditor who advanced the goods had no charge against the estate, but must proceed against the exors. personally.—*CAMPBELL v. BELL* (1869), 16 Gr. 115.—*CAN*.

6776 iii. —.]—*DEBENDRA NATH BISWAS v. HEM CHANDRA ROY* (1904), 1 L. R. 31 Calc. 253.—*IND*.

Sect. 4.—For own acts: Sub-sect. 2, A., B. & C.]

1 Horn & H. 65; 7 L. J. Ex. 105; 150 E. R. 1179; subsequent proceedings, 4 M. & W. 163.

Annotations:—Folld. Kitchenman v. Skeel (1848), 3 Exch. 49. **Reid.** Brown v. Maclean (1849), 12 L. T. O. S. 423; Bignell v. Harpur (1850), 19 L. J. Ex. 168; Farhall v. Farhall (1871), 7 Ch. App. 123.

6777. Work & labour done.]—CORNER v. SHEW, No. 6776, *ante*.

6778. Bond—Given by executor as such.]—L., one of the exors. of M., & of the devisees in trust of M.'s estate, gave a bond to O. for £7,000, describing himself as sole exor. of M. but the condition was for payment by L., his heirs, exors. & administrators:—**Held:** in an action on the bond, L. could not plead that the debt was not due from himself personally but from him in his character of exor.—**LINDSAY v. ORIENTAL BANK AT COLUMBO** (1860), 13 Moo. P. C. C. 401; 3 L. T. 98; 15 E. R. 151, P. C.

Annotation:—Mentd. Lindsay v. Duff (1862), 15 Moo. P. C. C. 452.

6779. Membership of partnership—Investment of trust funds—Specific limitation of contractual liability.]—If an exor. or trustee join a trading partnership or co., as for example, by investing trust funds in bank shares, he is personally liable for all the consequences of his engagement, & if he acted within the scope of his authority, he is left to seek his indemnity from the trust estate or the *cestui que trust*. If he wish to restrict any contract he may enter into, so as to exclude personal liability, he must make an express stipulation with the parties, in which case the extent of his liability will be solely a question of construction of the instrument & of the nature of the contract.—**LUMSDEN v. BUCHANAN** (1865), 13 L. T. 174, H. L.

6780. — No interference with business—Receipt of profits only.]—By articles of partnership T., W., & S. agreed to carry on the business of auctioneers in partnership for seven years; they were to contribute capital & to share profit & loss equally; & if either died during the partnership term, the surviving members of the firm were to continue the business, & were to pay to the personal representatives of deceased partner the share of the profits to which he would have been entitled if living. T. died during the partnership term. At the time of his death the firm had no capital, except office furniture & fittings, worth about £100. They had in their hands a sum of between £400 & £500, which was the proceeds of debts due to a former firm in which T. was a member, & left in the hands of the new firm for collection; & this sum belonged beneficially to T.; T. was also entitled in respect of his share of profits, beyond the amounts which he had drawn, to a sum of about £200. After the death of T., the surviving members of the firm continued to carry on the business, to collect the debts due to the old firm, & to earn profits. The exors. of T. never interfered in the business, but they claimed, under the articles of partnership, the share of profits to

6777 i. Work & labour done.]—An estate in the hands of an administrator is not liable for work done or services performed at his request, although the estate gets the benefit of the work & services, but the administrator is liable in his personal capacity in such a case.—**DEAN v. LEHBERG** (1907), 6 W. L. R. 214; 17 Man. L. R. 64.—**CAN.**

d. Contract for sale of land—By

one executor—Misrepresentation of authority.]—An offer in writing was made to & accepted by R., one of three exors. of S., for the purchase of land belonging to the estate. An agreement & cheque were subsequently received by R., but were returned upon the ground that he had previously offered the property to another person:—**Held:** there was an agreement for the sale sufficient to satisfy the require-

which T. would have been entitled if settlement of accounts in respect of T.'s in the partnership business was made between his exors. & the surviving partners. Sums of money amounting in the whole to about £625 were from time to time paid by the firm to the exors.; generally, & not on any

the death of T., the firm were employed by pltf. to sell property, they sold the property & received the proceeds, but did not pay over same to pltf. In an action brought, after the death of S., against the exors. of T. & W.:—**Held:** the exors. of T. were not liable as partners.—**HOLME v. HAMMOND** (1872), L. R. 7 Exch. 218; 41 L. J. Ex. 157; 20 W. R. 747.

—**See, further, PARTNERSHIP.**

6781. Contract of borrowing.]—**Re BRETTE,** **BRETTE v. BURDETT** (1864), 2 De G. J. & Sm. 244; 46 E. R. 369, L. JJ.

6782. —.]—**FARHALL v. FARHALL,** *Ex p.* **LONDON & COUNTY BANKING CO.,** No. 6165, *ante*.

6783. Goods received—Verbally ordered by deceased.]—The absence of writing does not make an exor. personally liable when he merely accepts delivery of goods ordered by testator in his lifetime (**COLLINS, J.**).—**CRAGGS v. CAIN** (1895), 11 T. L. R. 290.

Purchase of shares in company—After death of deceased.]—**See COMPANIES, Vol. IX., p. 408, Nos. 2619–2622.**

Agreement to pay costs.]—**See CONTRACT, Vol. XII., p. 263, No. 2153.**

B. Indorsement and Acceptance of Bills of Exchange.

See, now, Bills of Exchange Act, 1882 (c. 61), s. 31 (5); &, generally, BILLS OF EXCHANGE, Vol. VI., pp. 1 et seq.

6784. Representatives personally liable—Although bill indorsed “as executors.”]—There can be no such inconvenience, as has been suggested, from the exors. indorsing the bill; for it is immaterial whether they indorse it as exors. or not. If they indorse it at all, they are liable personally, & not as exors.; for their indorsement would not give an action against the effects of testator (**BULLER, J.**).—**KING v. THOM** (1786), 1 Term Rep. 487; 99 E. R. 1212.

Annotations:—**Reid.** Hostler v. Arundell (1802), 3 Bos. & P. 7; Ord v. Fenwick (1802), 3 East, 104; Cowell v. Watts (1805), 6 East, 405; Powley v. Newton (1816), 6 Taunt. 453; Partridge v. Court (1818), 5 Price, 412; Catherwood v. Chabaud (1823), 1 B. & C. 150; Aspinall v. Wake (1833), 10 Bing. 51.

6785. —.]—(1) Where two makers of a promissory note gave it to a creditor of their testator whereby “as exors. they severally & jointly promised to pay on demand, with interest”:—**Held:** they were personally liable.

(2) Plea, that debts. were exors. & made the note

ments of Stat. Frauds, but R. had no power to bind his co-exors. & was liable for the misrepresentation of authority.—**MANEER v. SANFORD** (1904), 24 C. L. T. 70; 15 Man. L. R. 181; 1 W. L. R. 128.—**CAN.**

e. Promise to give lien on assets—Before administration granted.]—**KIRWAN v. GORMAN** (1846), 9 I. Eq. R. 154.—**IR.**

as such, & *plene administraverunt præter*. Special demurrer thereto that they had thereby made themselves personally liable, & admitted that they had assets for the payment of the note, & that it might have been given for their own debt, & that they having promised to pay with interest, they could not become liable for it in their representative character:—*Held*: such plea was bad, & afforded no answer to the action.—*CHILDS v. MONINS* (1821), 2 Brod. & Bing. 460; 5 Moore, C. P. 282; 120 E. R. 1044.

Annotations:—*As to* (1) *Reid*. *Ridout v. Bristow* (1830), 1 Tyr. 84; *Aspinall v. Wake* (1833), 10 Bing. 51; *Barnard v. Pumfrett* (1841), 5 My. & Cr. 63; *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151. *As to* (2) *Reid*. *Crofts v. Beale* (1851), 17 L. T. O. S. 144.

6786. ———.]—*LIVERPOOL BOROUGH BANK v. WALKER*, No. 5996, *ante*.

6787. ——— *Bill payable by partnership—Representatives sharing in profits & loss—Although not carrying on business.*]—Where the exors. of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter:—*Held*: they were liable upon a bill drawn for the accommodation of the partnership, & paid in discharge of a partnership debt; although their names were not added to the firm but the trade was carried on by the other partners under the same firm as before, & the exors. when they divided the profits & loss of the trade, carried same to the account of the infant, & took no part of the profits themselves.—*WIGHTMAN v. TOWNROE* (1813), 1 M. & S. 412; 105 E. R. 154.

Annotations:—*Appld.* *Labouchere v. Tupper* (1859), 11 Moo. P. C. C. 198. *Reid*. *Hickman v. Cox* (1857), 3 C. B. N. S. 523; *Holme v. Hammond* (1872), L. R. 7 Exch. 218. *Mentd.* *Bullen v. Sharp* (1865), 12 Jur. N. S. 247.

6788. ——— *Acceptance by third party under power of attorney—Given by executor—Debt due from testator.*]—*Semble*: a letter of attorney given by an exor. to A. enabling him to transact the affairs of testator in the name of the exor. as exor., & to pay, discharge & satisfy all debts due from testator, conveys a sufficient authority to A. to accept a bill of exchange, in the name of the exor., drawn by a creditor for the amount of a debt due from testator, so as to make the exor. personally liable. But clearly if the exor. admits that such a bill, which has been so accepted by A. with the knowledge of the exor., is for a just debt, & that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill, without resorting to the letter of attorney.—*HOWARD v. BAILLIE* (1796), 2 Hy. Bl. 618; 126 E. R. 737.

Annotations:—*Reid*. *Ward v. Shew* (1833), 9 Bing. 608; *Re Disputed Adjudication* (1859), 33 L. T. O. S. 348. *Mentd.* *Re Acraman, Ex p. Bushell* (1844), 3 Mont. D. & De G. 615.

6789. ———.]—A power of attorney given by an extrix. to act for her as extrix. does not authorise the accepting of bills of exchange to charge her in her own right, though for debts due from her testator.—*GARDNER v. BAILLIE* (1796), 6 Term Rep. 591; 101 E. R. 720.

Annotations:—*Reid*. *Ward v. Shew* (1833), 9 Bing. 608; *Re Disputed Adjudication* (1859), 33 L. T. O. S. 348.

C. Money Had and Received.

See, generally, CONTRACT, Vol. XII., pp. 539–571, Nos. 4478–4760.

6790. *General rule—Liable de bonis propriis—Not de bonis testatoris.*]—The count is framed on

a cause of action arising wholly in the time of the exors.; it is for money had & received by them to the use of pltf. If that be pltf.'s money, he is entitled to it, whether there be assets or not, & whether the exor. & extrix. have or have not applied to other purposes the money which was received to pltf.'s use. . . . Pltf. might have had judgment generally against them, which would be *de bonis propriis*, & not *de bonis testatoris* (*HOLROYD, J.*).—*ASHBY v. ASHBY* (1827), as reported in 7 B. & C. 444; 108 E. R. 789.

Annotations:—*Folld.* *Waite v. Gale* (1845), 2 Dow. & L. 925. *Consd.* *Brown v. Maclean* (1849), 12 L. T. O. S. 423. *Reid*. *Corner v. Showe* (1838), 6 Dowl. 584; *Bignell v. Harpur* (1850), 4 Exch. 773; *Haynes v. Forshaw* (1853), 11 Hare, 93; *Farhall v. Farhall* (1871), 7 Ch. App. 123; *Padwick v. Scott, Re Scott's Estate*, *Scott v. Padwick* (1876), 2 Ch. D. 736. *Mentd.* *Batard v. Hawes* (1853), 2 E. & B. 287; *Rees v. Watts* (1855), 11 Exch. 410; *Mardall v. Thelluson* (1856), 6 E. & B. 976.

6791. *Receipt of mortgage debt—Money distributed amongst creditors—Debt in fact previously paid.*]—A mtge. comes to an exor., who receives the mtge. money, & pays it away to his testator's creditors; afterwards it appears that the mtge. had been satisfied in testator's lifetime; the exor. must refund, though he had before paid the money away in debts, which he had not otherwise assets to pay.—*POOLEY v. RAY* (1717), 1 P. Wms. 355; 2 Eq. Cas. Abr. 698; 24 E. R. 423, L. C.

Annotations:—*Reid*. *Hercy v. Dinwoody* (1793), 4 Bro. C. C. 257; *Pickering v. Stamford* (1795), 2 Ves. 581. *Mentd.* *Re Musgrave*, *Machell v. Parry*, [1916] 2 Ch. 417.

6792. *Money levied on execution—Paid to administrator of bailiff.*]—The ct. refused to order the administrator of a bailiff, to whom an execution had been delivered, to pay over to pltf. the money which he had received after the bailiff's death.—*WANT v. SWAYNE* (1739), Willes, 185; 125 E. R. 1123.

6793. *Admission by administrator.*]—Where an infant who was entitled to certain personal property, on her coming of age, as a residuary legatee, joined her father in a bond to secure to pltf. a sum due to him for the rent of apartments, occupied by her & her father, & after she became of age, employed deft. to take out administration *de bonis non* of the assets of testator, his exor. being dead, which deft. accordingly did, & became possessed of the property, & she afterwards gave pltf. an order on deft. to pay the amount of her father's bills due to the former, which on being presented to deft., he acknowledged that he possessed adequate funds, & that a person would be safe in advancing money on the security of the bond; but, before the order was executed, or the sum paid under it by deft., the daughter countermanded it:—*Held*: as he had consented to appropriate a sum sufficient to pay pltf.'s demand, he was liable to an action for money had & received, in which pltf. might not only recover the amount of the bond, but an acceptance given by the father of the infant, before she became of age, & which she afterwards requested deft. to pay.—*ROBERTSON v. FAUNTLEROY* (1823), 8 Moore, C. P. 10; 1 L. J. O. S. C. P. 55.

Annotation:—*Mentd.* *Walker v. Rostron* (1842), 9 M. & W. 411.

6794. *Receipt of money of third parties.*]—An action for money had & received will lie against an exor. who receives the money of third parties without declaring against him as exor.—*WAITE v. GALE* (1845), 2 Dow. & L. 925; 14 L. J. Q. B. 212; 9 Jur. 782.

. 4.—*For own acts*: Sub-sect. 2, C., D., E. & F. (a).]

6795. Purchase money on invalid sale—Invalidity not due to fraud.—Exors. believing themselves entitled to an equity of redemption in leasehold premises assigned same to pltf. In fact the equity of redemption belonged to their testator's widow, who subsequently enforced her right thereto:—*Held*: as there was no fraud in the exors., pltf. could not sue them for the return of the purchase-money in an action for money had & received.—*CLARE v. LAMB* (1875), L. R. 10 C. P. 334; 44 L. J. C. P. 177; 32 L. T. 196; 39 J. P. 455; 23 W. R. 389.

See, further, *CONTRACT*, Vol. XII., pp. 542, 544, 545, 548, Nos. 4501, 4521, 4526–4529, 4559.

D. Promise to Pay Debts of Deceased.

See Stat. Frauds, 1677 (c. 3), s. 4; Mercantile Law Amendment Act, 1856 (c. 97), s. 3; & generally, *CONTRACT*, Vol. XII., pp. 118–172.

6796. Promise must be in writing.—(1) Where an exor. is sued upon a parol promise of paying the debt, it is sufficient to ground a judgment against the assets of testator; but where by such promise it is attempted to charge the exor. personally, & to ground judgment against his own effects, it must be proved to be in writing, otherwise it is void.

(2) The law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration (*SKYNNER, C.B.*).—*RANN v. HUGHES* (1778), 4 Bro. Parl. Cas. 27; 7 Term Rep. 350, n.; 2 E. R. 18, H. L.

Annotations:—As to (1) *Refd.* *Reech v. Kennegal* (1748), 1 Ves. Sen. 123; *Hawkes v. Saunders* (1782), 1 Cowp. 289; *Ellis v. Bowen* (1801), For. 98; *Jones v. Tanner* (1827), 6 L. J. O. S. K. B. 71. As to (2) *Refd.* *Vez v. Emery* (1799), 5 Ves. 141; *Davies v. Penton* (1827), 6 B. & C. 216; *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151. Generally, *Mentd.* *Johnson v. Collings* (1800), 1 East, 98; *Kennedy v. Broun* (1863), 9 Jur. N. S. 119.

6797. Liability only if assets available.—If an exor. or heir promises to pay a debt when he has not assets, no action upon the case lies against him upon such promise; but contrary if he has assets (*per CUR.*).—*HODGSON & MAYNARD'S CASE* (1577), 3 Leon. 67; 74 E. R. 545.

6798. —.]—*Assumpsit* will lie against [an exor.] in consideration of his having sufficient assets; & if he expressly promise, the judgment shall be *de bonis propriis*.—*TREWIAN v. HOWELL* (1588), Cro. Eliz. 91; 78 E. R. 349.

Annotation:—*Refd.* *Hawkes v. Saunders* (1782), 1 Cowp.

6799. —.]—If an exor. promises to pay a debt when he has not assets, no action upon the case lies against him; but if he has assets, then it is otherwise (*per CUR.*).—*ANON.* (1594), 4 Leon. 5; 74 E. R. 689.

6800. —.]—A promise by an administrator to pay the debts of the intestate, if there be no assets, is *nudum pactum*.—*PEARSON v. HENRY* (1792), 5 Term Rep. 6; 101 E. R. 3.

Annotations:—*Mentd.* *Worthington v. Barlow* (1797), 7 Term Rep. 453; *Riddell v. Sutton* (1828), 2 Moo. & P. 345.

6801. Liability de bonis propriis.—*FILCOCKS & HOLT'S CASE* (1590), 1 Leon. 240; 74 E. R. 219.

6802. Promise to pay on day named.—The exor. is chargeable only in respect of the assets, & not otherwise; but if he promises to pay it at a day to come, it is now made his own debt, & to be satisfied by his own goods (*YELVERTON, J.*).—*GORING v. GORING* (1602), Yelv. 11; 80 E. R. 8. *Annotations*:—*Appld.* *Childs v. Monins* (1821), 2 Brod. & Bing. 460. *Refd.* *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

6803. Debts of deceased incurred while infant—Representative not liable—Unless deceased promised to pay—On coming of age.—*Assumpsit* cannot be maintained against an exor. on a promise to pay the debt of his testator, if testator was under age at the time the original contract was made, unless he had promised to pay after he came of age; for there was not originally any cause of action.—*STONE v. WYTHIOL* (1593), Cro. Eliz. 126; 1 Leon. 113; 78 E. R. 383.

Annotations:—*Mentd.* *Jane v. Chester* (1619), Poph. 151; *Ive v. Chester* (1620), Cro. Jac. 560; *Manby v. Scot* (1663), 1 Keb. 383.

6804. Verbal promise confirmed by writing.—A promise to pay or forbearance before Stat. Frauds was accounted a good consideration to charge the exor. or administrator *de bonis propriis*; & since, a writing is sufficient after a parol promise & by this letter it appears that the administrator had made a promise, & confirmed it by this letter, so decreed that the administrator should be bound by the promise, & should answer debts & costs out of his own estate, but have satisfaction out of the assets, if any.—*FREDERICK v. WYNNE* (1715), 2 2 Eq. Cas. Abr. 456; 22 E. R. 388.

Consideration.—See Sub-sect. 2, F., *post*.

E. Promise to Pay Legacies.

6805. Promise first made to deceased—To legatee after death of deceased—Liable only in respect of assets.—Exor. promised his testator to pay pltf. £100 legacy, & said he need not put it in his will. After testator's death, he said he would pay it. Decree for payment out of assets.—*REECH v. KENNIGATE* (1748), Amb. 67; 1 Ves. Sen. 123; 1 Wils. 227; 27 E. R. 39, L. C.

Annotations:—*Consd.* *Hawkes v. Saunders* (1782), 1 Cowp. 289. *Refd.* *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

6806. Verbal promise—Administrator de bonis non.—Under some circumstances a mere parol agreement is binding, & will be carried into specific execution by a ct. of equity. An administrator *de bonis non* verbally promising to pay an annuity given by testator's will, does under certain circumstances, make himself personally liable to such payment.—*HERBERT (LADY) v. POWIS (EARL)* (1766), 1 Bro. Parl. Cas. 355; 1 E. R. 618, H. L.

Annotation:—*Mentd.* *Clifford v. Turrell* (1845), 14 L. J. Ch. 390.

6807. Qualified promise—Alleged claim of set-off—Debt due to testator.—*LEWIS v. LEWIS* (1778), cited in 1 Hy. Bl. at p. 112; 126 E. R. at p. 67, N. P.

6808. Liability on account stated—Between executor & parties interested.—Where an account of the residuary estate of testator has been made out by the exors., & signed by the parties interested, under which account all of them have been paid

PART VI. SECT. 4, SUB-SECT. 2.—E.

1. *Promise first made to deceased.*—*SHANY v. GARTY* (1850), 2 Ir. Jur. 137.—IR.

except one, such one may recover his proportion, with interest, in *assumpsit*, against the exors.

There has been an account signed, & the other legatees have been paid; & it is no longer after this to be deemed a part of the residuary estate, but as so much money for pltf. in the hands of defts. (BURROUGH, J.).—GREGORY v. HARMAN (1828), 3 C. & P. 205, N. P.; *subsequent proceedings*, 1 Moo. & P. 209.

Annotations:—*Consd.* Hart v. Minors (1834), 2 Cr. & M. 700. *Refd.* Holland v. Clark (1842), 1 Y. & C. Ch. Cas. 151.

6809. ———.]—Where an exor. having called testator's legatees together, exhibited accounts of the assets & his disbursements & paid to several the sums due, but retained the legacy payable, to one of them who was absent, charging himself in his account with the amount so retained:—*Held*: he was liable to the legatee in *assumpsit* for so much money had & received & on the account stated.—HART v. MINORS (1834), 2 Cr. & M. 700; Tyr. & Gr. 990; 4 L. J. Ex. 275; 149 E. R. 942.

Annotation:—*Refd.* Holland v. Clark (1842), 1 Y. & C. Ch. Cas. 151.

6810. ———.]—T., by her will, desired that a sum of £500, lent by her to deft., should be allowed to remain in his hands during the life of her sister, he paying the interest to her sister, but that on her sister's death T.'s exors. should collect the £500, & divide it between her two nieces, one of whom was pltf., & the other deft.'s wife, same to be for their sole & separate use respectively, free from the control & debts of any husband, with benefit of survivorship, etc. During the lifetime of the tenant for life, pltf.'s husband took from deft. his acceptance for £242, payable in twelve months, as & for the share of pltf.'s wife in the legacy. Pltf. & her husband, & deft. & his wife, signed a receipt to the exor. of T.'s will as & for a receipt of the legacy of £500. But no money ever in fact passed; the £500 was never collected from deft.; the acceptance was never negotiated; &, on the death of pltf.'s husband, deft. procured a return of it to him. Again, pltf.'s father by his will bequeathed to her the proceeds of a life policy, & made deft. his exor., who, acting in that capacity, received £200 upon the policy. Afterwards, & after the death of pltf.'s husband & deft.'s wife, pltf. claimed from deft. payment of the two sums of £242 & £200, & a further sum for money lent by her to him. At an interview between them, in the presence of pltf.'s attorney, deft. dictated, & the attorney wrote out, a memorandum, by which deft. charged himself with the two sums of £242 & £200, & the item for money lent, & with interest from the date of the death of pltf.'s husband. At the same interview he mentioned certain claims of his against pltf.'s husband, & asked whether he could set them off, but did not enter them in the memorandum. He also afterwards, at the same interview, signed on the back of the memorandum an authority to his attorney to pay pltf. the amount due to her out of any moneys that might be received on his account, referring verbally to an intended sale of some property on his behalf. At the trial no evidence was given of any set-off. In an action on the common counts, it was objected that the £242 had been reduced into possession by pltf.'s husband, & therefore she had no right of action at law in her personal capacity, & that the £200 was held by deft. as exor., & therefore he could not properly be sued in his personal capacity, & that the memorandum & authority taken together were not, in the circumstances, a statement of an account as

due *in presenti*:—*Held*: the jury were justified in finding that the memorandum was a statement of account, sufficient to entitle pltf. to maintain her suit in respect of both the sums.—TOPHAM v. MORECRAFT (1858), 8 E. & B. 972; 30 L. T. O. S. 332; 4 Jur. N. S. 611; 6 W. R. 294; 120 E. R. 361. *Annotation*:—*Mentd.* Kennedy v. Broun (1863), 13 C. B. N. S. 677.

—.]—*See, also*, CONTRACT, Vol. XII., p. 574, Nos. 4780, 4783, 4784.

—.]—*See, generally*, CONTRACT, Vol. XII., pp. 571–588, Nos. 4761–4905.

6811. Promise made under mistake of liability.

—A., at his death, left among his papers two letters sealed, & directed to pltf., who had been his house-keeper for some years, but had left his service after giving birth to a child, of which he was the father, containing two promissory notes for £400 & £200 respectively. In one letter the note was said to be in consideration of the long & faithful services of pltf.; in the other he had written "in addition to any sum I owe you I enclose £200 as a mark of my respect." Defts., who were the exors. of A., paid £200 after his death on account of these notes to pltf., & promised, in writing, to pay the residue, but subsequently declined to do so; & pltf. brought an action of *assumpsit* against them, in which were counts upon the notes, & a count upon an account stated with defts. as exors.:—*Held*: (1) testator's estate was not liable in respect of the notes, as they had not been delivered by him to pltf., & could not operate as testamentary depositions, because not in conformity with Wills Act, 1837 (c. 26); (2) defts. were not liable upon the count for an account stated, because the payments & promise had been made under a mistake as to the liability of testator's estate, & without consideration.—GOUGH v. FINDON (1851), 7 Exch. 48; 21 L. J. Ex. 58; 18 L. T. O. S. 79; 155 E. R. 850.

Annotations:—*Generally*, *Mentd.* Hulse v. Hulse (1856), 17 C. B. 711; Marshall v. Wilson (1866), 14 W. R. 699.

6812. Legacy charged by legatee—Notice to executor—Prior charge not disclosed to chargee—Legacy due overestimated by executor.—A legatee charged the share to which he was entitled, under his father's will, to B., who gave notice to the exor. The exor. indorsed on the notice that he had no objection to pay the money "that might become due" to the legatee "on the final distribution of his father's property." There was at this time a prior charge, of which the exor. had notice, but he did not disclose it to B. The exor., on a subsequent occasion, also represented that the legatee's share would certainly be as much as £1,500, which estimate turned out to be erroneous:—*Held*: the exor. was not liable for the suppression of the existence of the first charge or bound to make good the representation as to the value of the share.—STEPHENS v. VENABLES (No. 2) (1862), 31 Beav. 124; 54 E. R. 1084.

Consideration.—*See* Sub-sect. 2, F., *post*.

F. Consideration for Promises to Pay.

(a) In General.

See, generally, CONTRACT, Vol. XII., pp. 172–234.

6813. Necessity for.—RANN v. HUGHES, No. 6796, *ante*.

6814. ———.]—A promise by an executor to answer damages out of his own estate would be void if made without consideration (ABBOTT, C.J.).

Sect. 4.—For own acts: Sub-sect. 2, F. (a) & (b) i. & ii.]

—**SAUNDERS v. WAKEFIELD** (1821), 4 B. & Ald. 595; 106 E. R. 1054.

Annotations:—Mentd. *Jenkins v. Reynolds* (1821), 3 Brod. & Bing. 14; *Lilley v. Hewitt* (1822), 11 Price, 494; *Russell v. Mosley* (1822), 6 Moore, C. P. 521; *Morley v. Boothby* (1825), 3 Bing. 107; *Lees v. Whitcomb* (1828), 3 C. & P. 289; *Newbury v. Armstrong* (1829), 6 Bing. 201; *Cole v. Dyer* (1831), 1 Cr. & J. 461; *James v. Williams* (1834), 5 B. & Ad. 1109; *Clancy v. Piggott* (1835), 2 Ad. & El. 473; *Re Frost*, [1898] 2 Ch. 556.

6815. ———.]—An action at law for a distributive share of an intestate's property cannot be maintained against the administrator, nor against his exor., although he may have expressly promised to pay.

Such a promise will not bind if made without sufficient consideration. . . there was no consideration for the exor.'s promise to pay (**BAYLEY, J.**).—**JONES v. TANNER** (1827), 7 B. & C. 542; 1 Man. & Ry. K. B. 420; 6 L. J. O. S. K. B. 71; 108 E. R. 825.

Annotations:—Refd. *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151; *Re West*, *West v. Roberts*, [1909] 2 Ch. 180. **Mentd.** *Crawshay v. Thornton & Daniloff* (1837), 1 Jur. 19.

———.]—*See, also*, **CONTRACT**, Vol. XII., pp. 173–176, Nos. 1275–1300.

6816. Must be expressed in writing.]—Promise by administrator to pay debt of intestate upon forbearance must be in writing.—**GRINDALL v. DAVIES** (1680), *Freem. K. B.* 532; 89 E. R. 398.

6817. ———.]—Mtgees. having offered to give debt., the exor. of the mtgor., time for payment of the mortgage money provided a sum of £1,500 should be made up on a day fixed, debt., on Dec. 18, wrote them a letter, stating his present inability to pay, & asking for a year's time, but saying he had £100, which he would pay over, & that he would engage by the beginning of Apr. to have another £100 ready, & other sums afterwards. The letter contained other statements, & a further request for time. On Jan. 3, the mtgees. sent debt. an answer saying they considered that £200 would be paid by Apr. 1, but could not promise further time unless the amount was made up to £1,500. The £200 not having been paid by Apr. 1, an action was brought by the mtgees. against debt., seeking to charge him personally on a promise to pay that sum, made in consideration of forbearance to Apr. 1:—**Held**: there was no sufficient promise in writing to bind debt. personally, under the Stat. Frauds, the correspondence not showing any unqualified promise by debt.—**HAMILTON v. TERRY** (1852), 11 C. B. 954; 21 L. J. C. P. 132; 138 E. R. 752.

———.]—*See, also*, **CONTRACT**, Vol. XII., pp. 151, 152, Nos. 1039–1045.

(b) What amounts to.

i. Forbearance by Creditors.

See, also, **CONTRACT**, Vol. XII., pp. 192, 193, Nos. 1515–1524.

6818. Good consideration—For maintenance of action.]—If an exor. promise a creditor that if

he will forbear to sue him until such a time, that then he will satisfy the creditor his debt, in that case the exor. is liable to pay the debt of his own goods.—**ESCRIG'S CASE** (1589), 4 Leon. 3; 74 E. R. 657.

6819. ———.]—A promise by an exor. to pay a bond debt of his testator, in consideration that pltf. *daret diem solutioni pro uno anno*, will support an *assumpsit*.—**CHAMBERS v. LEVERSAGE** (1598), *Cro. Eliz.* 644; 78 E. R. 883.

6820. ———.]—**FISHER v. RICHARDSON**, No. 6461, *ante*.

6821. ———.]—**BOND v. PAYNE**, No. 6822, *post*.

6822. ——— Possession of assets immaterial.]—If an extrix., in consideration of forbearance, promise to pay the debt of testator on a certain day, or to assign her interest in a term of years, of which she is possessed as extrix., as a security for the payment of the debt, she shall be charged generally in an action of *assumpsit* brought on this promise, & pltf. need not aver in his declaration that she had assets at the time of the promise.—**BOND v. PAYNE** (1612), *Cro. Jac.* 273; 79 E. R. 234; *sub nom.* **BANES'S CASE**, 9 Co. Rep. 91 a; *sub nom.* **ANON.**, *Jenk.* 290.

Annotations:—Consd. *Papworth v. Johnson* (1614), 2 Bulst. 91; *Davis v. Rayner* (1671), 2 Keb. 758. **Refd.** *Porter v. Bille* (1673), *Freem. K. B.* 125; *Hart v. Minors* (1834), 2 Cr. & M. 700.

6823. ———.]—If an exor. makes a promise to pay the debt of testator upon forbearance, he shall be charged in an action upon the case for his promise, if he do not perform it. . . . His having of assets, is not material, & he shall here be charged by his promise, though he has no benefit at all thereby; as if one says to such a schoolmaster, teach such a one, & I will give you so much for your pains; this is a good promise, & shall bind him, though he has no benefit at all by it; so if one do say to a mason, build such a house, & I will pay you so much money for it, this is good; for the matter considerable in such actions upon the case for promises made, is not whether the party, which does thus assume, has, or is to have any benefit thereby, but only whether the other, of whom the promise is thus made, has any manner of prejudice by it; & the promise made upon this is the only ground of the action (**COKE, C.J.**).—**CHAPMAN v. BARNABY** (1614), 2 Bulst. 278; 80 E. R. 1121.

6824. ———.]—**JOHNSON v. WHITCHCOTT** (1638), 1 Roll. Abr. 24.

Annotations:—Refd. *Payne v. Wilson* (1827), 7 B. & C. 423; *Oldershaw v. King* (1857), 29 L. T. O. S. 364.

6825. ———.]—It is not material whether debts. had assets or not at the time of the promise, for by the promise they caused pltf. to desist, who peradventure at that time was prepared to prove assets; & relying upon such promise might be much to his prejudice, if he could not afterwards recover upon it (*per CUR.*).—**DAVIS v. WRIGHT** (1671), 1 Vent. 120; 86 E. R. 83; *sub*

Holland v. Clark (1842), 1 Y. & C. Ch. Cas. 151.

PART VI. SECT. 4, SUB-SECT. 2.—
F. (b) i.

6818 i. Good consideration — For maintenance of action.]—Where a note payable on demand, signed by debt., as exor. of an estate, but not expressly

restricted to payment out of the estate was given in renewal of a former one, similarly signed, but payable at a definite time, the debt being originally testator's:—**Held**: there was a good consideration for the former note, if not for the demand note, namely,

forbearance on the part of pltf., & debt. was personally liable thereon; & his antecedent liability was a valuable consideration for the demand note.—**UNION BANK OF CANADA v. MCRAE**, 21 C. L. T. 409, 496.—**CAN.**

6826. ———.]—An exor. may be sued on a promise in consideration of forbearance, without averring assets, & although he have none.—*PORTER v. BILLE* (1673), *Freem. K. B.* 125; 89 *E. R.* 91.

6827. ———.]—Promissory note importing consideration.]—(1) A widow gave a promissory note "for value received by my late husband":—*Held*: deft. was not at liberty to show as a defence that it was given as an indemnity against liabilities incurred on behalf of her late husband, & that the payee had not been damnified.

(2) If an administratrix takes upon herself to give a security which may have the effect of inducing forbearance, & which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind the act of giving such a security supersedes the necessity of an investigation as to there being assets (*BAYLEY, J.*).—*RIDOUT v. BRISTOW* (1830), 1 *Cr. & J.* 231; 1 *Tyr.* 84; 9 *L. J. O. S. Ex.* 48; 148 *E. R.* 1404.

Annotations:—*As is* (1) *Distd. Nelson v. Serle* (1839), 4 *M. & W.* 795. *Generally, Mentd. Moseley v. Hanford* (1830), 5 *Man. & Ry. K. B.* 607.

6828. ———.]—*PAPWORTH v. JOHNSON* (1613), 2 *Bulst.* 91; 80 *E. R.* 984.

6829. ———.]—*GARDENER v. FENNER* (1625), 1 *Roll. Abr.* 15.

6830. ———.]—*ANON.* (1626), *Iitt.* 5: 124 *E. R.* 108.

6831. ———.]—*TRICKET (OR TRISKET) v. HANBY* (1661), 1 *Keb.* 114, 180, 193; 1 *Sid.* 45; 83 *E. R.* 846, 887, 895.

6832. ———.]—Though a bare account will not oblige an exor. to pay *de bonis propriis* yet a promise in consideration of forbearance will (*HALE, C.J.*).—*HAWES v. SMITH* (1675), 2 *Lev.* 122; 1 *Vent.* 268; 83 *E. R.* 479; *sub nom. SMITH v. HAWES*, 3 *Keb.* 417.

Annotation:—*Consd. Segar v. Atkinson* (1789), 1 *Hy. Bl.* 103.

6833. Promisor must be liable to be sued—Administration not taken out when promise made.]—*ROSYER v. LANGDALE* (1650), *Sty.* 248; 82 *E. R.* 684.

Annotation:—*Apprvd. Jones v. Ashburnham* (1804), 4 *East*, 455.

6834. ———.]—To a declaration in debt on a promissory note for £24 dated Jan. 3, 1837, made by deft., payable twelve months after date to pltf., deft. pleaded that one J. W., before & at his death, was indebted to pltf. in £24 for goods sold, which sum was due to pltf. at the time of the making of the promissory note in the declaration mentioned, that pltf., after the death of J. W., applied to deft. for payment, whereupon, in compliance with his request, deft., after the death of J. W., for & in respect of the debt so remaining due to pltf. as aforesaid, & for no other consideration whatever, made & delivered the note to pltf., & that J. W. died intestate, & that at the time of the making & delivery of the note, no administration had been granted of his effects, nor was there any exor. or exors. of his estate, nor any person liable for the debt so remaining due to pltf. as aforesaid, & deft. averred that there never was any consideration for the note except as aforesaid:—*Held*: the plea was a good answer to the declaration.—*NELSON v. SERLE* (1839), 4 *M. & W.* 795; 1 *Horn & H.* 456; 8 *L. J. Ex.* 305; 3 *Jur.* 290; 150 *E. R.* 1643,

Ex. Ch.; *reversg. S. C. sub nom. SERLE v. WATERWORTH* (1838), 4 *M. & W.* 9.

Annotations:—*Expld. Ashpitel v. Bryan* (1864), 5 *B. & S.* 723. *Refd. Baker v. Walker* (1845), 3 *Dow. & L.* 46; *Balfour v. Sea, Fire, Life Assce. Co.'s Official Manager* (1857), 27 *L. J. C. P.* 17. *Mentd. Jones v. Jones* (1840), 6 *M. & W.* 84; *Mather v. Maidstone* (1856), 18 *C. B.* 273.

6835. Promisee must have some one to sue—Enabling forbearance to operate as consideration.]—Where pltf. declared that A., since deceased, was indebted to him so much, & that after his death, in consideration of the premises, & that he, at the instance of deft., would forbear & give day of payment of the debt, not stating to whom he was to forbear, deft. promised, etc.:—*Held*: no consideration for the promise, for a promise can only be sustained on a consideration of benefit to deft. or of detriment to pltf., & unless there were some person whom pltf. could have sued for his debt his forbearance was no detriment to him.—*JONES v. ASHBURNHAM* (1804), 4 *East*, 455; 1 *Smith, K. B.* 188; 102 *E. R.* 905.

Annotations:—*Refd. Petch v. Lyon* (1846), 9 *Q. B.* 147; *Smith v. Hartley* (1851), 2 *L. M. & P.* 304.

6836. Holder of bill of exchange—Verbal promise by executor—To pay out of own estate.]—If exor. of the acceptor of a bill of exchange, orally promise to pay the holder out of her own state, provided he forbear to sue, & the holder forbear to sue in consequence, the promise being void, the drawer of the bill is not discharged by the holders having promised to give time, & having delayed to sue under such circumstances.—*PHILPOT v. BRIANT* (1828), 4 *Bing.* 717; 1 *Moo. & P.* 754; 6 *L. J. O. S. C. P.* 182; 130 *E. R.* 945; *previous proceedings* (1827), 3 *C. & P.* 244, *N. P.*

Annotation:—*Mentd. Oriental Financial Corpn. v. Overend Gurney* (1871), 7 *Ch. App.* 145, *n.*

Forbearance generally.—See *CONTRACT*, Vol. XII., pp. 189–196, Nos. 1445–1567.

ii. Other Consideration.

See, generally, *CONTRACT*, Vol. XII., pp. 172–234, Nos. 1270–1936.

6837. Possession of assets.]—*TREWINIAN v. HOWELL*, No. 6798, *ante*.

6838. ———.]—*Assumpsit* lies against an extrix. for a legacy, upon a promise in consideration of assets.—*HAWKES v. SAUNDERS* (1782), 1 *Cowp.* 289; 98 *E. R.* 1091.

Annotations:—*Refd. Rose v. Bowler* (1789), 1 *Hy. Bl.* 108; *Barnes v. Hedley* (1809), 2 *Taunt.* 184; *Jones v. Tanner* (1827), 6 *L. J. O. S. K. B.* 71; *Barnard v. Pumfrett* (1841), 5 *My. & Cr.* 63; *Earle v. Oliver* (1848), 2 *Exch.* 71; *Flight v. Reed* (1863), 1 *H. & C.* 703. *Mentd. Williams v. Moor* (1843), 12 *L. J. Ex.* 253.

6839. Taking out administration—By permission of plaintiff.]—*FILCOCKS & HOLT'S CASE* (1590), 1 *Leon.* 240; 74 *E. R.* 219.

6840. ———.]—One promises, if the widow of intestate would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets to pay debts:—*Held*: the promise was binding, & not within *Stat. Frauds*.—*TOMLINSON v. GILL* (1756), *Amb.* 330; 27 *E. R.* 221, *L. C.*

Annotations:—*Refd. Griffith v. Sheffield* (1758), 1 *Edon*, 73; *Gregory v. Williams* (1817), 3 *Mer.* 582; *Lloyd's v. Harper* (1880), 16 *Ch. D.* 290. *Mentd. Re Flavell, Murray v. Flavell* (1883), 25 *Ch. D.* 89.

6841. ———.]—A. declared against B. & his wife, administratrix of C., deceased, for that whereas C. died intestate, possessed of South Sea

Sect. 4.—For own acts: Sub-sect. 2, F. (b) ii.; sub-sects. 3, 4 & 5, A. (a).]

Stock which she held in trust for A. & upon which certain dividends were due, in consideration that A. at his own expense would procure administration to be granted to the wife of B. as next of kin to C. & would furnish evidence to enable B. & his wife to receive the dividends; B. & his wife as such administratrix promised to pay over to A. the amount of the dividends when received:—*Held*: the consideration stated was insufficient to support the promise.—**PARKER v. BAYLIS** (1800), 2 Bos. & P. 73; 126 E. R. 1163.

6842. — Promise conditional on grant of administration.]—An exor. is not personally liable on a promise, if he takes on himself the administration, to pay testator's debt.—**DAY v. CAUDREY** (1676), Freem. K. B. 434; 89 E. R. 324; *sub nom.* **DAY v. GARELY**, 3 Keb. 710.

6843. Delivery of additional goods—By creditor.]—If an administratrix promise to pay a debt of intestate's in consideration that the creditor sends her in more goods, an *assumpsit* will lie for both debts, & judgment *de bonis propriis* may be given.—**WHEELER v. COLLIER** (1595), Cro. Eliz. 406; 78 E. R. 650.

6844. Acceptance of defendant as debtor—Assignment by original creditor—To plaintiff.]—Pltf. declares, that deft.'s testator was indebted to A. who, after testator's death, assigned the debt to pltf. & appointed him to receive it to his own use, & deft. in consideration that pltf. would accept deft. for his debtor, promised to pay it to pltf. This is not a sufficient consideration to support the promise, to charge deft. *de bonis propriis*.—**FORTH v. STANTON** (1669), 1 Saund. 210; 2 Keb. 465; 1 Lev. 262; 85 E. R. 217.

Annotations:—Mentd. **Morton v. Burn** (1837), 7 Ad. & El. 19; **Green v. Cresswell** (1839), 2 Per. & Dav. 430; **Magnus v. Hall** (1843), 8 J. P. 71; **Macrory v. Scott** (1850), 5 Exch. 907; **Fitzgerald v. Dressler** (1859), 7 C. B. N. S. 374; **Reader v. Kingham** (1862), 13 C. B. N. S. 344; **Mountstephen v. Lakeman** (1871), 41 L. J. Q. B. 67; **Sutton v. Grey**, [1894] 1 Q. B. 285; **Harburg India Rubber Comb Co. v. Martin**, [1902] 1 K. B. 778; **Davys v. Buswell**, [1913] 2 K. B. 47.

6845. Delivery of deeds by attorney to executor—Before bill paid.]—An attorney having delivered up deeds to an exor., which he was not obliged to do till his bill was paid, & these deeds being of great use to exor. in several suits that were then carrying on:—*Held*: this is a sufficient consideration to make exor. liable for the full demand, whether there be assets or not.—**HAMILTON (DUCHESS) v. INCLEDON** (1719), 4 Bro. Parl. Cas. 4; 2 Eq. Cas. Abr. 456; 11 Vin. Abr. 279; 2 E. R. 3, H. L.

Annotation:—Folld. **Re Bentinck, Bentinck v. Bentinck** (1893), 37 Sol. Jo. 233.

6846. Payment of interest.]—**CHILDS v. MONINS**, No. 6785, *ante*.

6847. —.]—**BRADLY v. HEATH**, No. 6772, *ante*.

6848. Covenant under seal.]—Deft. covenants to pay by & out of the assets. Under the circumstances, this is not a covenant to pay contingent upon his having assets of testator in hand sufficient

for the purpose, because he takes care to have an indemnity if it should turn out that the assets are inadequate. That supposes him to advance the money absolutely. This is an absolute covenant to pay the money, coupled only with a designation of the fund which is chargeable with the payment (**PATTESON, J.**).—**BAIN v. KIRK** (1849), 13 Q. B. 540, n.; 18 L. J. Q. B. 83; 12 L. T. O. S. 374; 13 Jur. 559; 116 E. R. 1369, n. *Annotation:—Mentd.* **North v. Wakefield** (1849), 13 Q. B.

SUB-SECT. 3.—TORTS.

6849. Executor primarily liable—Right to indemnity—From testator's estate.]—A trustee in the due execution of his trust directed the bailiff employed in the settled estate to have certain trees felled. The bailiff ordered the wood-cutters usually employed on the estate to fell the trees. In doing so they allowed a bough to fall on a passer-by, who brought an action against the trustee & recovered heavy damages:—*Held*: the trustee was entitled to indemnity out of the trust estate.—**BENETT v. WYNDHAM** (1862), 4 De G. F. & J. 259; 45 E. R. 1183, L. J.

Annotations:—Folld. **Re Raybould, Raybould v. Turner**, [1900] 1 Ch. 199. *Apld.* **Re Tyrell, Tyrell v. Woodhouse** (1900), 82 L. T. 675. *Mentd.* **Havelock v. Havelock, Re Allen** (1881), 17 Ch. D. 807.

6850. — Subrogation of injured party to testator's estate.]—A trustee carried on testator's colliery business, & in so doing let down the surface of the land & injured the buildings of an adjoining owner, who recovered damages against the trustee personally for £1,092 & costs. The adjoining owner then claimed to be entitled to be paid direct out of testator's estate the amounts so recovered:—*Held*: following **Benett v. Wyndham**, No. 6849, *ante*, as the injury had been occasioned by the trustee in the reasonable management & working of testator's estate, he was entitled to be indemnified out of the assets, & consequently, the adjoining owner was entitled to stand in the place of the trustee & to claim the benefit of this right to indemnity so as to obtain payment of the damages & costs so recovered direct out of testator's estate.—**Re RAYBOULD, RAYBOULD v. TURNER**, [1900] 1 Ch. 199; 69 L. J. Ch. 249; 82 L. T. 46; 48 W. R. 301.

Annotation:—Refd. **Re Tyrell, Tyrell v. Woodhouse** (1900), 82 L. T. 675.

SUB-SECT. 4.—EFFECT OF ADMISSION OF ASSETS.

See Sect. 5, *post*, & Part VII., Sect. 2, sub-sect. 8, D., *post*.

SUB-SECT. 5.—DEVASTAVIT.

A. What amounts to Devastavit.

(a) Loss or Destruction of Estate of Deceased.

6851. Sale of testator's estate—Below proper value.]—**ANON.** (1504), Keil. 51; 72 E. R. 209.

the general estate.—**FERRIER v. PANNIER** (1894), 24 S. C. R. 86.—**CAN.**

PART VI. SECT. 4, SUB-SECT. 5.—A. (a).

k. Conversion of deceased's property—To executor's own use—Wife

PART VI. SECT. 4, SUB-SECT. 3.

g. Libel.]—Exors. are personally liable for libels published by them in that quality.—**RIELLE v. BENNING** (1889), M. L. R. 4 S. C. 219; 11 L. N. 415.—**CAN.**

h. Not keeping building in repair.]

—A. T. sued J. F. & M. W. F. personally & as exors. of the will of J. F., claiming damages for the death of her husband, who was killed by a window falling upon him from a building, which formed part of the general estate of the late J. F.:—*Held*: appellants were liable personally, but not as exors. of

6852. Release of debt—Amount due settled by arbitration—At submission of executors.]—ANON. (1573), Dal. 89; 3 Leon. 53; 74 E. R. 536.

6853. — By infant executor—Where sum due not received.]—ANON. (1584), And. 117; 123 E. R. 384.

*Annotation:—*Refd. Thrustout d. Levick v. Coppin (1771), 2 Wm. Bl. 801.

6854. — — — Where sum due received.]—ANON. (1584), And. 117; 123 E. R. 384.

*Annotation:—*Refd. Thrustout d. Levick v. Coppin (1771), 2 Wm. Bl. 801.

6855. — — — To administrator durante minore ætate—On executor attaining full age.]—VEGHELMAN v. KIGHTLEY (1585), And. 138; 123 E. R. 395; *sub nom.* KIGHTLEY & KIGHTLEY'S CASE, 4 Leon. 102; *sub nom.* BRIGHTMAN v. KEIGHLEY, Cro. Eliz. 43.

*Annotation:—*Consd. Pennington v. Healey (1833), 1 Cr. & M. 402.

6856. — Not by executor as such.]—Release given by an exor. but not as exor. shall not extend to bar a demand upon any other account.—(CALVERD v. CALVERD (1680), Cas. temp. Finch, 443; 23 E. R. 241.

6857. Conversion of deceased's property—To executor's own use—Return by sheriff to writ of execution.]—(1) Where the sheriff returns that an exor., etc., has sold & eligned & to his own use converted & disposed of the goods & chattels of testator, etc., to the value of the debt, omitting the word wasted & the issue is taken thereon, & the verdict finds that the exor., etc., did so, this will amount to a *devastavit*.

(2) If an administrator, etc., pay with his own money the debts of the intestate, etc., in such order as the law appoints, to the value of all the goods, he may lawfully dispose of the goods as he pleases, & it will not be a *devastavit*.—MERCHANT v. DRIVER (1669), 1 Saund. 307; 1 Vent. 20; 1 Sid. 412; 2 Keb. 488; 85 E. R. 422.

*Annotation:—*As to (2) Refd. Vanquelin v. Bouard (1863), 15 C. B. N. S. 341.

6858. — — — Deceased's debts properly paid—Out of representative's own money.]—MERCHANT v. DRIVER, No. 6857, *ante*.

6859. — — — Wife using goods of first husband.]—If a woman, possessed of effects which were her husband's who is dead, uses them as her own, & after marries, & her second husband also uses them, it is a *devastavit*.—QUICK v. STAINES (1798), 1 Bos. & P. 293; 2 Esp. 657; 126 E. R. 911.

*Annotations:—*Folld. *Re Moore, Ex p. Moore* (1842), 2 Mont. D. & De G. 616. *Mentd. Gaskell v. Marshall* (1831), 5 C. & P. 31.

6860. — — — Bankruptcy of second husband.]—Residuary personal estate was bequeathed to testator's widow & two other trustees, who with the widow were the exors. of the will, upon trust to be converted with all possible speed into money to be laid out in the purchase of an annuity for the lives of the widow & children; & the trustees were directed to pay the annuity to the wife for the sole benefit of the children.

giving goods to second husband—Without security.]—Testator devised his real property upon trust to his wife, whom he appointed his extrix. & trustee. The widow married G., without settlement. A sum of money, the produce of S.'s estate, was, after

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her second marriage, handed to her husband, G., who applied it to his own use, without giving any security for its repayment:—*Held: G. & wife had committed a *devastavit* & breach of trust respectively.*—SHEPARD v. GOODEY (1866), 5 N. S. W. S. C. II.

(Eq.) 81.—AUS.

6863 l. Interest lost to estate.]—Where exors. had not discharged the *onus* that was upon them in regard to the retention of shares, & had not acted reasonably in not selling or

After testator's death, the widow was permitted by the acting trustee to retain specific articles of furniture, part of the residuary estate; & eight years after testator's death she married again, & took these articles to her husband's house, where testator's children resided with her; & after six years more the second husband became bkpt.:—*Held: the trustees of the will could not claim the furniture from the*

In 1828, the first husband of Mrs. M. [petitioner] appointed her his extrix., & directed the residue of his property to be converted into money with all possible speed & the proceeds to be laid out in an annuity. Now, instead of converting the property into money, according to this direction, with all possible speed, no step is taken to indicate an intention of carrying the direction into effect; but the widow thought fit, considering it perhaps to be for the benefit of the family, though of that I cannot judge, to take to herself this property. By so doing she committed a *devastavit*, & made the goods her own. She has retained them for fourteen years in her own possession, without making any schedule of them, or doing anything to show that they were trust property. Eight years afterwards she married bkpt., & upon that occasion this property was not scheduled or distinguished in any way, but was carried by her to the house of her husband & thenceforth used & enjoyed by him without any claim being set up to them as trust property until this bkpcy. took place. I think therefore that this trust was never considered as having any existence before the bkpcy. occurred, which was fourteen years after the property was given to the widow to be converted into money as soon as possible. I consider it as property which she thus appropriated to herself & made her own. She was responsible to the children for her administration of the estate &, of course, did not get rid of that responsibility by her conversion of the property to her own use. I am of opinion that the property, as regards the world at large, had long since ceased to be the property of testator. The case of *Quick v. Staines*, No. 6859, *ante*, is decisive of the question (SIR JOHN CROSS).—*Re MOORE, Ex p. MOORE* (1842), 2 Mont. D. & De G. 616; 11 L. J. Bcy. 35; 6 Jur. 828.

6861. Set off—Debt due to & by creditor.]—BERRISTE v. BERRISTE (1690), Nels. 158; 21 E. R. 815.

6862. — — —.]—Exor. in trust for infants having paid under a written obligation, executed abroad, though in possession of a counter obligation to repay part with interest at the death of the party, acknowledging that to be so much more than the debt, & neither instrument having been transferred, was charged, as having paid incautiously, though innocently; & therefore he was permitted to try the question at law.—VEZ v. EMERY (1799), 5 Ves. 141; 31 E. R. 513.

—.]—*See, also*, Part VII., Sect. 2, sub-sect. 7, *post*.

6863. Interest lost to estate.]—HILLIARD v. GORGE (1677), 2 Cas. in Ch. 235; 22 E. R. 924.

Sect. 4.—For own acts: Sub-sect. 5, A. (a) & (b).]

6864. —.]—The exors. appointed by testator did not prove the will until nearly seven years after his death. Part of testator's estate consisted of moneys payable under a policy of insurance on the life of testator, which he had equitably mortgaged to his bankers as security for a larger amount. The insurance society would not pay over the moneys without production of the probate, & for nearly seven years the exors. paid the bankers or their transferee out of the estate interest at 5 per cent. on their debt. After production of the probate the insurance co. paid over the policy moneys to the bankers' transferee, together with interest at 1 per cent. *per annum* from the time when such moneys became payable; & the difference between the interest thus received & paid was £157 14s. 8d.

The exors. never had sufficient assets in their hands to pay all testator's debts:—*Held*: the exors. could not be ordered to account on the footing of wilful default or breach of duty by reason of this loss of interest to the estate.

On taking the common accounts of their receipts, exors. can properly be, & often are, charged with a *devastavit* arising on the accounts themselves (*CHITTY*, I.J.).—*Re STEVENS*, *COOKE v. STEVENS*, [1898] 1 Ch. 162; 67 L. J. Ch. 118; 77 L. T. 508; 46 W. R. 177; 14 T. L. R. 111; 42 Sol. Jo. 113, C. A.; *affg.*, [1897] 1 Ch. 422.

Annotation:—*Mentd.* *Kelsey v. Kelsey* (1922), 91 L. J. Ch. 382.

6865. Investment of deceased's estate—Exercise of reasonable discretion—Subsequent failure of security.]—Captain of a ship dies, leaving money on board, the mate becomes captain & improves the money, he shall, on allowance made him for his care in the management of such money account for the profits & not the interest only.

Where an exor. puts out money, though without the indemnity of a decree, upon a real security, which there was no reason then to suspect, but afterwards such security proves bad, he is not accountable for the loss, any more than he would have been entitled to the profits had it continued good.—*BROWN v. LITTON* (1711), 10 Mod. Rep. 20; 1 P. Wms. 140; 2 Eq. Cas. Abr. 5, 722; 24 E. R. 329.

Annotation:—*Reid.* *Crawshay v. Collins* (1826), 2 Russ. 325.

6866. — — — Private security.]—One of two exors. having alone proved the will, had received a debt due to testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereon, & afterwards permitted the money to be lent out to a third person, by whom it was paid to A. A. on being applied to by the exor., acknowledged that he had received the money, & that it belonged to testator's grandchildren, but refused to pay it over to the exor.:—*Held*: both exors. might join in an action brought to recover the money against A.; also it does not amount to a *devastavit*, if an exor. lends out on private security money belonging to testator, but not wanted for the immediate use of the will provided he exercises a

fair & reasonable discretion on the subject.—*WEBSTER v. SPENCER* (1820), 3 B. & Ald. 300; 106 E. R. 694.

Annotations:—*Dirtd.* *Brassington v. Ault* (1824), 2 Bing. 177. *Reid.* *Clark v. Hougham* (1823), 2 B. & C. 149; *Heath v. Chilton* (1844), 12 M. & W. 632.

6867. —.]—If an exor. lay out the assets on private securities, all the benefit made thereby shall accrue to the estate, yet the exors. shall answer all the deficiency & the particular circumstances of good conduct in the exor. cannot prevail against the general rule.—*ADYE v. FEUILLETEAU* (1783), 1 Cox, Eq. Cas. 24; 3 Swan. 84, n.; 29 E. R. 1045.

6868. — Along with executor's own money—Subsequent failure of security—Personal liability for loss.]—(1) The administrator of an intestate's estate paid to seven out of eight of the next of kin £1,250 on account of each share, & made only small payments on account of the remaining share. In distributing the residue of the estate, after a lapse of thirty years, the persons claiming the last-mentioned share insisted that for the purposes of distribution a sum of £1,250 ought to be treated as having been set apart on account of their share, & interest at 4 per cent. to be allowed thereon, & that the small payments ought to be treated as having been made on account of the interest on that £1,250:—*Held*: this would be conferring a benefit in the nature of compound interest on the claimants of the unpaid share, & the only mode of equalisation which the rules of the ct. allowed was to charge each recipient with the amount paid to him, together with simple interest at 4 per cent. from the date of payment.

(2) An administrator having advanced a sum consisting partly of the intestate's & partly of his own moneys on a security which it was apprehended would prove deficient:—*Held*: the deficiency, if any, must be borne by his own share of the moneys advanced in exoneration of the intestate's estate.—*LAMBE v. ORTON* (1863), 2 New Rep. 435; 33 L. J. Ch. 81; 11 W. R. 1043.

6869. Assigning term—To attend inheritance.]—One possessed of a term for 1,000 years, articles to purchase the inheritance, & by will gives £3,000 to his daughter, & makes his son exor., & dies; the son assigns the term in trust to attend the inheritance, of which he takes a conveyance in his own name. Afterwards the son acknowledges a judgment to A., & mortgages the same lands to B., & dies insolvent; A. shall first be paid his judgment, then B. shall be paid his mtge., & then the daughter, being administratrix to her brother, is entitled to her legacy of £3,000 in preference to the simple contract creditors.

A term assigned by an exor. in trust to attend the inheritance, shall in equity follow all the estates created out of it, & all incumbrances subsisting upon it. But the term being by this means become not assets at law, the exor. who assigned the same is liable to the creditors for a *devastavit*.

As the estate is to be sold for the satisfaction of creditors, though the sister who is administratrix

endeavouring to realise, & had not made out a case for their protection under Trustee Act:—*Held*: they were liable.—*Re NICHOLLS*, *HALL v. WILDMAN* (1913), 29 O. L. R. 206; 4 O. W. N. 1511.—CAN.

1. Destruction by fire—Breach of

Where an exor. had kept money the estate for several house, until the same was by fire, & the money lost: exor. was guilty of a breach trust with respect to the money.—

LAWSON v. CROOKSHANK (1869), 2 Ch. Ch. 426.—CAN.

m. — Failure to claim under policy of insurance.]—An exor. failed to claim timeously against an insurance co. under a life policy of deceased & in consequence the co. successfully resisted

of her brother S. claims a debt but by simple contract, on account of the *devastavit*, yet having a right as administrator, to retain against all creditors in equal degree, she shall consequently retain her debt prior to all the simple contract creditors of her brothers (TALBOT, C.).—CHARLTON v. LOW (1734), 3 P. Wms. 328; 2 Eq. Cas. Abr. 259, 463, 470; 24 E. R. 1087, L. C.

6870. Swearing property above value—Incurring greater stamp duty.—It is a question for the jury, whether the exor. has committed a *devastavit*, by swearing the property above its value, & so incurring a greater stamp duty than he would otherwise have to pay, seeing that the exor. is bound to act promptly, & therefore is not to be held to too close a search for testator's property.—JACKSON v. BOWLEY (1841), Car. & M. 97.

6871. On taking accounts.—*Re* STEVENS, COOKE v. STEVENS, No. 6864, *ante*.

6872. Executor taking security for debt—Renewal of security given to testator—Security taken in name of stranger.—EVELING v. LEVESON (1598), Gouldsb. 115; 75 E. R. 1032.

6873. ——NORDEN v. LEVEN, No. 6903, *post*.

6874. — Prior security not delivered up.—ANON. (1687), Freem. Ch. 100; 22 E. R. 1084.

(b) Improper Payments.

6875. Debt upon usurious contract.—An exor. pays a debt upon a usurious contract. That is a *devastavit*.—ANON. (1608), Noy, 129; 74 E. R. 1093.

6876. Payment of legacies—Before providing for debts—Liability arising from breach of covenant.—FELES v. LAMBERT (1648), Sty. 73; Aleyn, 38; 2 Vern. 101, n.; 82 E. R. 540.

Annotations:—*Reid*. Davis v. Rayner (1671), 2 Keb. 758; Simmons v. Bolland (1817), 3 Mer. 547.

6877. — Breach of condition of bond.—HAWKINS v. DAY, No. 6891, *post*.

6878. — Assets ultimately deficient—Sufficient when legacies paid.—If an exor., acting *bond fide*, & under a conviction that the assets are amply sufficient for the payment of testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4 per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate; & the ct. will direct an account to be taken of the value of the property so possessed by the legatees, & interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors.—SPODE v. SMITH (1827), 3 Russ. 511; 38 E. R. 667, L. C.

Annotation:—*Reid*. Johnston v. Newton (1853), 1 Eq. Rep. 571.

payment of the amount insured:—*Held*: as the loss was due to a failure to comply with his duty & not to any difficulty in construing the policy, the exor. was liable.—MASTER OF SUPREME COURT v. REUTER, [1910] T. L. 294.—S. AF.

PART VI. SECT. 4, SUB-SECT. 5.—A. (b).

n. Distribution of assets—With

provision for liability of estate.—Shares of the capital stock of a bank, passed to the administrators of M.'s estate, & were by them transferred to the next of kin. The shares were subject to the "double liability" declared by 3 & 4 Geo. V., c. 9, s. 125 (D). Other assets, exceeding in value the amount of the liability upon the shares, were handed over to the next of kin; & the whole estate was thus distributed;—*Held*: when the

6879. ——The exors. of a shareholder in a joint stock co., which was a going concern at the time of testator's death, paid a legacy under his will without providing for any contingent liability in respect of shares which they retained unsold. The co. was subsequently wound up & the exors. were placed in the list of contributories:—*Held*: they were liable to pay the amount of the legacy in satisfaction of calls.—TAYLOR v. TAYLOR (1870), L. R. 10 Eq. 477; 39 L. J. Ch. 676; 23 L. T. 134; 18 W. R. 1102.

Annotations:—*Folld*. *Re* Bowley's Estates, Jefferys v. Jefferys (1871), 24 L. T. 177. *Reid*. Jervis v. Wolferstan (1874), L. R. 18 Eq. 18.

6880. — Debts unknown to executor—Bond debt.—Where an exor. or administrator has satisfied debts & legacies affecting testator's or intestate's estate & paid over the remainder to the residuary legatee & has had no notice of any other subsisting demand, provided he had not done it too precipitately, that it was a good answer to an action for payment of bond debt (LORD KENYON).—CHELSEA WATERWORKS CO. v. COWPER (1795), 1 Esp. 275, N. P.

Annotations:—*Consd*. Davis v. Blackwell (1832), 9 Bing. 5. *Dbtd*. Norman v. Baldry (1834), 6 Sim. 621.

6881. ——An exor. will be allowed payments made by him to simple contract creditors of his testator, a bond being in existence but not payable; but he will not be allowed payments to legatees, notwithstanding he had no notice of the bond.—NORMAN v. BALDRY (1834), 6 Sim. 621; 52 E. R. 726.

Annotation:—*Reid*. Atkinson v. Grey (1853), 1 Sm. & G. 577.

6882. ——An exor., after payment of all the debts of which he had notice, invested certain parts of the residue of testator's personal estate remaining in his hands, in the funds in his own name, received the dividends, & paid them over to the legatees in satisfaction of their legacies given by the will:—*Held*: under these circumstances, the exor. could not sustain a plea of *plene administravit* to an action brought against him, fifteen years after testator's death, for a specialty debt of testator, of which he had had no notice.—SMITH v. DAY (1837), 2 M. & W. 684; Murp. & H. 185; 6 L. J. Ex. 219.

Annotations:—*Mentd*. Hogan v. Hand (1861), 14 Moo. P. C. C. 310; Lewis v. Baker, [1905] 1 Ch. 46; Llangattock v. Watney, Combe, & Reid (1909), 79 L. J. K. B. 233.

6883. — Admission of assets sufficient to have covered debt.—KNATCHBULL v. FEARNEHEAD, No. 6554, *ante*.

6884. — Claim concealed by creditor being also legatee.—Where a party entitled to a legacy under a will has a claim against testator, which he conceals from the exor. until after he has received the legacy, he cannot afterwards, in an action against the exor., object that the amount of the legacy was not paid in a due course of administration.—STROUD v. STROUD (1844), 7 Man. & G. 417; 8 Scott, N. R. 166; 3 L. T. O. S. 126; 135 E. R. 174.

administrators parted with the assets without providing for this liability, they were guilty of a *devastavit*, & so rendered themselves liable personally.—CLARKSON v. MCLEAN (1918), 42 O. L. R. 1; 13 O. W. N. 373.—CAN.

o. ——Where exors., who were aware of a mtge. affecting testator's real estate, distributed the personal estate among the legatees without providing for the mtge. debt,

Sect. 4.—For own acts: Sub-sect. 5, A. (b) & (c).]

6885. — — — — —.] — (1) Payments to legatees is no answer to the claims of creditors, though no debt had arisen at the time of such payment. Thus, where the testator held shares in a banking co., & nine years after his death the bank was wound up & a call made, it was held, that payments to legatees in the meantime could not be allowed to the exors. as against the official manager in respect of the call.

(2) Payments to legatees, made under a decree in a legatees' suit, cannot be allowed as against creditors, if made without having the accounts taken, & therefore as upon an admission of assets. —NEWCASTLE, ETC. BANKING CO. (OFFICIAL MANAGERS) v. HYMERS (1856), 22 Beav. 367; 52 E. R. 1149.

6886. — — — — —.] — The rule that an exor. who pays a legacy is personally liable to pay the amount of the legacy to any creditor of testator whose claim is unsatisfied, whether he had notice or not of the claim, applies to a case in which the creditor has given testator what purports to be a release of his claim, & the exor. *bonâ fide* believes the release to be valid, & the creditor does not question its validity till some years after the exor. has paid the legacy, fails in the first instance, but succeeds in setting aside the release on appeal. —*Re BEWLEY'S ESTATE, JEFFERYS v. JEFFERYS* (1871), 24 L. T. 177; 19 W. R. 464.

— — — — — *Effect of statutory advertisement.* — See Part IV., Sect. 1, sub-sect. 4, *post*.

6887. — — — — — *Release of debt by creditor—Release afterwards proved invalid.* — *Re BEWLEY'S ESTATE, JEFFERYS v. JEFFERYS*, No. 6886, *ante*.

— — — — —.] — See, generally, Part IV., Sect. 5, sub-sect. 4, *ante*; Administration of Estates Act, 1925 (c. 23), s. 27.

6888. *Payment of capital—To tenant for life.* — *BERKELY v. COPE* (1698), Colles, 39; 1 E. R. 169, H. L.

6889. — — — — — *Before expiry of time limit.* — A. bequeathed to C., a married woman, £1,000 stock, to be transferred to her in her own name, for her separate use, & the principal to remain in trust of A.'s trustees, till C.'s youngest child should attain twenty-one, when the principal was to be her own. A.'s exors. transferred £1,000 stock into the name of C., & she & her husband sold their stock before their youngest child attained twenty-one. C., after her husband's death, filed a bill to have this sum invested by A.'s exors. The exors. were decreed to pay the money into ct.; but C. was held to have made a valid disposition of the dividends which should accrue due before her youngest child attained twenty-one, & consequently not to be entitled to any of such dividends. —*CROSBY v. CHURCH* (1841), 3 Beav. 485; 10 L. J. Ch. 212; 5 Jur. 50; 49 E. R. 191.

Annotations: — *Mentd. Sawyer v. Sawyer* (1885), 28 Ch. D. 595; *Shute v. Hogge* (1888), 58 L. T. 546.

6890. — — — — — *In discharge of annuity.* — Testator

which the real estate afterwards proved insufficient to meet:—*Held:* the exors. were personally liable to the mtgee. for such deficiency to the extent of the assets so distributed. —*SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY v. BEATTY* (1899), 29 L. R. Ir. 290.—IR.

—.] — An exor. who pays

out inheritances without providing for a continuing liability of the estate incurs a personal liability to the creditors. —*UNION BANK (LIQUIDATORS) v. KIVER* (1891), 8 S. C. 146; 1 C. T. R. 64.—S. AF.

q. — — — — —.] — *UNION BANK (LIQUIDATORS) v. WATSON'S EXECUTORS, CAPE OF GOOD HOPE BANK*

bequeathed an annuity of £250 to his widow, & directed that a competent part of the money which he should die possessed of, & which should be invested in his name, should, with the widow's consent, be placed out, in the names of his exors., on other security or in the funds, to the intent that the widow might, during her life, receive the annuity, as it became due, out of the interest, dividends, proceeds, & produce thereof; & after giving certain legacies, testator bequeathed the invested moneys, & all his residuary personalty, to certain other persons. The exors. paid the pecuniary legacies in full, & in course of time exhausted all the remaining assets, about £4,300, in keeping down the annuity:—*Held:* this was no *devastavit*, because the capital fund was applicable, under the terms of the gift, in payment of the annuity. —*MINER v. BALDWIN* (1853), 1 Sm. & G. 522; 17 Jur. 823; 65 E. R. 229.

6891. *Payment of debts—Simple contract debt—Before breach of condition of bond.* — Payment by exor. of simple contract debt, before breach of condition of bond, is good, & no *devastavit* in case of deficiency of assets, but payment of legacies is not. —*HAWKINS v. DAY* (1753), Amb. 160, 803; 1 Dick. 155; 3 Mer. 555, n.; 27 E. R. 107, L. C.

Annotations: — *Consd. Simmons v. Bolland* (1817), 3 Mer. 547. *Apld. Newcastle, etc. Banking Co. v. Hymers* (1856), 22 Beav. 367. *Refd. Fletcher v. Stevenson* (1844), 3 Hare, 360; *King v. Mallcott* (1852), 16 Jur. 236.

6892. — — — — — *Before bond debt—Not being then payable.* — *NORMAN v. BALDRY*, No. 6881, *ante*.

6893. — — — — — *Decreed to be statute-barred.* — An exor. is not at liberty to pay a debt out of his testator's estate after a claim to enforce the debt has been dismissed on the ground that it is statute-barred.

There being a difference of opinion between two exors. as to the propriety of paying a statute-barred debt, the creditor took out a summons for administration, which was dismissed on the ground of the statute. The solr. who acted for the creditor then induced one of the exors., without the knowledge of the other, to draw a cheque in his favour for the amount of the debt on a fund standing to the joint account of the exors., & forming part of their testator's estate, & induced the bank to cash the cheque, & paid the proceeds into his own bank in trust for the creditor:—*Held:* the solr. & the creditor were liable, as well as the exor. who signed the cheque, to restore the money to testator's estate. —*Re MIDGLEY, MIDGLEY v. MIDGLEY*, [1893] 3 Ch. 282; 62 L. J. Ch. 905; 69 L. T. 241; 41 W. R. 659; 9 T. L. R. 565; 37 Sol. Jo. 616; 2 R. 561, C. A.

Annotations: — *Consd. Budgett v. Budgett*, [1895] 1 Ch. 202. *Refd. Trevor v. Hutchins*, [1896] 1 Ch. 844; *Re Macdonald, Dick v. Fraser* (1897), 76 L. T. 713.

— — — — —.] — See, generally, Part IV., Sect. 2, sub-sect. 4, *ante*.

6894. — — — — — *Non-interest bearing debt—In preference to interest bearing debt.* — *Re STEVENS, COOKE v. STEVENS*, No. 6864, *ante*.

— — — — —.] — See, generally, Part IV., Sect. 2, *ante*.

(LIQUIDATORS) v. VAN LIERS' EXECUTORS (1891), 8 S. C. 300.—S. AF.

r. — — — — — *Debts unknown to executor—Judgment debt.* — Exors. against whom there is a judgment for a debt owing by deceased & who have paid out the inheritance to the heirs in ignorance of such claim against the estate are entitled to recover the money

6895. Payment of annuity—Previously paid by testator—No investigation of annuitant's titles.]—An exor. taking a transfer of stock during his testator's life with the knowledge that it was a trust fund, in his capacity of exor., held liable to the *cestuis que trust*.

So, if an exor. continues to pay an annuity which his testator paid during his life, for seven years after the death of testator, he cannot then refuse to continue the payments for want of assets, but will be held personally liable to the annuitant's claim, on account of his laches in not ascertaining what the rights of the annuitant were.—**BENTHAM v. NOBLE** (1833), 2 L. J. Ch. 93.

6896. Payment of remuneration—For work done for testator—No agreement for payment between testator & payee—Medical attendance.]—**SHALLCROSS v. WRIGHT**, No. 6545, *ante*.

6897. Payment to certain residuary legatees—Subsequent insufficiency of assets—Reduction of share of remaining legatees—First payment allowed.]—L., trustee of a will, prior to the institution of a suit for administration of testator's estate made certain payments to persons beneficially interested in the residue. The chief clerk in his certificate disallowed these payments on the ground that at the time they were made there was a debt due from testator. At the time the payments were made testator's estate was sufficient for them & for payment of an equal sum to the other residuary legatees as well as of the debt but it was not now sufficient for these purposes & also for payment of the costs of the suit:—**Held**: he was entitled to be allowed these payments although the time for reviewing the chief clerk's certificate had expired.—**LLOYD v. LLOYD** (1875), 23 W. R. 787.

Distribution of assets—Duty of representative.]—IV., *ante*.

(c) Failures and Omissions.

6898. Interest on debt—Failure to keep down.]—It is a *devastavit* for an administrator to allow interest on a debt to grow into arrear & then suffer a judgment for it.—**SEAMAN v. DEE** (1672), 2 Lev. 40; 3 Keb. 15; 1 Vent. 198; 83 E. R. 443.

Annotations:—**Refd.** **Davies v. Monkhouse** (1729), Fitz-G. 76; **Bank of England v. Morrice** (1736), Lee temp. Hard. 219; **Dickenson v. Harrison** (1817), 4 Price, 282; **Re Stevens, Cooke v. Stevens**, [1898] 1 Ch. 162. **Mentd.** **Herries v. Jamieson** (1794), 5 Term Rep. 553.

6899. ———.]—A. is indebted to B. upon bond, & makes C. his exor., & dies, leaving assets sufficient to keep down the interest due upon the bond. If the exor. does act, & possess himself of the assets, & keep them in his hands, & let the interest go on, this prejudice turns upon himself.—**ANON.** (1709), 2 Eq. Cas. Abr. 456; 22 E. R. 388.

6900. ———.]—An exor. who allows his testator's estate to become insolvent by keeping an account at a bankers at compound interest will not be allowed the accumulated interest in passing his accounts.—**BATE v. ROBINS** (1863), 32 Beav. 73; 55 E. R. 28.

6901. Interest bearing debt—Failure to pay—Fund available for payment.]—Where there is an exor., & a debt is to be paid by him, which does

carry interest as a bond, there [the Lord Chancellor] directed an inquiry whether the exor. had a sufficient personal estate in his hands to discharge it; & if it is found, before a master, that he has, then to turn the interest upon the exor. himself, for he might have paid it, & saved the interest; & it may be, he made interest of the money in his hands in the meantime.—**ANON.** (1708), 2 Eq. Cas. Abr. 455; 22 E. R. 388.

6902. ———.]—**HALL v. HALLET**, No. 6054, *ante*.

6903. Getting in deceased's property—Property left with stranger—Agreement to accept money in lieu.]—A stranger, who has goods of an intestate in his possession, enters into articles of agreement with the administrator to pay a certain sum of money & retain the goods; *qu.*: whether the administrator be chargeable as for a *devastavit*.

An exor. having an action of trover in right of testator compounds it by articles for payment of so much at a future day, this is a conversion & assets in hands before payment.—**NORDEN v. LEVEN** (1677), Freem. K. B. 442; T. Jo. 88; 3 Keb. 778; 2 Lev. 189; 89 E. R. 331.

Annotations:—**Refd.** **Jenkins v. Plombe** (1704), 6 Mod. Rep. 91; **Farr v. Newman** (1792), 4 Term Rep. 621.

6904. Instituting proceedings—Within statutory time—Defence of Statute of Limitations.]—Suppose intestate, after the action brought, had died within the six years, so as the administrator had convenient time to bring the action within six years, & that he does not do, but brings it after the six years, it will not help him. So it seems in that case, not bringing the action within the six years would be a *devastavit*.—**HAYWARD v. KINSEY** (1701), 12 Mod. Rep. 568; 88 E. R. 1526; *sub nom.* **KINSEY v. HAYWARD**, 1 Lut. 256; 1 Ld. Raym. 432.

Annotations:—**Refd.** **Willcox v. Huggins** (1730), 1 Barn. K. B. 335; **Hickman v. Walker** (1737), Willes, 27; **Carver v. James** (1740), 7 Mod. Rep. 348; **Adam v. Bristol Inhabitant** (1834), 2 Ad. & El. 389; **Curlewis v. Mornington** (1858), 27 L. J. Q. B. 439. **Mentd.** **Brown v. Babington** (1703), 2 Ld. Raym. 880; **R. v. Leighton** (1708), Fortes. Rep. 173; **Emery v. Bartlett** (1729), 2 Stra. 827; **Davies v. Lowndes** (1843), 6 Man. & G. 471; **Swindell v. Bulkeley** (1886), 18 Q. B. D. 250.

6905. Keeping down costs—Failure to apply for stay—Of concurrent actions.]—The waste of the estate that must ensue from numerous actions & suits being brought & prosecuted, can only be prevented by the exors. putting in their answer immediately in the suit which it is most expedient should go on, & so facilitating & expediting a decree to the utmost of their power. After a decree made all persons having an interest may apply to stay creditors or legatees from proceeding any further in their different suits or actions, but the exors. are the persons by whom such an application should be made. It is part of their trust to protect the estate. They are bound to do everything & with speed for avoiding useless expense. They will be held responsible for any neglect under this head. This is what the ct. considers to be the duty of exors. for preventing the waste of the estate, where creditors & legatees are taking separate proceedings to enforce the payment of their different claims.—**BAILEY v. HILL** (1817), 2 Coop. temp. Cott. 311; 47 E. R. 1172.

paid to the heirs.—**WATSON'S EXECUTOR v. WATSON'S HEIRS** (1891), 8 S. C. 283; 1 C. T. R. 244.—S. AF.

PART VI. SECT. 4, SUB-SECT. 5.—
A. (c).
a. Conversion of testator's property

—Loss arising from deferred sale—
Under discretionary powers.]—Exors.
with a discretionary power to sell their

Sect. 4.—For own acts: Sub-sect. 5, A. (c) & (d).]

6906. Insurance of property—Either by representatives—Or continuance of testator's insurance.]—Upon a reference to a master to inquire what sums the exors. might have received but for their wilful default, the master has no authority to charge exors. neglecting to insure with the amount of the policy for which the testator to the time of his death was accustomed to insure premises, which in the hands of the exors. are destroyed by fire. *Semble*: exors. are not bound either to insure or to continue the insurances of their testator.—*BAILEY v. GOULD* (1840), 4 Y. & C. Ex. 221; 9 L. J. Ex. Eq. 43.

Annotation:—*Reid. Re McEacharn, Gamblos v. McEacharn* (1911), 103 L. T. 900.

6907. Conversion of testator's property—Failure of security.]—There is no rule in equity any more than at law, that the mere non-suing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as deprived him of the right of requiring payment of the specialty debt. S. covenanted with B. for immediate payment of a sum of money in exoneration of B., & in substitution for a similar sum which B. was liable to pay within six months of his death. S. died without having paid, or been called on to pay, that sum, leaving property amply sufficient to meet it, but her exor., instead of providing out of her estate funds to meet the liability on her covenant, left her estate, consisting entirely of shares in a bank, which afterwards failed, unconverted. The investment in bank shares was authorised by the will of S.:—*Held*: the exors. of B. were entitled, after a lapse of eighteen & a half years, to enforce that covenant against the estate of S. & the exor. of S., having committed a *devastavit* in not converting the shares to provide for payment of the debt, was liable to make good the amount for which his testatrix was so liable under her covenant.—*Re BAKER, COLLINS v. RHODES. Re SEAMAN, RHODES v. WISH* (1881), 20 Ch. D. 230; 51 L. J. Ch. 315; 45 L. T. 658; 30 W. R. 858, C. A.

Annotations:—*Auld. Re Gale, Blake v. Gale* (1883), 22 Ch. D. 820. *Fold. Re Birch, Roe v. Birch* (1884), 27 Ch. D. 622. *Consd. Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609.

6908. Failure to take out probate.]—*Re STEVENS, COOKE v. STEVENS*, No. 6864, *ante*.

6909. —.]—*Re MORRIS, GRIFFITHS, MORRIS v. MORRIS* (1908), 124 L. T. Jo. 315.

(d) *Loss arising through Employment of Agents.*

See Trustee Act, 1893 (c. 53), s. 17, repealed by Trustee Act, 1925 (c. 19), s. 23.

6910. General rule.]—*CLOUGH v. BOND*, No. 6956, *post*.

6911. —.]—I accept it as settled law that although a trustee cannot delegate to others the confidence reposed in himself nevertheless he may in the administration of the trust fund avail himself of the agency of third parties such as bankers, brokers & others if he does so from a moral necessity or in the regular course of business. If a loss

to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result (*LORD FITZGERALD*).—*SPEIGHT v. GAUNT* (1883), 9 App. Cas. 1; 53 L. J. Ch. 419; 50 L. T. 330; 48 J. P. 84; 32 W. R. 435, H. L.; *reversg. S. O. sub nom. Re SPEIGHT, SPEIGHT v. GAUNT*, 22 Ch. D. 727, C. A.

Annotations:—*Consd. Bullock v. Bullock* (1886), 56 L. J. Ch. 221; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546. *Apld. Jobson v. Palmer*, [1893] 1 Ch. 71; *Shepherd v. Harris*, [1905] 2 Ch. 310. *Reid. Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387; *Re Godfrey, Godfrey v. Faulkner* (1883), 23 Ch. D. 483; *Fry v. Tapson* (1884), 28 Ch. D. 208; *Re Dewar, Dewar v. Brooke* (1885), 54 L. J. Ch. 830; *Smith v. Stonoham* (1886), 3 T. L. R. 77; *Learoyd v. Whiteley* (1887), 36 Ch. D. 25; *Re Partington, Partington v. Partington* (1887), 57 L. T. 654; *Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674; *Re Hurst, Addison v. Topp* (1890), 63 L. T. 665; *Colchester Union Grdns. v. Moy* (1893), 68 L. T. 564; *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470; *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Evans Williams v. Byron* (1901), 18 T. L. R. 172; *National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A. C. 373; *Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509; *Re Mackay, Griessemann v. Carr*, [1911] 1 Ch. 300; *Re Shoppard, De Brimont v. Harvey*, [1911] 1 Ch. 50. *Mentd. Re De Pothonier, Dent v. De Pothonier*, [1900] 2 Ch. 529; *Eaton v. Buchanan*, [1911] A. C. 253; *Re Solomon, Nore v. Meyer*, [1912] 1 Ch. 261; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

6912. Loss through robbery—While goods in hands of agent.]—A decree having been made for a general account & payment of the balance against a party who died, & his personal representative having delivered certain goods, part of the effects, to her own solr., to be delivered over, not answerable in the event of his being robbed of them. She would not have been answerable if they had remained in her own possession till the accident.—*JONES v. LEWIS* (1751), 2 Ves. Sen. 240; 28 E. R. 155.

Annotations:—*Consd. Job v. Job* (1877), 6 Ch. D. 562. *Reid. Brown v. Sewell* (1853), 11 Hare, 49; *Bostock v. Floyer* (1865), 35 L. J. Ch. 23.

6913. Misappropriation—By agent—Agent previously employed by deceased.]—One of three exors. having employed in proving the will the solr. who was employed by testatrix in making it, also employed the same solr. to negotiate for the compromise of a debt due from the estate. The exor. & the creditor were both living in London. In June, 1872, the solr. wrote to the exor. informing him that a compromise had been effected of this particular debt for £260, & of another debt for £50, & asking for a cheque. The exor. on July 4, sent a cheque for £310 to the solr. who paid it into his own account. The compromise, in fact, had not been effected, & the money was misappropriated: but the exor. having taken no step in the meantime, did not find out the loss until Dec. 1872:—*Held*: the £310 ought to be allowed to the exor.—*Re BIRD, ORIENTAL COMMERCIAL BANK v. SAVIN* (1873), L. R. 10 Eq. 203; 28 L. T. 658; 21 W. R. 725.

Annotation:—*Reid. Re Mackay, Griessemann v. Carr*, [1911] 1 Ch. 300.

6914. — Agent properly employed—No negligence.]—A trustee, although remunerated for his services, is not liable for loss occasioned to

testator's real estate:—*Held*: not liable, in the circumstances, for loss arising from deferring a sale.—*McMILLAN v. McMILLAN* (1874), 21 Gr. 369.—*CAN.*

PART VI. SECT. 4, SUB-SECT. 5.—
A. (d).

6910i. General rule.]—A testamentary extrix. who employs an agent in the administration of her trust, is bound to supervise his management & to take

all due precautions, & she cannot escape liability for the misappropriation of funds by such agent.—*Low v. GEMLEY* (1890), 18 S. C. R. 685.—*CAN.*

6910ii. —.]—*KILBEE v. SNEYD* (1828), 2 Mol. 186.—*IR.*

the trust estate by the felonious acts of his servants, provided such servant is properly entrusted with the custody of the trust property, & is selected & employed without negligence.—*JOBSON v. PALMER*, [1893] 1 Ch. 71; 62 L. J. Ch. 180; 67 L. T. 797; 41 W. R. 264; 9 T. L. R. 106; 3 R. 173.

Annotation:—*Reid. Shepherd v. Harris*, [1905] 2 Ch. 310.

6915. — Judicial Trustees Act, 1896 (c. 35).—Testator inserted a clause in his will authorising his exors. to employ agents, & indemnifying them against such agents' acts & omissions. The surviving exor. sent a cheque to the solr. to the estate, on the representation that the amount was wanted for the payment of estate duty, but made out the cheque in favour of the solr. himself. The solr. misappropriated the money:—*Held*: the exor. was entitled to be relieved from liability by sect. 3 of above Act, for he had acted honestly, with the belief that he could trust the solr., & in view of the clause specially authorising him to employ agents, his conduct could not be called unreasonable.—*Re MACKAY, GRIESSEMANN v. CARR*, [1911] 1 Ch. 300; 80 L. J. Ch. 237; 103 L. T. 755.

Annotation:—*Reid. Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

6916. — By co-executor—Acting as broker.—The rule laid down in *Speight v. Gaunt*, No. 6911, ante, that in investing trust funds a trustee may employ a broker, & pay the purchase-money to the broker, if he follows the usual & regular course of business adopted by ordinary prudent men, applies to a case where a co-trustee is employed & paid as broker under a clause in the will creating the trust.

It is not the usual course of business for purchasers of Colonial or other inscribed stocks to attend personally at the bank & accept the transfer, though that course is recommended by a note on the common form of stock receipt issued to purchasers by the bank. A trustee will not, therefore, be held liable for the fraud of his co-trustee, acting as broker, because he did not so attend & accept such a transfer, though he would have discovered the fraud if he had done so.

The mere fact that a trustee improperly accepted a share of commission from his co-trustee acting as broker, which he repaid to the trust fund before trial does not make him a partner with his co-trustee, or liable to make good the loss occasioned by the fraud of the co-trustee committed in the transaction for which the commission was paid.—*SHEPHERD v. HARRIS*, [1905] 2 Ch. 310; 74 L. J. Ch. 574; 93 L. T. 45; 53 W. R. 570; 21 T. L. R. 597.

.]—*See, further*, Sub-sect. 5, B. (b) ii., & Sect. 6, post.

6917. Insolvency of agent properly employed—Agent previously employed by deceased.—Exors. depositing moneys belonging to the estate, with the same persons as testator entrusted with his moneys in his lifetime, although they are not bankers, are not liable for a loss sustained by their bkpcy.—*DORCHESTER (LORD) v. EFFINGHAM (EARL)* (1829), Taml. 279; 48 E. R. 111.

6918. — Auctioneer.—An auctioneer, in good credit & extensive business, was employed by exors. to sell testator's leasehold estates. Owing to objections raised by purchasers' solrs. the purchases were not completed until six months afterwards. On the day on which the purchases

were completed, the auctioneer failed to attend or to account for the deposit moneys in his hands, but shortly afterwards admitted to the exors. his inability to pay the amount due from him in respect of such deposits, & promised to pay the same shortly, out of moneys coming to him in respect of a sale of large property, which he was about to effect. The exors. by the advice of their solrs. did not issue legal process against the auctioneer until two months after the time appointed for the completion of the purchases, when it was found that deft., being in insolvent circumstances, had absconded:—*Held*: the exors. were not liable to make good the loss sustained by the auctioneer's insolvency.—*EDMONDS v. PEAKE* (1843), 7 Beav. 239; 13 L. J. Ch. 13; 49 E. R. 1056.

Annotation:—*Reid. Williams v. Higgins* (1868), 17 L. T. 525.

6919. — Only in respect of sums properly remitted—Premature remittance of legacy duty.—Testator died in Aug. 1861, & his exors. remitted to their solr. £80 to obtain probate & £25 to pay legacy duty. The solr. became bkpt. in Nov. 1861, & the money was lost. The ct. allowed the exors. the £80, but not the £25, the latter advance being premature, the legacies not having yet, 1863, been paid.—*CASTLE v. WARLAND* (1863), 32 Beav. 660; 2 New Rep. 433; 55 E. R. 259.

Annotation:—*Reid. Re Mackay, Griessemann v. Carr*, [1911] 1 Ch. 300.

6920. — Bank.—*BELCHIER v. PARSONS*, No. 7066, post.

6921. — Not in respect of excessive balance—Lodged with bank.—Exors. of testator, who died in 1862, had, in Mar. 1865, a balance of nearly £3,000 at their bankers, who had been the bankers of testator for twenty years. The estate realised more than £30,000, & considerable sums were from time to time required to be paid into & out of the account, & the balance was larger than it would otherwise have been in expectation of a mtge. having to be paid off. A loss having resulted from the failure of the bank:—*Held*: the exors. were not justified in keeping a balance of more than £1,000, & the loss upon the excess above that sum must be borne by them.—*ASTBURY v. BEASLEY* (1869), 17 W. R. 638.

6922. ——A common order having been made for the administration of testator's estate, the district registrar by his certificate found the outstanding personal estate to consist in part of book debts amounting nominally to £291, as to £113 part of which he certified that it represented a portion of book debts which the exors. had employed H. to collect, & for which H. had not accounted, & had claimed to deduct £55 for remuneration, but that £25 was enough. The certificate went on to say that H. had gone into liquidation, & that no part of the £113 was likely to be recovered. No application was made to vary this certificate. It appeared that H. had collected in all £168, had paid to the exors. in Apr., May & June, 1880, sums amounting in all to £55, & had gone on collecting without making any further payment to the exors. till July, 1881, when a receiver was appointed in the action, but it did not appear when he became insolvent nor at what times the moneys received came to his hands. The action having come on for further consideration:—*Held*: where an exor. or trustee employed an agent to collect money in circumstances which made such employment proper, & the money collected was lost by the agent's

Sect. 4.—For own acts: Sub-sect. 5, A. (d) & B. (a), (b) i. & ii.]

insolvency, the burden of proof was not on the exor. to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was.—*Re BRIER, BRIER v. EVISON* (1884), 26 Ch. D. 238; 51 L. T. 133; 33 W. R. 20, C. A.

Liability on footing of wilful default.]—See Sub-sect. 5, B. (a), *post*.

See, also, TRUSTS & TRUSTEES.

B. Liability.

(a) Principles of Liability—Wilful Default.

See Judicature Act, 1873 (c. 66), s. 25 (11); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 44; Trustee Acts, 1893 (c. 53), s. 24; 1925 (c. 19), s. 30.

6923. Executor equivalent to trustee—Liable for breaches of trust.]—*Re MARSDEN, BOWDEN v. LAYLAND, GIBBS v. LAYLAND*, No. 6991, *post*.

6924. Executor a gratuitous bailee.]—(1) Where the assets of a testator have come into the possession of the exor. & are afterwards lost to the estate, the rule at law as well as in equity now is, that the exor. stands in the position of a gratuitous bailee, & therefore cannot be charged without some wilful default: *Jud. Act, 1873 (c. 66), s. 25 (11).*

(2) *Semble*: in an administration action under the new practice, an order charging an exor. with wilful default may, in a proper case, be made at any time during the progress of the action.—*JOB v. JOB* (1877), 6 Ch. D. 562; 26 W. R. 206.

Annotations:—As to (2) Consd. Laming v. Gee (1878), 48 L. J. Ch. 196. *Expld. Mayer v. Murray* (1878), 8 Ch. D. 424. *Consd. Barber v. Mackrell* (1879), 12 Ch. D. 534; *Re Symons, Luke v. Tonkin* (1882), 21 Ch. D. 757. *Refd. Re Aird, Morton v. Quick* (1878), 26 W. R. 441; *Re Wrightson, Wrightson v. Cooke*, [1908] 1 Ch. 789.

6925. Wilful default—Necessity for—Rule in equity.]—*JONES v. LEWIS*, No. 6912, *ante*.

6926. ——— Rule at common law.]—An exor. administering, having once received money, assets of his testator, cannot discharge himself under the plea of *plene administravit* to an action by a bond creditor of his testator, by showing that he paid the money over to his co-exor., even for the purpose of satisfying the bond creditor who had applied for payment to such co-exor., if the co-exor. afterwards misapplied the money by retaining it to satisfy his own simple contract debt.

No case at law has yet decided that an executor once become fully responsible by actual receipt of a part of his testator's property for the due administration thereof can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets either on the score of

inevitable accident as destruction by fire, loss by robbery or the like or reasonable confidence disappointed or loss by any of the various means which afford excuse to ordinary agents & bailees in case of loss without negligence on their part (*LORD ELLENBOROUGH, C.J.*).—*CROSSE v. SMITH* (1806), 7 East, 246; 3 Smith, K. B. 203; 103 E. R. 94.

Annotations:—Refd. Stearn v. Mills (1833), 4 B. & Ad. 657; *Job v. Job* (1877), 6 Ch. D. 562.

6927. ——— Since Judicature Act, 1873 (c. 66), s. 25 (11).]—*JOB v. JOB*, No. 6924, *ante*.

6928. ———.]—*SPEIGHT v. GAUNT*, No. 6911, *ante*.

6929. ———.]—*Re STEVENS, COOKE v. STEVENS*, No. 6864, *ante*.

6930. ——— Loss through employment of agent—No default in employment.]—*JOBSON v. PALMER*, No. 6914, *ante*.

6931. ——— Onus of proof—On person charging default.]—The transfer by an exor. of the trade of his testator & of the premises in which it was carried on, which were of small value, to a third party, who afterwards continued the trade for his own benefit:—*Held*: under the circumstances, not to be necessarily a breach of trust.

Where upwards of twenty years had elapsed after an exor. had settled the accounts of his testator's estate with the residuary legatee, & had given up all interference in the trust:—*Held*: the onus was on the residuary legatee to prove that the conduct of the exor., which might have been a breach of trust, was so in fact; & the onus was not shifted by an omission that the account was settled on a misunderstanding of the rights of the parties, by which the residuary legatee was prejudiced.—*PORTLOCK v. GARDNER* (1842), 1 Hare, 594; 11 L. J. Ch. 313; 6 Jur. 795; 66 E. R. 1168.

6932. ———.]—*Re BRIER, BRIER v. EVISON*, No. 6922, *ante*.

6933. No liability until devastavit proved.]—*BARTLETT v. HARTON*, No. 7424, *post*.

(b) Who Liable.

i. In General.

6934. Devastavit by co-representative—Other representative not liable.]—*HARGTHORPE v. MILFORTH*, No. 7008, *post*.

6935. ———.]—If one exor. do waste, the other shall not be charged.—*DOWNES v. WISEMAN* (1631), Toth. 88; 21 E. R. 132.

6936. ——— Rule at law—& in equity.]—(1) If two exors. be, & one of them waste all, or any part of the estate, the *devastavit* shall by law charge him only, & not his co-exor.; & in that case *equitas sequitur legem*.

PART VI. SECT. 4, SUB-SECT. 5.—B. (a).

i. Wilful default — Interest on moneys lost—Whether allowed against exors.]—Although the ct. will order exors. to make good moneys lost by neglect or default, it will not also charge them interest on those sums.—*VANSTON v. THOMPSON* (1864), 10 Gr. 512.—CAN.

a. ——— What amounts to.]—Wilful default in an exor. does not imply deliberate or intentional default. He may be charged with a loss arising

from mere negligence or imprudence, if unexcused.—*CONOLLY v. CONOLLY* (1866), 17 I. Ch. R. 208.—IR.

b. ———.]—Testatrix left £150 to G. The exors. despatched a banker's draft to G. to an address given to them by G.'s sister, without further inquiry. The money having got into the hands of the wrong person:—*Held*: the exors. were guilty of negligence amounting to wilful default & must make good the loss out of their own pockets.—*LITTLE v. COUNTY DOWN (GOVERNORS)*, [1918] 1 I. R. —IR.

c. ——— Not paying legacy.]—Testator by his will directs \$300 to be paid to his niece, & leaves an estate sufficient to meet same. The exor. is guilty of wilful default in not paying the legacy.—*PURCHASE v. PITMAN* (1901), 8 Nfld. L. R. 469.—NFLD.

PART VI. SECT. 4, SUB-SECT. 5.—B. (b) i.

d. Representative durante minority.]—An infant, whether exor. or exor. *de son tort*, is not liable for a *devastavit*.—*YOUNG v. PURVIS* (1886), 11 O. R. 597.—CAN.

(2) If upon the proofs or circumstances the ct. be satisfied that there be *dolus malus*, or any evil practice, fraud or ill intent in him that permitted his companion to receive the whole profits, he may be charged though he received nothing.—TOWNLEY v. SHERBORNE (1633), J. Bridg. 35; Toth. 88; 123 E. R. 1181.

Annotations:—*Mentd.* Scurfield v. Howes (1790), 3 Bro. C. C. 90; Thompson v. Finch (1856), 22 Beav. 316.

6937. ———.]—VANBROUGH v. COCK (1671), 1 Cas. in Ch. 200; 22 E. R. 761.

6938. ———.]—CHAMPNEYS v. BROWNE, No. 7012, *post*.

6939. ——— Unless collusion alleged.]—JAMES v. FREARSON, No. 7015, *post*.

6940. Representative durante minoritate—Liability when minor attains full age—To detain—Not account.]—The remedy of an infant, on coming of age & proving the will, against the administrator *durante minore etate* for goods, is not an action of account, but of detain, or he can sue in the ordinary's ct.—ANON. (1544), Benl. 25; 73 E. R. 949.

6941. ———.]—CHANDLER v. THOMPSON (1620), Hob. 265; 80 E. R. 411.

Annotations:—*Reid.* Lawson v. Crofts (1661), 1 Keb. 157; Elstob v. Thorowgood (1697), 1 Ld. Raym. 283. *Mentd.* R. v. Middlesex (1804), 4 East, 604.

Liability for acts of co-representative.]—See Sect. 4, *post*.

ii. Representative of Representative.

See 30 Car. 2, c. 7; 4 Will. & Mar., c. 24, s. 12; Administration of Estates Act, 1925 (c. 23), s. 29.

6942. Whether representative liable—In equity.]—Though an exor. of an exor. should not be charged at law for a *devastavit* by the first exor., yet in equity here he should be charged (FINCH, J.).—ANON. (1675), Freem. Ch. 313; 22 E. R. 1234.

6943. ———.]—TUCKE'S (SIR BRIAN) CASE, No. 6731, *ante*.

6944. ——— Not for action of debt.]—Debt lies not against the exor. of an exor. upon a *devastavit* by the first exor.—BROWNE v. COLLINS (1675), Freem. K. B. 392; 3 Keb. 530; 2 Lev. 110; 1 Vent. 292; 89 E. R. 291.

6945. ———.]—HOLCOMB v. PETIT, No. 6732, *ante*.

6946. ———.]—A. being entitled to a legacy of £5,000, the exor. & residuary legatee misrepresented the amount to be £4,000, & for this sum the residuary legatee gave his bond to A. The exor., having paid all the debts & other legacies, handed over all that remained to the residuary legatee, & which was more than sufficient to satisfy A.'s demand:—*Held*: a bill might be sustained by A. against the residuary legatee & the representatives of the exor. for recovering the extra £1,000 & interest, without making the representatives of testator a party.—BEASLEY v. KENYON (1841), 3 Beav. 514; 49 E. R. 214.

6947. ———.]—In a suit for administration, instituted by the administrator, who was also the first tenant for life of the estate under the will, orders were made for the sale of Bank stock & East India stock, & for the realisation of other funds & securities, & the investment of the proceeds in Consols, but such orders were not prosecuted:—*Held*: the estate of the administrator was liable for the loss or damage occasioned to the estate of original testator, by the neglect or

omission to carry into effect the directions of the orders.—SOWERBY v. CLAYTON (1844), 3 Hare, 430; 8 Jur. 597; 67 E. R. 449.

6948. ——— Where no knowledge of *devastavit*—But allegation of constructive notice possible.]—BARTLETT v. HARTON, No. 7424, *post*.

6949. ——— Receipt of assets of first testator admitted—No receipts of assets of second testator.]—A bill against R., who was the exor. of M., the extrix. of T., to establish a claim against T.'s estate, alleged a specific misappropriation by M. of T.'s assets, & asked for the accounts of T.'s estate. There was no allegation in the bill imputing to R. knowledge of M.'s dealings with the estate. R., having by his answer admitted assets of T. received by M. but not assets of M. received by himself, submitted that he was not bound to set forth the accounts of T.'s estate. Answer held sufficient.—LANDER v. WESTON (1849), 13 Jur. 877; *subsequent proceedings* (1850), 14 Jur. 949.

6950. ——— Devastavit by deceased co-executor—Receipt of profits of land under trust for sale.]—A case of wilful default & negligence was alleged on the pleadings against exors. for not having sold testator's estate, & at the first hearing accounts & inquiries were directed:—*Held*: (1) as at the original hearing it was not ascertained who the parties entitled under the will were, defts. were still chargeable with their breach of duty; (2) as testator's widow, a co-extrix. with another deft., had received the rents & profits during the whole period, her estate was liable to make good the surplus over what she would have been entitled to in case there had been a sale & investment according to the will.—PATTENDEN v. HOBSON, PATTENDON v. CHURCH (1853), 1 Eq. Rep. 28; 22 L. J. Ch. 697; 21 L. T. O. S. 84; 17 Jur. 406; 1 W. R. 282.

Annotation:—*Generally*, *Mentd.* *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276.

6951. ——— Assets of first testator in hands of co-executor.]—Plea to count that H. appointed J. & R. his exors., that R. was at the time of the death of J. still living, that J. had at the time of his death, & that after his death, R. had in his hands personal estate & effects of H. sufficient to satisfy the judgment & that deft. had never had any personal estate & effects of H. in his hands as exor. to be administered:—*Held*: plea bad; deft. being responsible as exor. for the *devastavit* by J. which the plea admitted.—COWARD v. GREGORY (1866), L. R. 2 C. P. 153; 36 L. J. C. P. 1; 15 L. T. 279; 12 Jur. N. S. 1000; 15 W. R. 170.

Annotations:—*Mentd.* Mills v. East London Union (1872), L. R. 8 C. P. 79; Jacob v. Down, [1900] 2 Ch. 156; Hewitt v. Rowlands (1924), 131 L. T. 757.

6952. ——— Devastavit committed by mistake.]—Law of Property Amendment Act, 1860 (c. 38), s. 13, is no bar to a suit by the administrator *de bonis non* of intestate against the personal representative of the original administrator to recover assets which by mistake had been misappropriated by the original administrator more than twenty years before, where the persons entitled were *sui juris* at the time.

The sect. applies to assets distributed by the administrator, not to assets retained by him (ROMILLY, M.R.).—REED v. FENN (1866), 35 L. J. Ch. 464; 14 W. R. 704.

Annotation:—*Reid.* *Re Johnson, Sly v. Blake* (1885), 29 Ch. D. 964.

Sect. 4.—For own acts: Sub-sect. 5, B. (b) iii.

iii. Where Representative a Married Woman.

See Married Women's Property Act, 1882 (c. 75).

6953. Liability of husband—Pre-nuptial devastavit by wife—Liability de bonis propriis.]—If a man marry an administratrix to a former husband, who has wasted the assets during her widowhood, he shall be liable to the debts of intestate; for it shall be considered a *devastavit* in him.—*KINGS v. HILTON* (1640), Cro. Car. 603; 79 E. R. 1118.

6954. ———.]—Where a man marries a woman, without stipulating for any particular fortune, or making any settlement; if after the death of the wife, debts of hers appear, the husband not being a purchaser, in such case shall be answerable for the debts of the wife in equity, as far as he had any money, or other personal estate of hers.—*POWELL v. BELL* (1706), Prec. Ch. 255; 1 Eq. Cas. Abr. 60; 24 E. R. 124, L. C.

*Annotation:—*Reid. *Heard v. Stamford* (1735), 3 P. Wms. 409.

6955. ——— In respect of any interest in wife's property.]—*POWELL v. BELL*, No. 6954, *ante*.

6956. ——— Post nuptial devastavit—By co-executor of wife—Intermeddling with estate by husband.]—A. & B., the wife of C., took out administration to an intestate. A. & C., with the knowledge of B., & for the purpose of distribution amongst the next of kin, sold out stock belonging to the intestate, & paid the proceeds into a bank, to the joint account of A. & C.; & they agreed that all cheques on the bank should be signed by them jointly. Soon afterwards all the next of kin, except one who was abroad, but was expected to return shortly, were paid their shares, & a sum was reserved in the bank to answer the share of the absent party. C. died, & 10 months afterwards A. drew out the reserved sum & absconded:—*Held*: C.'s estate was answerable for the loss; but the question as to B.'s liability was reserved.

It will be found to be the result of the best authorities, that a personal representative, exercising due diligence with regard to the estate of testator or intestate, will not be made liable for the insolvency of the person in whose hands a trust fund is deposited. Yet, if that line of duty is not strictly pursued, & money is invested upon insolvent estates, or deposited in the hands of persons not to be trusted, such personal representative would be held liable (*per* CUR.).—*CLOUGH v. BOND* (1838), 3 My. & Cr. 490; 8 L. J. Ch. 51; 2 Jur. 958; 40 E. R. 1016, L. C.; *subsequent proceedings, sub nom.* *CLOUGH v. DIXON, COLLINS v. BOND, COLLINS v. COLLINS* (1841), 10 Sim. 564.

*Annotations:—*Expld. & Distd. *Kingham v. Lee* (1846), 15 Sim. 396. *Consd.* *Vaughan v. Vanderstegen* (1854), 2 Drew. 363; *Smith v. Smith* (1856), 21 Beav. 385. *Foll.* *Soady v. Turnbull* (1865), 34 L. J. Ch. 539 (*see* (1866), 1 Ch. App. 494). *Reid.* *Munch v. Cockerell* (1840), 5 My. & Cr. 178; *M'Gachen v. Dew, Dew v. M'Gachen* (1851), 15 Beav. 84; *Johnson v. Newton* (1853), 11 Hare, 160; *Lander v. Weston* (1855), 3 Drew. 389; *Browne v. Butter* (1857), 24 Beav. 159; *Re Speight, Speight v.*

Gaunt (1883), 22 Ch. D. 727; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546. *Broadhurst v. Bagnay* (1841), 1 Y. & O. Ch. Cas. 16; *Fletcher v. Fletcher* (1844), 8 Jur. 1040; *Horn v. Coleman* (1856), 28 L. T. O. S. 96; *Welstead v. Colville* (1860), 28 Beav. 537; *Newton v. Hallett* (1868), 19 L. T. 471; *Grimwade v. Mutual Soc.* (1884), 52 L. T. 409; *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470.

6957. ——— By husband or wife—Wife also executor of husband.]—The husband of an extrix, or administratrix is liable for all the assets received or *devastavits* committed by himself or by his wife during the coverture, & his estate remains liable after his death. The husband of an extrix, who was liable for a breach of trust, made his wife & two others his extrix. & exors. They possessed themselves of all his assets:—*Held*: the husband's liability was not satisfied by the circumstance of his widow uniting in herself the two characters; & in a suit to charge the husband's assets, an inquiry as to the amount of such assets received by her was refused, & it was held that her legal personal representative was not a necessary party.—*SMITH v. SMITH* (1850), 21 Beav. 385; 2 Jur. N. S. 907; 4 W. R. 316; 52 E. R. 908.

*Annotation:—*Apld. *Re Smith's Estate, Clifford v. Washington* (1879), 48 L. J. Ch. 205.

6958. ———.]—The defaults of a *feme* trustee during coverture are chargeable to her husband.

Testator appointed his wife & two others exors. & trustees; directed his business & a leasehold house to be sold, & gave the residue, which was principally leasehold property, to his wife, directing that if she married again it should be settled to her separate use for life, then he bequeathed the house "if not sold, & the money settled as above stated & all money, etc., so settled upon her for her lifetime" to certain other persons; but if his wife should not marry again he left the property to her own disposal at her death.

The widow married again two years after testator's death; the leaseholds were not converted, & she received the entire income till her death, twenty-nine years afterwards, by which time the greater portion of the terms of years had run out. Her second husband, who survived his wife & her co-trustees, never acted in the trust:—*Held*: the leaseholds ought to have been converted upon the widow's second marriage, & the second husband was liable as a trustee having legal control over the trust property, for a breach of trust in permitting the tenant for life to receive the entire income of the unconverted property. *Semble*: the excess of income thus received by the tenant for life must be held as received by her husband through her hands.

The husband was ordered to recoup to the trust estate the difference between the income of the leaseholds received by himself or his wife during the coverture, & the dividends which would have been produced by a sale thereof at the time of her marriage & investment of the proceeds in consols.—*Re SMITH'S ESTATE, CLIFFORD v. WASHINGTON* (1879), 48 L. J. Ch. 205; 40 L. T. 389.

PART VI. SECT. 4, SUB-SECT. 5.—
B. (b) iii.

e. Liability of husband.]—A., a married woman, having misappropriated a deposit receipt belonging to her father, cashed the same with a trader to whom her husband was indebted. In an action by the exors. of A.'s father against A., as administra-

trix of her husband, & also in her personal capacity, evidence was given that A.'s father had ceased to treat the appropriation of the deposit receipt by A. as a theft:—*Held*: it must be inferred that A.'s father had ratified the appropriation by A. of the deposit receipt, & the conversion by her of the same into cash, & that A.'s husband having adopted the acts of his wife as

his agent, would have been liable to an action for money had & received to the use of the father, & judgment should be against A., as administratrix of her husband, as well as in her personal capacity.—*LYONS v. O'BRIEN*, [1911] 2 I. R. 539.—IR.

f. ———.]—When a husband consents to his wife undertaking an office

6959. — Devastavit by wife—Death of wife before judgment on devastavit.]—BARON v. BERKLEY (1698), 1 Lut. 670; 125 E. R. 351.

6960. Liability of wife—Devastavit by husband.]—The husband of a *feme extrix*. commits a *devastavit*, & becomes bkpt., the wife is not liable.—BEYNON v. GOLLINS (1788), 2 Bro. C. C. 323; 2 Dick. 697; 29 E. R. 177, L. C.

Annotation:—Consd. Soady v. Turnbull (1866), 1 Ch. App. 494.

6961. — — — Committed during joint lives.]—A married woman *extrix*. proved the will & survived her husband:—*Held*: she was liable for a *devastavit* committed by her husband during their joint lives.—SOADY v. TURNBULL (1866), 1 Ch. App. 494; 35 L. J. Ch. 784; 14 L. T. 813; 30 J. P. 612; 12 Jur. N. S. 612; 14 W. R. 955, L. JJ.

6962. — — — Devastavit by co-executor.]—CLOUGH v. BOND, No. 6956, *ante*.

(c) *Devastavit at Instigation of Beneficiary.*

See Trustee Acts, 1893 (c. 53), s. 45 (1); 1925 (c. 19), s. 62.

6963. Representatives freed from liability.]—(1) It is established by all the cases that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such *cestui que trust* can never complain of such a breach of trust. I go further & agree that either concurrence in the act or acquiescence without original concurrence will release the trustees (LORD ELDON, C.).

(2) It may be laid down now that though one exor. has joined in a receipt, yet whether he is liable shall depend on his acting (LORD ELDON, C.).—WALKER v. SYMONDS (1818), 3 Swan. 1; 36 E. R. 751, L. C.

Annotations:—*Reid*. Burrows v. Walls (1855), 5 De G. M. & G. 233; Farrant v. Blanchford (1863), 1 De G. J. & Sm. 107; Chillingworth v. Chambers, [1896] 1 Ch. 685; Fletcher v. Collis, [1905] 2 Ch. 24. *Mentd.* Hood v. Pimm (1831), 4 Sim. 101; Tarleton v. Hornby (1835), 1 Y. & C. Ex. 333; Munch v. Cockerell (1836), 8 Sim. 219; Perry v. Knott (1841), 4 Beav. 179; Shipton v. Rawlins (1845), 4 Hare, 619; *Re* Pratt, *Ex p.* James (1853), 3 De G. M. & G. 493; Thompson v. Finch (1856), 22 Beav. 316; Lloyd v. Attwood (1859), 3 De G. & J. 614; *Re* Brogden, Billing v. Brogden (1888), 38 Ch. D. 546; London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72.

6964. — — —.]—Suppose a *cestui que trust* in remainder induced his trustees to commit a breach of trust for the benefit of the tenant for life can such a remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in if some other *cestui que trust* compels them to make the loss good. I apprehend not (LINDLEY, L.J.).—CHILLINGWORTH v. CHAMBERS, [1896] 1 Ch. 685; 65 L. J. Ch. 343; 74 L. T. 34; 44 W. R. 388; 12 T. L. R. 217; 40 Sol. Jo. 294, C. A.

Annotations:—*Reid*. Fletcher v. Collis, [1905] 2 Ch. 24.

he becomes liable for the obligations incurred by her in that character if she has no separate estate.—PATTISON v. M'VICAR (1886), 13 R. (Ct. of Sess.) 550; 23 Sc. L. R. 373.—SCOT.

PART VI. SECT. 4, SUB-SECT. 5.—
B. (c).

g. Representatives freed from liability—Beneficiaries derive benefit.]—Actions were brought by residuary beneficiaries to set aside a sale made by *extrices*. of lands belonging to the estate. At the time of the sale a good price was obtained, but since then the

lands had more than doubled in value. Pltfs. had joined in the deed to purchaser & obtained certain specific legacies out of purchase-moneys, but claimed the lands had been in reality secretly purchased by one of the *extrices*. & that there had been a consequent breach of trust:—*Held*: the onus was on the pltfs. to get rid of the deed they signed, & no sufficient grounds had been shown.—v. RAYCROFT, RAYCROFT v. COOK (1913), 24 O. W. R. 867; 4 O. W. N. 1568; 12 T. L. R. 846.—CAN.

h. Consent to devastavit by some

Mentd. Robinson v. Harkin, [1896] 2 Ch. 415; Moxham v. Grant, [1900] 1 Q. B. 88; Slade v. Chaine, [1908] 1 Ch. 522; *Re* Rhodesia Goldfields, Partridge v. Rhodesia Goldfields, [1910] 1 Ch. 239.

6965. — — — Although beneficiary deriving no benefit.]—Independently of the Trustee Act, 1893 (c. 53), s. 45, a beneficiary of full contracting age & capacity who knowingly consents to a breach of trust is not entitled to relief against the trustee for any loss occasioned to that beneficiary's interest in the trust estate by reason of the breach of trust, even though he has derived no benefit thereby; the consent to the breach of trust, if proved, need not be in writing.

In 1885 a trustee, with the consent of a husband tenant for life, sold out the whole of a trust fund & handed it over to the wife of the tenant for life, who spent it for her own purposes.

In 1891 an action was commenced by the remaindermen against the trustee to make him liable for the loss occasioned by this breach of trust, in which an order was eventually made staying proceedings on the trustee undertaking by mtges. of policies on his life & by a portion of his pension to replace the whole of the funds so lost; this order directed the money so paid in to be applied, first, in satisfaction of the trust fund, & then of interest thereon from 1891. At the time of the death of the trustee in 1902 the whole of the trust fund had thus been replaced, with a considerable surplus representing interest from 1891; this surplus was now claimed by the representative of deceased trustee by way of indemnity, & by the trustee in bkpcy. of the tenant for life:—*Held*: as the tenant for life who had concurred in the breach of trust could not require the trustee to make good his life interest in the trust estate, he had no right as against the trustee to anything that represented income of the fund replaced by the trustee, & his trustee in bkpcy. was in no better position, & accordingly, the representative of the deceased trustee was entitled to this surplus.—FLETCHER v. COLLIS, [1905] 2 Ch. 24; 74 L. J. Ch. 502; 92 L. T. 749; 53 W. R. 516; 49 Sol. Jo. 499, C. A.

6966. “Instigation” or “request”—Need not be in writing.]—In Trustee Act, 1888 (c. 59), s. 6, providing for indemnity to a trustee who has committed a breach of trust “at the instigation or request or with the consent in writing of a beneficiary,” the words “in writing” apply only to “consent,” & not to “instigation” or “request.”

The discretion which the section confers upon the ct. of ordering that the interest of the beneficiary be impounded by way of indemnity to the trustee ought to be exercised in a case where both the trustee & the instigating beneficiary were aware of the facts which constitute the breach of trust.

creditors—Whether all creditors bound.]—An administratrix made default & the sureties pleaded an equitable defence that the administratrix had with the knowledge of creditors continued trading, instead of settling the estate, & that the deficiency of assets had resulted from such trading:—*Held*: however this equitable defence might avail against assenting creditors, it afforded no answer to any who had not acquiesced.—SUTHERLAND v. WILSON (1881), 14 N. S. R. (2 R. & G.) 354; 1 C. L. T. 95.—CAN.

The exors. under

Sect. 4.—For own acts: Sub-sect. 5, B. (c) & C. (a), (b) & (c) i.]

Where a trustee for a married woman, tenant for life restrained from anticipation, advanced part of the capital to her upon her verbal request & statement that the money was needed to prevent her home from being sold up:—*Held*: the trustee, upon making good to the estate the money so advanced, ought to be indemnified out of the

66 L. T. 760; 40 W. R. 524; 36 Sol. Jo. 504.

Annotations:—*Reid*. Bolton v. Curre (1894), 13 R. 174; *Re Somerset*, Somerset v. Poulett, [1894] 1 Ch. 231; Mara v. Browne, [1895] 2 Ch. 69.

6967. Consent to devastavit—Whether must be in writing.]—GRIFFITH v. HUGHES, No. 6966, *ante*.

6968. ———.]—FLETCHER v. COLLIS, No. 6965, *ante*.

6969. Impounding beneficiaries share—Jurisdiction of court—Exercise of discretion.]—GRIFFITH v. HUGHES, No. 6966, *ante*.

6970. ———.]—An investment of trust funds on mtge. of property of insufficient value was made by trustees at the instigation & request & with the consent in writing of the tenant for life; but it did not appear that he intended to be a party to any breach of trust, or to an investment on the property without inquiry, & in effect he left it to the trustees to determine whether the investment was a proper one for the moneys proposed to be advanced:—*Held*: the trustees were not entitled under Trustee Act, 1888 (c. 59), s. 6, to have the life interest of the tenant for life impounded by way of indemnity to them against their liability for the loss to the estate by reason of the improper investment.—*Re SOMERSET*, SOMERSET v. POULETT (EARL), [1894] 1 Ch. 231; 63 L. J. Ch. 41; 69 L. T. 744; 42 W. R. 145; 10 T. L. R. 46; 38 Sol. Jo. 39; 7 R. 34, C. A.

Annotations:—*Consd.* Fletcher v. Collis, [1905] 2 Ch. 24. *Reid*. *Re Dive*, Dive v. Roebuck, [1909] 1 Ch. 328. *Mentd.* Mara v. Browne, [1895] 2 Ch. 69; *Re Fountaine*, *Re Dowler*, Fountaine v. Amherst, [1909] 2 Ch. 382.

See, further, TRUSTS & TRUSTEES.

C. Remedies for Devastavit.

(a) In General.

See Trustee Act, 1888 (c. 59), s. 8; LIMITATION OF ACTIONS.

6971. Grounds upon which remedy founded—Improper parting with assets—Remedy in administration distinguished.]—LACONS v. WARMOLL, No. 6985, *post*.

6972. Action on suggestion of devastavit—Without return from sheriff—On execution or other writ.]—WHEATLY v. LANE (1669), 1 Sid.

a provision of the will, paid out of the funds an amount due for board & maintenance of a daughter of deceased, the assets of the estate being insufficient to pay the claims of creditors in full:—*Held*: the exors. were not relieved by the fact that the widow of deceased, who was the principal creditor, was aware of the payment & made no objection, it appearing that she was not aware of the condition of the assets, or of the insufficiency of the estate.—*Re RYERSON'S ESTATE* (1896), 29

N. S. R. (17 R. & G.) 81.—CAN.

PART VI. SECT. 4, SUB-SECT. 5.—C. (a).

1. Devastavit followed by sequestration of testator's estate—Suit by Official Assignee.]—When exors. have committed a devastavit & afterwards sequestrated testator's estates, the Official Assignee may recover the amount of such devastavit for the benefit of the creditors.—HASKER v. M'MILLAN

397; 1 Saund. 216; 1 Lev. 255; 2 Kcb. 455; 82 E. R. 1179.

Annotations:—*Reid*. Davenport v. Calne (1686), Comb. 47; Berwick v. Andrews (1704), 6 Mod. Rep. 125; Hope v. Bague (1802), 3 East, 2; Coward v. Gregory (1866), L. R. 2 C. P. 153; Jewesbury v. Mummery (1872), 27 L. T. 618; *Re Marvin*, Crawter v. Marvin, [1905] 2 Ch. 90. *Mentd.* Ranken v. Harwood, Ranken v. Boulton (1846), 5 Hare, 215; Bunbury v. Hewson (1849), 18 L. J. Ex. 258; Gladstone v. Padwick (1871), L. R. 6 Exch. 203; Phillips v. Homfray (1883), 24 Ch. D. 439; Bathyany v. Walford (1887), 36 Ch. D. 269; *Re Monk*, Wayman v. Monk (1887), 35 Ch. D. 583; Peebles v. Oswaldtwistle U. D. C., [1896] 2 Q. B. 159; Davies v. Hood (1903), 88 L. T. 19; Jackson v. Watson (1909), 78 L. J. K. B. 587.

6973. ——— Before action against representative as such.]—There is a suggestion of a devastavit by the administrator before an action brought against him as administrator. Admitting the declaration true, yet there may be no wrong to you; for besides the goods wasted, the administrator may have sufficient to pay you, & this is a new practice, not to be countenanced (HERBERT, C.J.).—DAVENPORT v. CALNE (1687), Comb. 47; 90 E. R. 335.

6974. Party injured a simple contract creditor.]—CHARLTON v. LOW, No. 6869, *ante*.

6975. ———.]—THORNE v. KERR, No. 6983, *post*.

6976. Jurisdiction of county court—To try action.]—The county ct. has jurisdiction to try a question of devastavit.—WINCH v. WINCH (1853), 13 C. B. 128; 22 L. J. C. P. 104; 20 L. T. O. S. 223; 17 J. P. 72; 17 Jur. 88; 1 W. R. 131; 138 E. R. 1145.

6977. Bar to enforcement of remedy—Conduct of party injured—Acquiescence in improper dealings by executor.]—Testator having directed his trustees & exors. after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest £400 in trust for his wife for life in bar of dower, & after her death for W.; & upon farther trust, out of the residue of the money, to invest £100 in trust for J. for life, & after his death for his children; & upon farther trust to pay other sums to persons named; & having bequeathed the residue of his estate to W.; & the only acting exor. having made no investment on the trusts of the will, but having paid interest on the two sums of £400 to the respective legatees, & applied the assets to his own use, & afterwards become bkpt.:—*Held*: by that dealing the two legatees had waived whatever priority the will might have given to them; & the dividends payable on the whole sum proved under the commission against the exor. in respect of testator's estate, was divided among the pecuniary legatees & the residuary legatee, in the proportion of the amount of their legacies, & of the residue, as it was computed at the death of testator, with interest on each.—*Re CHADWIN*, *Ex p.* CHADWIN (1818), 3 Swan. 380; 36 E. R. 902, L. C.

Annotations:—*Reid*. Partington v. Carrington (1860), 34 L. T. O. S. 69; Baker v. Farmer (1868), 3 Ch. App. 537. *Mentd.* Newman v. Williams (1840), 4 Jur. 1123.

(1879), 5 V. L. R. 217.—AUS.

m. Executors also devisees—Property devised chargeable for devastavit.]—Dcft. co. was administrator cum testamento annexo of an estate in which probate had been granted to individual exors. & trustees, two of whom had collected moneys & had failed to account. The same two exors. were also specific devisees under the will. The estate was still unadministered:—*Held*: the estate had

6978. ———.]—Testator in the cause, who died in 1813, bequeathed two sums of £1,000 & £600 to trustees in trust, as to the sum of £1,000 for the separate use of his daughter M. for life, & after her decease, as to one moiety as she should appoint, & as to the other to fall into his residue; & as to the sum of £600 for the separate use of A., his son's wife, for life. The exor., J., did not invest the two sums, but possessed himself of the estate, which was ample, & died in 1823. In 1824, a release was given by the devisees under testator's will to C., the exor. of J. The deed, to which M. was a party, but not A., after reciting that the two sums of £1,000 & £600 were in the hands of C., released & indemnified him from all claims & demands in respect of testator's estate, except so far as regarded the moneys actually vested in him in trust, as before mentioned:—*Held*: (1) the effect of the deed was to show an appropriation of the two legacies in the hands of C.

(2) It was shown, & not denied, that A. received interest under the deed of 1824:—*Held*: consequently, she was bound by its provisions. Bill by the legatees against the persons beneficially interested under the will of J., the exor., praying for an account, & that they might be decreed to refund, dismissed with costs.—*PARTINGTON v. CARRINGTON* (1859), 34 L. T. O. S. 69; 5 Jur. N. S. 1093.

6979. ——— **Delay.**—Testator, who died in 1796, gave his personal estate to his widow for life, with remainder to B. B. died in 1826, & the widow in 1849. Pltfs. then filed a bill against the representatives of the exors. to make them liable for investing in 5 per cents.; instead of in consols, etc. In 1837 pltfs. had notice of the state of the investment:—*Held*: they were barred by laches & lapse of time.

Obligation on a party entitled to a residuary estate, in remainder to see that it is properly invested.—*BROWNE v. CROSS* (1851), 11 Beav. 105; 51 E. R. 226.

Annotations:—*Distd.* *Davies v. Hodgson* (1858), 25 Beav. 177. *Dbtd.* *Baker v. Peck* (1861), 4 L. T. 3; *Life Assn. of Scotland v. Siddal*, *Cooper v. Greene* (1861), 3 De G. F. & J. 58.

6980. ———.]—*DAVIES v. HODGSON*, No. 5992, *ante*.

6981. ———.]—Mere laches in abstaining from calling upon the exors. to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the exors. for *devastavit*, unless there has been such a course of conduct, or express authority, on his part that the exors. have been thereby misled into parting with the assets available to answer his claim.—*Re BIRCH*, *ROE v. BIRCH* (1884), 27 Ch. D. 622; 54 L. J. Ch. 119; 51 L. T. 777; 33 W. R. 72.

Annotation:—*Apld.* *Re Rix*, *Rix v. Rix* (1912), 56 Sol. Jo. 573.

6982. ——— **Law of Property Amendment Act, 1860 (c. 38), s. 13.**—*REED v. FENN*, No. 6952, *ante*.

—.]—*See, generally*, Part VII., Sect. 2, subsect. 5, B., *post*.

Remedy of executor under age—Against ad-

a charge upon the property specifically devised to the two exors. to make good their *devastavit*.—*PALMER v. PERMANENT TRUSTEE CO.* (1915), 16 S. R. N. S. W. 162.—*AUS.*

n. *Action on suggestion of de-*

vastavit—How far former proceedings conclusive.—An exor. did not appear, & judgment was given against him. On execution being issued, a return of *nulla bona* was made. On an action on the judgment suggesting a *devastavit* being commenced:—*Held*: the former

ministrator durante minoritate.—*See* Nos. 6940, 6941, *ante*.

(b) *Where Representative becomes Bankrupt.*

See *BANKRUPTCY*, Vol. IV., p. 249, Nos. 2368–2380.

(c) *Defences open to Representative.*

i. *In General.*

6983. Claim barred by statute.—T., heir-at-law & exor. of a bond debtor, entered into possession of his real estates, & admitted assets, & died before 1833, having devised his real estates to A. whom he appointed extrix. A. paid interest on the bond up to her death in 1834, & interest was afterwards paid by her exors. Upon a bill filed within twenty years after the death of A. seeking payment of the bond out of the real estates of T. & A.:—*Held*: (1) the debt was the personal debt, but not the specialty debt of T., & the creditors were not entitled to have it paid out of his real estates; (2) the debt was not the debt of A. unless by reason of her *devastavit*, the remedy for which was barred by Stat. Limitations.—*THORNE v. KERR* (1855), 2 K. & J. 54; 25 L. J. Ch. 57; 26 L. T. O. S. 233; 2 Jur. N. S. 322; 4 W. R. 131; 69 E. R. 691.

Annotations:—*As to* (2) *Consd.* *Re Baker*, *Collins v. Rhodes*, *Re Seaman*, *Rhodes v. Wish* (1881), 20 Ch. D. 230; *Lacons v. Warmoll*, [1907], 2 K. B. 350; *Re Blow*, *St. Bartholomew's Hospital v. Camlden*, [1914] 1 Ch. 233. *Reid.* *Re Gale*, *Blake v. Gale* (1883), 22 Ch. D. 820; *Re Marsden*, *Bowden v. Layland*, *Gibbs v. Layland* (1884), 26 Ch. D. 783; *Re Hyatt*, *Bowles v. Hyatt* (1888), 38 Ch. D. 609.

6984. ———.]—Testator mortgaged an estate to pltfs., & devised it to three exors. upon trusts in favour of his daughters, & after the death of all his children for sale. The exors. distributed the whole personal estate without providing for the mtge. debt. After this, one of the exors. died. The daughters occupied the farm for twenty years after the distribution of the personal estate, paying rent to the exors., & until 1880 paying the interest on the mtge. The mtgees. then brought an action for foreclosure or sale, & claimed to have any deficiency made good by the two surviving exors. & the exors. of deceased exor.:—*Held*: any claim founded on the *devastavit* in distributing the personal estate was barred after six years, but that pltfs. were entitled to foreclosure & to an order for administration of mtgor.'s estate.—*Re GALE*, *BLAKE v. GALE* (1883), 22 Ch. D. 820; 53 L. J. Ch. 694; 48 L. T. 101; 31 W. R. 538; *subsequent proceedings* (1885), 31 Ch. D. 196; (1886), 32 Ch. D. 571, C. A.

Annotations:—*Distd.* *Re Hyatt*, *Bowles v. Hyatt* (1888), 38 Ch. D. 609. *Consd.* *Lacons v. Warmoll*, [1907] 2 K. B. 350. *Reid.* *Re Marsden*, *Bowden v. Layland*, *Gibbs v. Layland* (1884), 26 Ch. D. 783; *Re Lacey*, *Howard v. Lightfoot*, [1907] 1 Ch. 330.

6985. ———.]—In an action commenced in the High Ct. in 1905, & transferred to the county ct. against one of two exors. of testator, who died in 1897, in respect of claims accruing due in 1903 & 1904 upon a guarantee given by testator, pltfs. alleged a *devastavit* to have been committed by deft., in wrongfully handing over the assets of testator to a beneficiary under the will in 1898,

judgment was conclusive evidence against the exor. as to the possession of assets, & the return was evidence against him that he had wasted the assets.—*TRAVERS v. MILLET* (1880), 1 N. Z. L. R. 1 (S. C.).—*N.Z.*

Sect. 4.—For own acts: Sub-sect. 5, C. (c) i. & ii.]

more than six years before the commencement of the action, without making any provision for future liability under the guarantee. The county ct. judge having given judgment for pltf., adjudging that deft. had committed a *devastavit*, & ordered execution against deft. *de bonis propriis*:—*Held*: the claim in respect of the *devastavit* was barred by Stat. Limitations, & therefore the order for execution *de bonis propriis* was wrong.

The remedy in administration is upon the footing that a fund has been so dealt with that the exor. has not discharged himself of it, & is therefore still liable to account for it; he cannot say he has parted with it, whereas an action for a *devastavit* proceeds upon the footing that the exor. has parted with the fund & is liable because he has parted with it (BUCKLEY, L.J.).—*LACONS v. WARMOLL*, [1907] 2 K. B. 350; 76 L. J. K. B. 914; 97 L. T. 379; 23 T. L. R. 495, C. A.

Annotations:—*Consd. Re Blow, St. Bartholomew's Hospital v. Camlden*, [1914] 1 Ch. 233. *Reid. Re Croyden, Hincks v. Roberts* (1911), 55 Sol. Jo. 632; *Re Richardson, Pole v. Pattenden*, [1919] 2 Ch. 50.

6986. —.]—A legal personal representative handed over assets to the wrong person more than six years before the commencement of proceedings by the person entitled to recover the same:—*Held*: the claim was barred.—*Re CROYDEN, HINCKS v. ROBERTS* (1911), 55 Sol. Jo. 632.

Annotations:—*N.F. Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Reid. Re Blow, St. Bartholomew's Hospital v. Camlden*, [1914] 1 Ch. 233.

6987. —.]—Testatrix who died in 1887 bequeathed her residuary personal estate to trustees upon trust to pay the income in equal third parts to her two nephews & her niece during their respective lives & subject thereto to hold the capital & income of the whole in trust for the children of her said nephews & niece who might be living at the time of the failure of the trust thereinbefore contained. Upon the death in 1896 of one of the nephews leaving a widow & children, the trustees, acting upon the erroneous advice of their solr. as to the effect of the will, paid the income of the deceased nephew's share to his widow for the maintenance of his children. In 1910 it was declared by the ct. that the period of distribution was at the death of the survivor of testatrix's nephews & niece, that there was an implied trust for accumulation of the income until the period of distribution, but that under *Thellusson Act*, 1880 (c. 98), that trust came to an end in 1908, twenty-one years from the death of testatrix.

In an action by testatrix's sole next of kin to recover from the trustees the income of the deceased nephew's share as from 1908, & the interest arising from accumulations of income which ought to have been made between 1896 & 1908, defts. pleaded Stat. Limitations, relying upon sect. 8 of *Trustee Act*, 1888 (c. 59), & also claimed relief under *Judicial Trustees Act*, 1896 (c. 35):—*Held*: (1) the case fell within sect. 8 (1) (b) of *Trustee Act*, 1888 (c. 59), as being one where no existing statute of limitations applied, & by virtue of the proviso at the end of par. (b), time did not begin to run against pltf. until 1908, when her interest fell into possession, so that the statute was no bar to her claim; (2) the application of sect. 3 of *Judicial Trustee Act*, 1896 (c. 35), is not confined to cases where the breach of trust arises from some executive or administrative blunder, but may extend to cases

where money is paid to a person not entitled according to the true construction of the instrument; that in this case the trustees could not be said to have acted "unreasonably" merely because they had, under legal advice, taken a wrong view of the construction of the will, & there being no question as to their having acted "honestly," they "ought fairly to be excused for the breach of trust," & were entitled, under sect. 3, to be relieved from personal liability for the same.—*Re ALLSOP, WHITTAKER v. BAMFORD*, [1914] 1 Ch. 1; 83 L. J. Ch. 42; 109 L. T. 641; 30 T. L. R. 18; 58 Sol. Jo. 9, C. A.

Annotation:—*Generally, Mentd. Re Claridges Patent Asphalt Co.*, [1921] 1 Ch. 543.

6988. —.]—The lessee under certain leases from pltf. died in Jan. 1902, having specifically bequeathed the leaseholds to his wife for life & after her death to his children. In Oct. 1902, his exors. distributed the entire residue without making any provision against their liability under the covenants in the leases otherwise than by taking an indemnity from the beneficiaries. In 1906 one of the exors. died. After 1909 the rent under the leases fell into arrear. In 1911 pltf. commenced a creditor's administration action against the surviving exor. & the beneficiaries, to which action the exors. of deceased exor. were subsequently added as defts. for the purpose of taking the estate accounts & charging the estate of the deceased exor. with all sums received by him:—*Held*: as against the exors. of the deceased exor., the action, although in form a common creditor's administration action, was in reality an action the whole object of which was to recover money within *Trustee Act*, 1888 (c. 59), s. 8 (1) (b), & under the provisions thereof the lapse of time afforded these defts. a good defence.

The principle stated in *Re Marsden, Bowden v. Layland, Gibbs v. Layland, & Re Hyatt, Bowles v. Hyatt*, Nos. 6991, 6993, *post*, that an exor. cannot set up his own *devastavit* in order to obtain the benefit of Stat. Limitations, has been altered by *Trustee Act*, 1888 (c. 59).

In my opinion an exor. can plead *Trustee Act*, 1888 (c. 59), against a creditor, in like manner as an express trustee can plead it against his *cestui que trust* (SWINFEN EADY, L.J.).—*Re BLOW, ST. BARTHOLOMEW'S HOSPITAL (GOVERNORS) v. CAMLDEN*, [1914] 1 Ch. 233; 83 L. J. Ch. 185; 109 L. T. 913; 30 T. L. R. 117; 58 Sol. Jo. 136, C. A.

Annotations:—*Consd. Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Reid. Re Williams, Jones v. Williams*, [1916] 2 Ch. 38.

6989. — When defence to be set up—When order to account is made.]—Where an originating summons for accounts is issued against trustees or exors. entitled under *Trustee Act*, 1888 (c. 59), s. 8, to limit their liability to six years before the date of the summons, the defence of the statute must be raised at the time the order to account is made, so that it may be qualified by a reference to the statute or the point may be reserved for the ct. on the further consideration. Otherwise it will be too late to set up the statute for the first time on the hearing on further consideration, or even when the accounts are being vouched before the Master.—*Re WILLIAMS, JONES v. WILLIAMS*, [1916] 2 Ch. 38; 85 L. J. Ch. 498; 114 L. T. 992; 60 Sol. Jo. 495.

6990. —.]—The real & personal estate of testator, who died in 1909, was administered by his widow & deft. as exors. of his will, & their

functions came to an end in 1910. Under the will the widow was absolutely entitled to the whole of the residuary estate. No formal accounts were delivered to the widow by deft., who was a solr., but he informed her of all that was done, & about the end of 1910 prepared & gave to her a book containing all the particulars of her property. She died in 1917, & in 1918 beneficiaries under her will, of which deft. was also exor., brought an action against him for the administration of original testator's estate & for an account of his dealings therewith, but did not allege that any part of the estate had been misapplied. The deft. relied upon Trustee Act, 1888 (c. 59), s. 8, as a defence to the action:—*Held*: (1) the action was one to recover a legacy within Real Property Limitation Act, 1874 (c. 57), s. 8, & as there was thus an existing statute of limitation applicable, Trustee Act, 1888 (c. 59), s. 8 (1) (b), did not apply, & the period of twelve years limited by the Act of 1874 not having expired when the action was brought that Act was no defence to the action; (2) the Trustee Act, 1888 (c. 59), did not apply at all, & the plffs. were entitled to an account. *Semble*: however, in taking the account deft. would not be precluded from setting up any available defence with regard to particular items.

(3) An action by a residuary legatee against an exor. for the administration of testator's estate is none the less an action to recover a legacy within Real Property Limitation Act, 1874 (c. 57), s. 8, by reason of there being no allegation by pltf. that deft. had, at the date of action brought, assets of testator in his hands.—*Re RICHARDSON, POLE v. PATTENDEN*, [1920] 1 Ch. 423; 89 L. J. Ch. 258; 122 L. T. 714; 36 T. L. R. 205; 64 Sol. Jo. 290, C. A.

ii. *Plea of Devastavit in Administration Action.*

See Trustee Act, 1888 (c. 59), s. 8.

6991. Whether defence available—To obtain benefit of Statute of Limitations.—Testator mortgaged leaseholds & died. His exors. took possession of his estate, recovered the rents of the leaseholds, paid the interest on the mtge., & without providing for the mtge. debt, made certain payments to the beneficiaries under the will. In the course of proceedings by the mtgee. for the realisation of his security & by the legatee for administration, the exor. carried in an account in which he claimed credit for all payments made to the beneficiaries on the ground that under the circumstances the mtgee. must be taken to have acquiesced in such payments, & further, that as to such of the payments as were made upwards of six years before the action any claim on a *devastavit* was barred after six years by the Stat. Limitations:—*Held*: there was no sufficient proof of acquiescence, & the exors. having acknowledged the mtge. debt by payment of interest, & being bound in equity by a trust properly to deal with the assets, could not set up their own wrong by way of *devastavit* as a defence in order to claim the benefit of the Stat. Limitations.

Where an exor. accepts that office, he accepts the duties of the office & he becomes a trustee in the sense that an exor. is personally liable in equity for all breaches of the ordinary trusts which in cts. of equity are considered to arise from his office (KAY, J.).—*Re MARSDEN, BOWDEN v. LAYLAND, GIBBS v. LAYLAND* (1884), 26 Ch. D. 783; 54 L. J. Ch. 640; 51 L. T. 417; 33 W. R. 28.

Annotations:—*Consd. Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609; *Lacons v. Warmoll*, [1907] 2 K. B. 350.

Reid. Re Blow, St. Bartholomew's Hospital v. Cambden, [1914] 1 Ch. 233.

6992. — — —.]—In 1868, upon the death of the mtgor., the mortgaged property was sold by A., the mtgee., under the power of sale contained in the mtge. deed. The balance of the proceeds after payment of the mtge. debt was retained by B., who, in effecting the mtges., had acted as solr. for both parties, & conducted the sale on behalf of A. The power of sale in the mtge. deed contained the usual provision that the surplus proceeds should be paid to the mtgor., his heirs, or assigns. The mtgor. had died unmarried & intestate, & being illegitimate left no next of kin. Administration had not been taken out to him. A. died in 1877, having left all his property to his widow, C., whom he appointed his extrix. C. died in 1878, having appointed B. & R. her exors. Upon the death of B. in 1881, R., as being through C. the legal personal representative of A., claimed as against B.'s estate the balance of the proceeds of the sale in 1868 of the mtged. property:—*Held*: B., having received this balance in a fiduciary character as agent for A., & with full knowledge that A. was an express trustee of the balance for the mtgor., & in the circumstances, liable to a claim by the Crown, & Stat. Limitations could not be set up as a bar to the claim.—*Re BELL, LAKE v. BELL* (1886), 34 Ch. D. 462; 56 L. J. Ch. 307; 55 L. T. 757; 35 W. R. 212.

Annotation:—*Reid. Soar v. Ashwell*, [1893] 2 Q. B. 390.

6993. — — —.]—Testator mortgaged freeholds, & died in May, 1867, having devised all his real & personal estate to A. & B. upon certain trusts, & having appointed them his exors. The exors., without making provision for the mtge. debt, applied the whole of the personal estate in payment to simple contract creditors & beneficiaries. In 1869 A. died & C. was appointed trustee in his place in 1871. The rents of the real estate were received by A. & B. & by B. & C. & after payment of the interest on the mtge., the balance was applied in accordance with the trusts of the will. The mortgaged property became an insufficient security, & interest having fallen into arrear, the mtgees. in 1886 commenced proceedings against B. & C. under which accounts of testator's personal estate received by A. & B. or by B. alone, were directed, & also the usual accounts of testator's real estate including an account of rents & profits against B. & C. Accounts were accordingly carried in, in which B. & C. claimed credit for all payments & disbursements made to simple contract creditors & beneficiaries, & further that as to such of the payments as were made by A. & B. upwards of six years prior to the action any claim on a *devastavit* was statute barred, & that as to the rents & profits they were not liable to account for them at all:—*Held*: (1) B. could not set up his own, & A.'s wrongful payment by way of *devastavit* as a defence in order to claim the benefit of Stat. Limitations; (2) as to the rents & profits which had been received by B. & C. jointly, they were under 3 & 4 Will. 4, c. 104, assets by accretion liable under the circumstances for payment of creditors by specialty just as much as the real estate was assets under that statute.—*Re HYATT, BOWLES v. HYATT* (1888), 38 Ch. D. 609; 57 L. J. Ch. 777; 59 L. T. 297.

Annotations:—*As to* (1) *Consd. Lacons v. Warmoll*, [1907] 2 K. B. 350. *Reid. How v. Winterton* (1896), 65 L. J. Ch. 832; *Re Croyden, Hincks v. Roberts* (1911), 55 Sol. Jo. 632; *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233. *As to* (2) *Distd. Re Moon, Holmes v. Holmes*, [1907] 2 Ch. 304.

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6994. ———.]—*LACONS v. WARMOLI*, No. 6985, *ante*.

6995. ———.]—*Re BLOW, ST. BARTHOLOMEW'S HOSPITAL (GOVERNORS) v. CAMBDEN*, No. 6988, *ante*.

D. Relief of Representative.

See Judicial Trustee Act, 1896 (c. 35), ss. 1 (2), 3 (1); Trustee Act, 1925 (c. 19), s. 61.

6996. Before Judicial Trustee Act, 1896 (c. 35)—*Relief in equity—Destruction of assets—Before payment of bond debt.*—*CROFT'S (LADY) EXECUTORS v. LYNDESEY & COVILL* (1676), *Freem. Ch.* 1; 2 *Eq. Cas. Abr.* 452; 22 *E. R.* 1014.

6997. ——— *Payment to co-executor—For payment of deceased's debts.*—*BACON v. BACON* (1800), 5 *Ves.* 331; 31 *E. R.* 614, *L. C.*

Annotations:—Distd. Shipbrook v. Hinchinbrook (1810), 16 *Ves.* 477; *Moses v. Levi* (1839), 3 *Y. & C. Ex.* 359; *Curtis v. Mason* (1843), 12 *L. J. Ch.* 442. *Consd. Re Speight, Speight v. Gaunt* (1883), 22 *Ch. D.* 727; *Re De Clifford's Estate, De Clifford v. Quilter, De Clifford v. Lansdowne*, [1900] 2 *Ch.* 707. *Reid. Langford v. Gascoyne* (1805), 11 *Ves.* 333; *Crosse v. Smith* (1806), 7 *East*, 246; *Hanbury v. Kirkland* (1829), 3 *Sim.* 265.

6998. ——— *Failure to get in estate—All reasonable efforts made to do so.*—Where it is the duty of a trustee or exor. to obtain payment of a sum of money, he is exonerated & never required to make good any loss if he has done all he could to obtain payment but his efforts have not proved successful. Nay more, if he has taken no steps at all to obtain payment, but it appears, that if he had done so, they would have been, or there is reasonable ground for believing they would have been, ineffectual, he is exonerated from all liability.—*CLACK v. HOLLAND* (1854), 19 *Beav.* 262; 24 *L. J. Ch.* 13; 24 *L. T. O. S.* 40; 18 *Jur.* 1007; 2 *W. R.* 402; 52 *E. R.* 350.

Annotations:—Distd. Williams v. Higgins (1868), 17 *L. T.* 525. *Consd. Re Brogden, Billing v. Brogden* (1888), 38 *Ch. D.* 546. *Apld. Re Hurst, Addison v. Topp* (1890), 63 *L. T.* 665; *Re Roberts, Knight v. Roberts* (1897), 76 *L. T.* 479. *Reid. Re Greenwood, Greenwood v. Firth* (1911), 105 *L. T.* 509. *Mentd. Ashwin v. Burton* (1862), 32 *L. J. Ch.* 196; *Saunders v. Dunman* (1878), 7 *Ch. D.* 825; *Re Leslie, Leslie v. French* (1883), 23 *Ch. D.* 552.

6999. Under Judicial Trustee Act, 1896, c. 35—*Relief in discretion of court—On proof of trustee acting reasonably & honestly—No general rules or principles laid down.*—The power to relieve a trustee from personal liability for a breach of trust given by sect. 3 of the above Act is meant to be acted on freely & fairly in the exercise of judicial discretion, but the ct. must, before exercising the power, be satisfied by sufficient evidence that the trustee acted reasonably as well as honestly. No general rules or principles can be laid down as those to be acted upon in carrying out the section; each case depends on its own circumstances.

Where two trustees appointed by a testatrix, one being a solr. & the other a linendraper, invested trust money on a mtge. which was an improper investment both as to its nature & as to its value, the ct. refused to excuse the linendraper when it was not satisfied that he had acted with the care which he would probably have taken if the money

had been his own, but found that he had relied on the solr. The ct., however, ordered the solr. to indemnify his co-trustee from the loss resulting from his negligence.—*Re TURNER, BARKER v. IVIMEY*, [1897] 1 *Ch.* 536; 66 *L. J. Ch.* 282; 76 *L. T.* 116; 45 *W. R.* 495; 13 *T. L. R.* 249; 41 *Sol. Jo.* 313.

Annotations:—Apprvd. Re Roberts, Knight v. Roberts (1897), 76 *L. T.* 479. *Apld. Re Stuart, Smith v. Stuart*, [1897] 2 *Ch.* 583. *Consd. Re Mackay, Griessemann v. Carr*, [1911] 1 *Ch.* 300. *Reid. Re Barker, Ravenshaw v. Barker* (1898), 46 *W. R.* 296; *Head v. Gould*, [1898] 2 *Ch.* 250; *Re Linsley, Cattley v. West*, [1904] 2 *Ch.* 785.

7000. ——— *Improper investment.*—*Re TURNER, BARKER v. IVIMEY*, No. 6999, *ante*.

7001. ——— *Advertisement for claims against deceased—Undue delay—Payment of legacy & income before advertisement made.*—Sect. 3 of the above Act applies to the case of an exor. who has committed a *devastavit*, but in construing that section the ct. is bound to see that there has been no undue delay in advertising for claims.

Testator, who died in June, 1894, leaving assets amounting to £22,000, & debts, as then ascertained, of about £100, gave an immediate legacy of £300, to his widow; the exor. paid this legacy & allowed the widow to receive the income arising from the estate for the support of herself & family. In Aug. following a claim for rents received by testator as an agent, & not accounted for, was sent in; in Nov. the usual advertisements for creditors were issued; in Dec. an action claiming an account on the footing of wilful default by testator was commenced. The exor., without going to the ct. for directions, defended the action, & continued to allow the widow to receive the income till judgment in Apr. 1896, which resulted in some £26,000 being found due from testator's estate to pltf's.—*Held*: though there had been undue delay in issuing the advertisements for claims, the exor. had acted reasonably under all the circumstances in paying the £300 legacy & such further sums on account of income as were necessary to maintain the widow & family up to the issue of the writ, but not after, & to this extent he might be relieved from personal liability.—*Re KAY, MOSLEY v. KAY*, [1897] 2 *Ch.* 518; 46 *W. R.* 74; *sub nom. Re KAY, MOSLEY v. KEYWORTH*, 66 *L. J. Ch.* 759; 13 *T. L. R.* 582.

Annotations:—Apld. Re Allsop, Whittaker v. Bamford, [1914] 1 *Ch.* 1. *Reid. Re Barker, Ravenshaw v. Barker* (1898), 46 *W. R.* 296; *Re De Clifford's Estate, De Clifford v. Quilter, De Clifford v. Lansdowne*, [1900] 2 *Ch.* 707; *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 *Ch.* 233.

7002. ——— *Failure to get in debts due.*—Where the exor. of a deceased solr. was *bond fide* & on reasonable grounds satisfied that he could not maintain an action against a client personally to recover costs incurred in an administration action & owing to the solr., there being an arrangement between the solr. & the client to the effect that the latter should not be personally liable to the solr. for the costs, except in the event of his being unable to recover the same in the administration action, it was held that the principle of *Clack v. Holland*, No. 6998, *ante*, was applicable, & that the exor. was not guilty of any wilful default; but that even if the exor. was technically liable for a breach of trust, then under sect. 3 of the above Act he, having acted honestly & reasonably,

ought fairly to be excused.—*Re ROBERTS, KNIGHT v. ROBERTS* (1897), 76 L. T. 479; 41 Sol. Jo. 468, C. A.

Annotation:—Reid. Re Barker, Ravenshaw v. Barker (1898), 46 W. R. 296.

7003. ———.]—Testator by his will gave his real & personal estate to his exors. & trustees upon trust to maintain the same in the like mode of investment as at his death until one of his sons should attain the age of twenty-four. The estate comprised a debt of £166 due upon a promissory note payable upon demand; the exors., believing the debtor to be a man of good credit, neither called in, nor applied to the ct. for directions as to this debt; the debtor died insolvent eighteen months after testator; & the estate suffered a loss:—*Held*: having regard to the terms of the will & the amount of the debt, the exors. might reasonably have thought they were not bound either to call in the debt or to apply for directions, & under the circumstances, having acted honestly & reasonably, they ought to be relieved, under sect. 3 of the above Act, from their breach of trust & from personal liability for the same.—*Re GRINDEY, CLEWS v. GRINDEY*, [1898] 2 Ch. 593; 67 L. J. Ch. 624, 79 L. T. 105; 47 W. R. 53; 14 T. L. R. 555, C. A.

Annotations:—Consd. Re Mackay, Griessemann v. Carr, [1911] 1 Ch. 300; *Re Ailsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

7004. ——— **Payment to solicitor—On account of administration—Insolvency of solicitor.**]—During five years' administration of testator's estate by the ct., the exors., who knew that large sums were necessary for the payment of debts, disbursements, & other administration purposes, paid various sums from time to time to their solrs. in reliance on their statements that these sums were in each case required for those purposes, to which they were in fact in great part applied. Shortly before the close of the administration the solrs. became bkpt., & the total amount paid to them being substantially in excess of the amount required & applied for administration purposes, the balance was lost to the estate:—*Held*: under the special circumstances, the exors. had acted honestly & reasonably, & ought fairly to be excused for making the payments in reliance on their solrs.' statements, & ought to be relieved from personal liability in respect of the balance lost.—*Re DE CLIFFORD'S (LORD) ESTATE, DE CLIFFORD (LORD) v. QUILTER, DE CLIFFORD (LORD) v. LANSDOWNE (MARQUIS)*, [1900] 2 Ch. 707; 69 L. J. Ch. 828; 83 L. T. 160; 16 T. L. R. 547; 44 Sol. Jo. 689.

7005. ——— **Misappropriation of fund.**]—*Re MACKAY, GRIESSEMANN v. CARR*, No. 6915, *ante*.

7006. ——— **Improper payment.**]—*Re AILLSOP, WHITTAKER v. BAMFORD*, No. 6987, *ante*.

Necessity for wilful default.]—*See* Sub-sect. 5, B. (a), *ante*.

See, further, TRUSTS & TRUSTEES.

SUB-SECT. 6.—LOSS ON INVESTMENTS.

Authorised investments.]—*See* Part IV., Sect. 1, sub-sect. 3, B. (a) iii., *ante*.

Unauthorised investments.]—*See* Sect. 4, sub-sect. 5, *ante*.

misappropriated money given to him | the time of the representation no | *CLARK v. BELLAMY* (1900), 20 C. L. T. by testator to invest, & had in fact at | securities or money in his hands.— | 350; 27 A. R. 435.—*CAN.*

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SECT. 5.—FOR ACTS OF CO-REPRESENTATIVE.

SUB-SECT. 1.—IN RESPECT OF ASSETS RECEIVED.

See Trustee Acts, 1893 (c. 53), s. 24; 1925 (c. 19), s. 30; **TRUSTS & TRUSTEES.**

7007. Only for such assets as representatives receive.]—Where there are two exors. & one of them is made deft., he shall be charged no further than for the goods come to his own hands.—*HERBAGE v. BACKSHAW* (1593), Toth. 86; 21 E. R. 131.

7008. ———.]—An exor. shall only be charged to the amount of the assets which come to his hands, & not for the wrong or *devastavit* of his companion.—*MARGTHORPE v. MILFORTH* (1594), Cro. Eliz. 318; 78 E. R. 568.

Annotations:—Fold. Champneys v. Browne (1735), Barnes, 440. *Reid. Nation v. Tozer* (1834), 4 Tyr. 561.

7009. ———.]—A co-exor. shall not be charged for more than comes to his hands.—*JOHN v. KINGSTON* (1633), Toth. 87; 21 E. R. 132.

7010. ——— **Unless agreement between executors—For dealing with assets.**]—In case of joint exors., none is chargeable for more than comes to his hands severally. But . . . if by agreement amongst themselves, one be to receive & intermeddle with such a part of the estate, & another with such a part, each of them will be chargeable for the whole: because the receipts of each are pursuant to the agreement made betwixt both.—*GILL v. A.-G.* (1662), Hard. 314; 145 E. R. 474.

Annotations:—Apld. Sadler v. Hobbs (1786), 2 Bro. C. C. 114. *Reid. R. v. Artillery Ground, Tower Division & Bray* (1754), Park. 167; *Crosse v. Smith* (1806), 7 East, 246; *Steen v. Mills* (1833), 2 L. J. K. B. 106.

7011. ——— **Executors acting severally.**]—*DARWELL v. DARWELL*, No. 7064, *post*.

7012. ———.]—Three administrators appointed a receiver who received a sum of money for their use, & divided to each administrator one-third part; two of the administrators afterwards failed; & the question was upon a point reserved at *Nisi Prius*, whether the third administrator was liable for the whole sum, or for his own third part only to a new administrator.

Deft. is responsible for that third part only which he received, & not for a *devastavit* committed by his co-administrators (*per* CUR.).—*CHAMPNEYS v. BROWNE* (1735), Barnes, 440; 94 E. R. 994.

7013. ———.]—*LITTLEHALES v. GASCOYNE*, No. 7238, *post*.

7014. ——— **No assets in fact received.**]—*STEARNS v. MILLS*, No. 7313, *post*.

7015. ——— **Alleged collusion by executors.**]—On a bill filed against an exor., seeking to charge him in respect of *devastavits* committed by his co-exor., who had died, deft., by his answer, denied that he had ever interfered in testator's affairs in the lifetime of the co-exor.; & it was admitted that he had not proved the will till the death of that exor.:—*Held*: nevertheless, upon the evidence of two witnesses, speaking to different facts, but corroborated by circumstances, more especially by the fact of a composition deed having been executed by the surviving exor. with the exor. of deceased, there was a sufficient ground for inquiring

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into the acts of the surviving exor. The ct. accordingly directed special inquiries on the subject.—*JAMES v. FREARSON* (1842), 1 Y. & C. Ch. Cas. 370; 62 E. R. 929.

Annotation:—Refd. Re Stevens, Cooke v. Stevens, [1897] 1 Ch. 422.

SUB-SECT. 2.—NEGLECT OF DUTY.

See Trustee Acts, 1893 (c. 53), s. 24; 1925 (c. 19), s. 30.

7016. No protection.]—A trustee who stands by & sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust.

Testator bequeathed to his partner & to B. his personal estate, upon trust to invest the same, for the benefit of his wife & children. Both exors. proved the will, & the surviving partner retained testator's moneys in the trade, which were lost. B. took no active part in the trusts, but was cognisant of the breach of trust, & took no proceedings to prevent it:—*Held*: B. was responsible for the consequences of the breach of trust.—*BOOTH v. BOOTH* (1838), 1 Beav. 125; 8 L. J. Ch. 39; 2 Jur. 938; 48 E. R. 886.

Annotations:—Apprvd. Styles v. Guy (1849), 1 Mac. & G. 422. *Refd. Blakely v. Blakely* (1855), 24 L. T. O. S. 322; *Chillingworth v. Chambers*, [1896] 1 Ch. 685.

7017. —.]—(1) Two exors. were directed, after making some annual payments, to invest & accumulate the surplus. One of the exors. received the dividends of stock for several years, & misapplied them; it did not appear that the other exor. had any knowledge thereof:—*Held*: the latter was not answerable for the breach of trust.

(2) Two exors. sold out stock, & the produce was received by one:—*Held*: the other was responsible for its misapplication, but was entitled to an inquiry, whether any part had been applied in discharge of claims against testator.

(3) There can be no doubt that if an exor. knows that the moneys received by his co-exor. are not applied according to the trusts of the will, & stands by & acquiesces in it, without doing anything on his part to procure the due execution of the trusts, he will in respect of that negligence be himself charged with the loss (*LORD LANGDALE, M.R.*).—*WILLIAMS v. NIXON* (1840), 2 Beav. 472; 9 L. J. Ch. 269; 48 E. R. 1264.

Annotations:—As to (3) Refd. Blakely v. Blakely (1855), 24 L. T. O. S. 322. *Generally, Mentd. Massey v. Moss* (1842), 1 Harc. 319.

7018. —.]—*TERRELL v. MATTHEWS*, No. 7050, *post*.

7019. — Once responsibility assumed.]—It is the duty of all exors., who prove the will, to watch over, & if necessary to correct, the improper conduct of each other, & mere passiveness in an exor. will frequently form no protection, where the earlier authorities would seem to exempt him

from liability.—*STYLES v. GUY* (1849), 1 Mac. & G. 422; 14 Jur. 355; 41 E. R. 1328; *sub nom. STILES v. GUY*, 1 H. & Tw. 523; 19 L. J. Ch. 185; 14 L. T. O. S. 305, L. C.

Annotations:—Refd. Paddon v. Richardson (1855), 7 De G. M. & G. 563; *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162. *Mentd. Re Flower & Metropolitan Board of Works, Re Flower & Same* (1884), 27 Ch. D. 592.

7020. —.]—*TRAVIS v. MILNE, MILNE v. MILNE*, No. 5979, *ante*.

7021. —.]—*Re ATKINSON, PAGE v. GADSDEN* (1904), 48 Sol. Jo. 641.

7022. Permitting co-representative to retain assets—Assets subsequently lost—Fund for charity.]—*WALTHAMSTOW POOR CHARITY CASE* (1629), *Duke*, 65.

7023. —.]—Where a trust fund standing in the names of two trustees had been sold out, & the money had been received by one of them, who was to pay it to the *cestuis que trust*, but failed to do so & afterwards became insolvent & the money was lost:—*Held*: the other trustee was not exonerated from personal liability to make good the fund, on the ground that all the acts which he had done were required for convenience or conformity.—*CURTIS v. MASON* (1843), 12 L. J. Ch. 442; 1 L. T. O. S. 383, L. C.

7024. — Assets in co-executor's firm.]—(1) An exor. directed to invest in real or sufficient securities is liable for loss sustained by leaving the assets in a firm even of which his co-exor. is a partner.

(2) Dividends received in respect of part of the estate of testator being in the hands of the agent of one exor., & part of the estate being in a firm of which his co-exor. is partner, but which is or is expected to be insolvent, the agent cannot demand a general release as a condition of payment of a share of such estate to a legatee.—*FULTON v. GILMORE* (1845), 4 L. T. O. S. 431.

7025. — Co-representative mortgagor of deceased.]—*CANDLER v. TILLET*, No. 7047, *post*.

7026. —.]—Testator gave annuities to pltf's., & appointed three exors., one of whom, A., was residuary legatee. No fund was set apart to answer the annuities, but A. was permitted by his co-exors. to receive the assets, which he wasted, though he paid the annuities for eighteen years, at the end of which he became insolvent:—*Held*: the co. exors. were liable to pltf's. for A.'s receipts.—*EGBERT v. BUTTER* (1856), 21 Beav. 560; 52 E. R. 976.

Annotations:—Mentd. Fox v. Buckley (1876), 3 Ch. D. 508; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534.

7027. — Improper retention of funds in bank.]—Testator, who died in 1835, directed his exors. & trustees, A. & B., to convert his real & personal estate, & after paying his debts, etc., to invest the proceeds on mtge. of freeholds, etc., or on Govt. securities. A. & B. deposited the proceeds in a bank, at interest, in their joint names. A. died in 1842, & B. drew out the balance & applied it to his own use. No sufficient reason being shown for retaining the money in the bank:—*Held*: the estate of A. was liable to make good

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*p. General rule.]—*When one or more of several trustees acts or act in getting in & dealing with the trust funds, an inactive trustee is account-

able therefor equally with the others, if having the means of knowledge by exercise of ordinary vigilance, he stands by & permits a breach of trust to go on.—*MCCARTER v. MCCARTER* (1884), 7 O. R. 243.—*CAN.*

*q. Permitting co-representative to retain assets—Assets subsequently lost—Co-representative of mortgagor of deceased.]—*One of two exors. was indebted to the estate on a mtge. to testator of which his co-exor. was

the loss.—*GIBBINS v. TAYLOR* (1856), 22 Beav. 344; 4 W. R. 432; 52 E. R. 1140.

7028. ———.]—A., one of the two trustees & exors. of a will & resident in L., authorised a person to get in three mtges., part of the estate. The solr. forwarded the deeds of reconveyance to D., the other trustee, in the country, who executed & returned them. The solr. received the money & paid it to A. alone, who misapplied it:—*Held*: D. was liable for the amount.—*COWELL v. GATCOMBE* (1859), 27 Beav. 568; 54 E. R. 225.

7029. ———.]—Testator bequeathed all his personal estate, in trust, to two trustees, & exors., & provided that each trustee should be exempted from liability from losses occurring without his own wilful default, & should retain & allow to his co-trustee all expenses incidental to the trusteeship; & further, that one of the trustees, an auctioneer, should act in the management & winding up of his affairs, & in converting the same into money. The trustee, the auctioneer, sold part of testator's effects by auction, & died thirteen months afterwards insolvent, when the money arising out of the sale, which had been allowed to remain in his possession, went to his creditors:—*Held*: the surviving trustee was liable for the trust-money.—*WILLIAMS v. HIGGINS* (1868), 17 L. T. 525; 16 W. R. 390.

7030. ———.]—Each of two trustees retained possession of a moiety of bonds held in trust, & which passed by delivery, & one trustee committed a breach of trust:—*Held*: the other trustee was liable to make good the loss sustained.

Deft. did not discharge his duty in allowing his co-trustees to retain possession of one-half of the bonds & the course pursued enabled the co-trustee to improperly deal with them (*HALL, V.-C.*).—*LEWIS v. NOBBS* (1878), 8 Ch. D. 591; 47 L. J. Ch. 662; 26 W. R. 631.

Annotations:—*Reid. Re Sisson's Settltmt., Jones v. Trappes*, [1903] 1 Ch. 262. *Mentd. Re Roth, Goldberger v. Roth* (1896), 74 L. T. 50; *Re Smith, Smith v. Thompson*, [1896] 1 Ch. 71; *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

7031. ———.]—Testatrix who had a general power of appointment over a sum of consols comprised in her marriage settlement, gave certain specific legacies of this stock. On her death the stock was sold by the trustees of the settlement, & the proceeds paid into a bank to the joint account of the two exors. of the will. Crossed cheques for the legacies were drawn by the exors., payable to the order of the legatees respectively. The indorsements were forged by one of the exors., who obtained payment to himself, & absconded. The legatees never consented to the payment being made in cash:—*Held*: it was the duty of the exors. to have re-converted the money into stock, & the remaining exor. was liable for the value of the legacies.—*Re BENNISON, CUTLER v. BOYD* (1880), 60 L. T. 859.

7032. ———]—Mere permission does not involve liability—Subsequent concurrence in application.]—One exor. in trust is not answerable for the receipts of the other merely by taking probate, permitting the other to possess the assets, &

joining in acts necessary to enable him to administer. *Secus*: if he goes farther, & concurs in the application.—*HOVEY v. BLAKEMAN* (1799), 4 Ves. 596; 31 E. R. 306.

Annotations:—*Reid. Chambers v. Minchin* (1802), 7 Ves. 186; *Crosse v. Smith* (1806), 7 East, 246; *Terrell v. Matthews* (1841), 1 Mac. & G. 433, n.; *Styles v. Guy* (1849), 1 Mac. & G. 422. *Mentd. Denton v. Davy* (1836), 1 Moo. P. C. C. 15; *Campbell v. Campbell* (1842), 13 Sim. 168.

7033. ———]—Through collusion or fraud.]—*TOWNLEY v. SHERBORNE*, No. 6936, *ante*.

7034. ———.]—*LANGFORD v. GASCOYNE*, No. 7041, *post*.

7035. ———]—Subsequent breach of trust.]—Two exors. permitting their co-exor. to retain in his hands the ascertained residue:—*Held*: liable as for a breach of trust.—*LINCOLN v. WRIGHT* (1841), 4 Beav. 427; 49 E. R. 404.

Annotations:—*Approved. Styles v. Guy* (1849), 1 Mac. & G. 422. *Mentd. Chillingworth v. Chambers*, [1896] 1 Ch. 685.

7036. ———.]—*Re ATKINSON, PAGE v. GADSDEN* (1904), 48 Sol. Jo. 641.

SUB-SECT. 3.—ENTRUSTING ASSETS TO CO-REPRESENTATIVES.

See Trustee Acts, 1893 (c. 53), s. 24; 1925 (c. 19), s. 30.

7037. Representative entrusting assets answerable for them.]—If one exor. pays over assets to the other, he is still answerable for them.—*ANON.* (1728), Mos. 25; 25 E. R. 254.

7038. ———.]—(1) Exors. drawing a joint draught for property of their testator, & suffering it to remain in the hands of a tradesman:—*Held*: both were liable, although one of them had done no other act in execution of the will.

(2) I take it to be clear that where by any act or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-exor., they shall both be answerable (*LORD THURLOW, C.*).—*SADLER v. HOBBS* (1786), 2 Bro. C. C. 114; 29 E. R. 66, L. C.

Annotations:—*As to (1) Folld. Scurfield v. Howes* (1790), 3 Bro. C. C. 90. *Consd. Chambers v. Minchin* (1802), 7 Ves. 186. *Reid. Hovey v. Blakeman* (1799), 4 Ves. 596; *Steen v. Mills* (1833), 2 L. J. K. B. 106; *Gregory v. Gregory* (1836), 2 Y. & C. Ex. 313. *As to (2) Consd. Crosse v. Smith* (1806), 7 East, 246.

7039. ———]—Where entrusted unnecessarily—Or voluntarily.]—If one exor. possess part of his testator's estate, & pays it over to another exor., who embezzles it, the former, or in case of his death, his assets shall make it good.

Where one exor. receives the whole or part of his testator's estate & pays it over voluntarily & unnecessarily to his co-exor. & the same is embezzled; if embezzled or lost he who so paid it is answerable (*CLARKE, M.R.*).—*TOWNSEND v. BARBER* (1763), 1 Dick. 356; 21 E. R. 307.

Annotation:—*Consd. Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470.

7040. ———]—Act done in regular course of business not unnecessary.]—The proposition in

aware, but took no steps to compel payment, & the mtgor. as exor. executed a discharge under the statute, & registered the same:—*Held*: the co-exor. was liable to make good any loss occasioned thereby.—*MOPHADEN v. BACON* (1867), 13 Gr. 591.—*CAN.*

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70391. Representative entrusting assets answerable for them—Where entrusted unnecessarily.]—*LOWE v. SHIELDS*, [1902] 1 I. R. 320.—*IR.*

r. Misappropriation of funds.]—

Action against representative of exor. for loss by his negligence, his co-exor. having misappropriated funds of testator's estate:—*Held*: no negligence could be imputed.—*AUSTIN v. AUSTIN* (1906), 3 C. L. R. 516.—*AUS.*

s. ———.]—H. & C. were appointed

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Candler v. Tillett, No. 7047, *post*, that an exor. who does an act by which his co-exor. obtains sole possession of a part of testator's estate is liable for the co-exor.'s misapplication of it must be read, "who unnecessarily does an act." Such an act is not "unnecessary" if it is done in the regular course of business in administering the property.

Testator up to his death was the registered holder of a large amount of American railway bonds. These bonds were issued payable to bearer, but the holder could register them, after which they could only be transferred by entry in the books of the co., but the owner could un-register them so as to make them again payable to bearer. Exors. who desired to sell bonds of which their testator was registered holder could either sell & transfer them as registered bonds, or un-register them & then sell. It was proved that the former course was extremely unusual. Testator appointed his wife & two stockbrokers, J. & C., his exors. & trustees, & authorised J. & C. to charge for business done by them as stockbrokers for his estate. J. had been testator's stockbroker. The exors. determined to sell the bonds, & for that purpose the three unregistered them & put them in the hands of J. to sell. J. sold them & from time to time paid considerable sums into a bank to the account of testator's estate, but ultimately absconded after misappropriating a considerable part of the proceeds. The dispositions of testator's will were such that the sale could not be treated as an unauthorised act, & the absconding of J. took place within eleven months after the death of testator. Testator's children brought this action to make all three exors. liable for the loss:—*Held*: the unregistering the bonds & handing them to J. to sell were not "unnecessary" acts, & the co-exors. were not liable for J.'s misappropriation; & as J. was trusted by testator & his co-exors. had no reason to suspect him, there had been no such delay in calling upon J. for an account as to make them liable.—*Re GASQUOINE, GASQUOINE v. GASQUOINE*, [1894] 1 Ch. 470; 63 L. J. Ch. 377; 70 L. T. 196; 10 T. L. R. 220; 7 R. 449, C. A.

7041. — Although with innocent motive.]—Exor. doing any act, by which property gets into the possession of another executor, though with an innocent motive, is equally answerable. Otherwise if he is merely passive.—*LANGFORD v. GASCOYNE* (1805), 11 Ves. 333; 32 E. R. 1116.

Annotations:—*Consd. Thompson v. Finch* (1856), 22 Beav. 316. *Reid Clough v. Bond* (1838), 3 My. & Cr. 490; *Moses v. Levi* (1839), 3 Y. & C. Ex. 359; *Broadhurst v. Balguy* (1841), 1 Y. & C. Ch. Cas. 16; *Stiles v. Guy*

exors. H. took upon himself the actual management of the estate, with the knowledge & consent of, but not under any express agreement with C. H. applied a sum of money to his own use, but of this C. was not aware. The will contained the usual indemnity clause exonerating each from liability for the other:—*Held*: C. was not liable for the sum appropriated by H.—*KING v. HILTON* (1881), 29 Gr. 381.—CAN.

t. —.]—Testator empowered his exors. to sell his lands to pay off debts or incumbrances against his estate. The land was sold by the exors., but by tacit consent, one of them took the management of the estate & received the moneys arising

from it, including the proceeds of the sale, which he misappropriated. An extrix. joined in the conveyance to the purchaser for the sake of conformity, but did not receive any of the purchase-money:—*Held*: under these circumstances, the extrix. was not responsible to the estate for the misappropriation by her co-trustee.—*Re CROWTER, CROWTER v. HINMAN* (1885), 10 O. R. 159.—CAN.

a. —.]—Where one of two exors. who was entitled under the will to a sum charged on the real estate, had applied in his own business a portion of the personal estate, which was by the will directed to be invested, & which was not equal in amount to

(1849), 1 H. & Tw. 523; *Re Gasquoino, Gasquoino v. Gasquoino*, [1894] 1 Ch. 470. *Mentd. Symonds v. Jenkins* (1876), 34 L. T. 277.

7042. — Entrusted for payment of deceased's debts.]—*CROSSE v. SMITH*, No. 6926, *ante*.

7043. — In due course of administration—Rule in equity.]—*MOSES v. LEVI*, No. 7045, *post*.

7044. — Representative acting as agent of co-representative—Co-representative having legal title to funds—Proceeds of sale of land.]—An exor., who is employed by his co-exor. as his agent to sell an estate, which, under the will of testator, the co-exor. alone had power to sell, & who hands over the price of the estate to his co-exor., is not accountable for the misapplication of that price by the co-exor., because he had no legal right to retain it, although, by the will of testator, the price of the estate, when sold, was to be considered as part of his personal estate.—*DAVIS v. SPURLING* (1829), 1 Russ. & M. 64; Taml. 199; 39 E. R. 25. **Annotations:—***Mentd. A.-G. v. Chesterfield* (1854), 18 Beav. 596; *Blagrove v. Routh* (1856), 2 K. & J. 509; *Gething v. Keighley* (1878), 9 Ch. D. 547.

7045. — Entrusted for payment of residuary legatees.]—(1) Testatrix bequeathed the residue of her property to certain persons, some of whom lived in the west of England & others in Norfolk, & she appointed two persons to be exors., one of whom lived at Clifton, & the other at Diss. The exors., having paid all the debts & specific legacies of testatrix, entered into an arrangement by which the Clifton exor. was to pay the residuary legatees in the west of England, & the Diss exor. those in Norfolk, & the residuary funds were apportioned between them for that purpose. The Diss exor. having made default in payment of one of the legatees in that neighbourhood:—*Held*: the other exor. was responsible for the default.

(2) Although a ct. of equity will give protection to an exor. who hands over testator's assets to his co-exors. for the payment of testator's debts in a due & ordinary course of administration, the principles upon which that protection rests do not apply to the case of an exor. handing over the assets for the payment of testator's residuary legatees.—*MOSES v. LEVI* (1839), 3 Y. & C. Ex. 359; 160 E. R. 741.

7046. — Assets only obtainable by act of representative—Co-representative appointed acting administrator—Direction to pay debts to him.]—A., B., C., D. & E., the two latter being married women, took out administration to an intestate, & afterwards appointed C. to be the acting administrator, & directed the creditors to pay their debts to him. C. became insolvent:—*Held*: A., B. & C., & the husbands of D. & E., were responsible for C.'s

the charge in his favour on the realty & his co-exor., though aware of such application had not taken any steps to prevent the same:—*Held*: they were both equally liable to account for the whole of the principal sum & interest.—*ARCHER v. SEVERN* (1886), 13 O. R. 316.—CAN.

b. —.]—The retention or misappropriation by a co-exor. of funds drawn from the estate by him as agent of a legatee, is a full discharge of the liability of his co-exor. in an action by the legatee.—*PERCY v. NORMAN* (1881), 6 Nfld. L. R. 360.—NFLD.

c. Assets entrusted to managing executor—Advances made to him—On part of assets of estate.]—Where

receipts.—*LEES v. SANDERSON* (1830), 4 Sim. 28; 58 E. R. 12.

7047. ———.]—(1) If one exor. does an act which enables his co-exor. to obtain sole possession of money belonging to the estate, & which, but for that act, he could not have obtained possession of, & the money afterwards misapplied by such co-exor., both are liable for the loss.

(2) C. knew that T., his co-exor., owed money to testator on an equitable mtge., allowed him to keep the title-deeds in his sole possession, taking no steps to compel payment, though he was very active in recovering a debt due to himself personally from T. T. deposited his title-deeds with another person as a security for fresh advances, & testator's debt was lost:—*Held*: C. was liable for the loss.

(3) Testator placed his securities in the custody of T., his confidential solr. By his will he appointed T. & C. his exors. T. made out a list of such securities, which he signed & retained in a box, but he gave the key to C. Afterwards T. sent the box to C., requesting him to take out a mtge. security & send it to him for the purposes of an intended transfer. C., having no reason to suspect T., complied, & the mtge. money was received by T. alone & misapplied by him:—*Held*: his co-exor., C., was not liable, it appearing from the evidence that the solr. had a second key of the box, & could & probably did, open the box himself.—*CANDLER v. TILLET* (1855), 22 Beav. 257; 4 W. R. 160; 52 E. R. 1106; *sub nom.* *CANDLER v. TILLET*, *CANDLER v. WADE*, *CANDLER v. WHEELTON*, *WADE v. CANDLER*, 25 L. J. Ch. 505.

Annotation:—As to (1) *Consd.* *Re Gasquoine*, *Gasquoine v. Gasquoine*, [1894] 1 Ch. 470.

SUB-SECT. 4.—JOINT ACTS.

A. In General.

7048. Taking out probate.—*HOVEY v. BLAKEMAN*, No. 7032, *ante*.

7049. Joinder in necessary acts of administration.—*HOVEY v. BLAKEMAN*, No. 7032, *ante*.

7050. ———.]—(1) A., an exor. & trustee, concurs with his co-exor., & co-trustee, B., in selling out public stock, part of their testator's property, & in conveying & surrendering testator's freehold, leasehold, & copyhold estate to purchasers, & they both subscribe the receipts in writing for the amount of the respective purchase-moneys, which were indorsed on the back of the purchase deeds; but B. alone received the moneys, & the produce of the stock:—*Held*: the acts in which A. had joined, with B., being indispensable & necessary for the administration of testator's estate, he was not liable for a *devastavit* thereof, committed by B.

(2) In a suit instituted by residuary legatees under a will, against A. & B., the exors., B. having become bkpt., & at the time of his bkpcy. being

largely indebted to testator's estate, the ordinary decree only was made at the hearing of the cause, no distinct case of malversation having been adduced against A., & the master, by his report, charged B. alone with the receipt of testator's estate. The ct., on further directions, on the application of pl'tfs., declined to direct an inquiry as to the balances of testator's estate retained in B.'s hands from time to time, for the purpose of enabling pl'tfs. to establish a case of liability against A. in respect of such balances.

(3) An exor. who proves a will may be wholly passive, or active, so far as it is necessary to enable his co-exor. to act in the administration of the estate, but the acts in which he joins must be necessary for the purpose of such administration.—*TERRELL v. MATTHEWS* (1841), 1 Mac. & G. 433, n.; 11 L. J. Ch. 31; 5 Jur. 1074; 41 E. R. 1333, L. C.

Annotation:—As to (2) *Reid*. *Peterson v. Peterson* (1867), 16 L. T. 377.

7051. ———.]—*Re GASQUOINE*, *GASQUOINE v. GASQUOINE*, No. 7040, *ante*.

B. Joinder in Sale of Property.

7052. Liability for assets received by co-executor.—Exors. who all join in a sale shall be all charged, though one only receives the money: *secus* of trustees.—*APLYN v. BREWER* (1701), Prec. Ch. 173; 24 E. R. 84.

Annotations:—*Reid*. *Sadler v. Hobbs* (1786), 2 Bro. C. C. 114; *Scurfield v. Howes* (1790), 3 Bro. C. C. 90.

7053. ———.]—Two trustees for sale of an estate join in a conveyance of it to a purchaser, & in a receipt for the consideration money; but each of them received only a moiety thereof. One of them afterwards becomes insolvent; the other shall not be answerable for what the insolvent trustee received.

Otherwise it is where exors. join in sales.—*FELLOWS v. OWEN* (1705), 2 Vern. 504, 515; Freem. Ch. 283, 286; 23 E. R. 922, 929; *sub nom.* *FELLOWS v. MITCHELL*, 1 P. Wms. 81.

Annotations:—*Apld.* *Murrell v. Cox & Pitt* (1706), 2 Vern. 570. *Reid*. *R. v. Artillery Ground, Tower Division & Bray* (1754), Park. 167; *Sadler v. Hobbs* (1786), 2 Bro. C. C. 114; *Scurfield v. Howes* (1790), 3 Bro. C. C. 90. *Mentd.* *Sibthorpe v. Moxholme* (1747), 1 Wils. 178; *Leeds v. Amherst* (1850), 20 Beav. 239.

7054. ———.]—No inquiry as to necessity for sale.—One exor. & trustee charged under the circumstances with a loss occasioned by joining in the sale of stock; the other having received all the money & absconded.

It is not enough to say it [the concurrence in the act] is legally necessary; but their purpose must be made out to be connected with the due execution of the trust. . . . Can it possibly be said that deft. did more than leave it to his co-exor. to do what he pleased with the property? (*LORD ELDON, C.*)—*CHAMBERS v. MINCHIN* (1802), 7 Ves. 186; 32 E. R. 76, L. C.

Annotations:—*Reid*. *Clough v. Bond* (1838), 8 L. J. Ch. 51; *Terrell v. Matthews* (1841), 1 Mac. & G. 436, n.; *Stiles v. Guy* (1849), 14 L. T. O. S. 305.

advances were made in good faith by way of loan to the managing exor., as such, & subsequently security was taken therefor from him on part of the assets of the estate, & the name of the lender appeared as a creditor in several annual balance sheets sent to the other exors., & no objection on their part was ever made:—*Held*: the securities would not be ordered to be delivered back to them, without payment of such advances.—*EWART v.*

GORDON (1867), 13 Gr. 40.—*CAN.*

PART VI. SECT. 5, SUB-SECT. 4.—A.

d. Management entrusted to two of the executors—*Liability of others.*—Where testator by his will committed the management of the property to his widow along with two out of the five exors. including the widow, it is not open to one of the exors., who was not

specifically entrusted with the management, to contend for the purpose of avoiding liability as exor. that his duties were purely advisory, that he was but one of many, that votes of the majority of the exors. governed, & that the real management was entrusted to two of the exors. in co-operation with the widow.—*LAKHIMCHAND v. JAI KUVARBAI* (1905), I. L. R. 29 Bom. 170.—*JND.*

Sect. 5.—For acts of co-representative: Sub-sect. 4, B. & C. Sect. 6: Sub-sect. 1.]

7055. ———.]—According to what rate shall an exor., who is also one of several residuary legatees, be charged with stock sold out by him & applied in payment of his own share of the residue, long before proportional payments are made to the other residuary legatees.—**HARRINGTON v. HARRINGTON** (1822), 1 L. J. O. S. Ch. 41.

7056. ——— Not devoted to purposes of administration.]—**WILLIAMS v. NIXON**, No. 7017, *ante*.

7057. ——— Purpose of sale—Paying debts—Money not required therefor.]—**SHIPBROOK (LORD) v. HINCHINBROOK (LORD)** (1805), 11 Ves. 252; 32 E. R. 1085.

*Annotations:—***Apld.** **Underwood v. Stevens** (1816), 1 Mer. 712. **Consd.** **Moses v. Levi** (1839), 3 Y. & C. Ex. 359. **Refd.** **Clough v. Bond** (1838), 3 My. & Cr. 490; **Terrell v. Matthews** (1841), 1 Mac. & G. 433, n.; **Stillos v. Guy** (1849), 1 Mac. & G. 422; *Re* **Gasquoine, Gasquoine v. Gasquoine**, [1894] 1 Ch. 470. **Mentd.** **Broadhurst v. Balguy** (1841), 1 Y. & C. Ch. Cas. 16; **Symonds v. Jenkins** (1876), 34 L. T. 277.

7058. ———.]—Exors. & trustees charged for negligence by joining in a transfer to a co-exor. upon his representation, that it was required for debts; but not liable so far as they can prove the application to that purpose; though he possessed other funds, not through them; which funds he wasted.—**SHIPBROOK (LORD) v. HINCHINBROOK (LORD)** (1810), 16 Ves. 477; 33 E. R. 1066, L. C.

*Annotations:—***Apld.** **Underwood v. Stevens** (1816), 1 Mer. 712. **Refd.** **Clough v. Bond** (1838), 3 My. & Cr. 490; **Terrell v. Matthews** (1841), 1 Mac. & G. 433, n.; *Re* **Gasquoine, Gasquoine v. Gasquoine**, [1894] 1 Ch. 470. **Mentd.** **Broadhurst v. Balguy** (1841), 1 Y. & C. Ch. Cas. 16.

7059. ———.]—One of two exors. & trustees, not having acted otherwise than by joining with his co-exor. & trustee in the sale of stock, under a representation that the sale was necessary for payment of debts, which it was not; the produce having been received by the latter, & the greater part applied by him to his own private purposes; held chargeable for the amount, except so far as any part was applied to the trust purposes; together with interest at 4 per cent.; notwithstanding the parties beneficially interested consented to & approved of the sale, under a similar misrepresentation.—**UNDERWOOD v. STEVENS** (1816), 1 Mer. 712; 35 E. R. 833.

*Annotations:—***Consd.** **Moses v. Levi** (1839), 3 Y. & C. Ex. 359. **Refd.** **Clough v. Bond** (1838), 3 My. & Cr. 490; **Terrell v. Matthews** (1841), 1 Mac. & G. 433, n.; *Re* **Gasquoine, Gasquoine v. Gasquoine**, [1894] 1 Ch. 470. **Mentd.** **Broadhurst v. Balguy** (1841), 1 Y. & C. Ch. Cas. 16.

7060. ——— Payment of legacies.]—**TERRILL v. MATTHEWS**, No. 7050, *ante*.

C. Joinder in giving Receipt for Money.

7061. Liability for money received by co-representative.]—**APLYN v. BREWER**, No. 7052, *ante*.

7062. ———.]—**FELLOWS v. OWEN**, No. 7053, *ante*.

7063. ———.]—If exors. join in receiving money, both are answerable. Otherwise where trustees

join.—**MURRELL v. COX & PITT** (1706), 2 Vern. 570; 23 E. R. 971; *affg.* (1705), 2 Vern. 570, n.

*Annotations:—***Refd.** **Fellows v. Mitchell** (1705), 1 P. Wms. 81; **Scurfield v. Howes** (1790), 3 Bro. C. C. 90.

7064. ———.]—If exors. sever in their receipts & disbursements, in such case they shall be only respectively answerable *pro tanto*; but if they act jointly, each of them shall answer the whole, if one becomes insolvent.—**DARWELL v. DARWELL** (1709), 2 Eq. Cas. Abr. 456, pl. 6; 22 E. R. 388, L. C.

7065. ——— To creditors—Not to legatees.]—Two exors. join in a receipt, & only one of them actually receives the money both chargeable to creditors, but not to legatees. Two trustees join in a receipt, & one receives the money; only the receiving trustee shall be charged.—**CHURCHILL v. HOBSON (LADY)** (1713), 1 P. Wms. 241; 1 Eq. Cas. Abr. 247, pl. 2; 1 Salk. 318; 24 E. R. 370, L. C.

*Annotations:—***Consd.** **Harden v. Parsons** (1758), 1 Eden, 145; **Westley v. Clarke** (1759), 1 Eden, 357; **Sadler v. Hobbs** (1786), 2 Bro. C. C. 114. **Dbtd.** **Scurfield v. Howes** (1790), 3 Bro. C. C. 90. **Refd.** **R. v. Artillery Ground Tower Division & Bray** (1754), Park. 167; **Crosse v. Smith** (1806), 3 Smith, K. B. 203; **Steen v. Mills** (1833), 2 L. J. K. B. 106.

7066. ———.]—Assignee of bkpt. employed a broker to sell a quantity of tobacco. The broker received the money, & at the end of ten days failed, before he paid it over. The assignee not bound to make it good.

If two exors. join in giving a discharge for money, they are both answerable, though one only actually received it. *Aliter* where trustees join.

If trustee appoints rents to be paid to a banker at that time in credit & the banker afterwards breaks, the trustee is not answerable (**LORD HARDWICKE, C.**).—**BELCHIER v. PARSONS** (1754), Amb. 218; 1 Keny. 38; 27 E. R. 144, L. C.

*Annotations:—***Refd.** **Scurfield v. Howes** (1790), 3 Bro. C. C. 90; **The Prima Vera** (1808), Edw. 23; **Raw v. Cutten** (1832), 9 Bing. 96; **Speight v. Gaunt** (1883), 9 App. Cas. 1; **Robinson v. Harkin**, [1896] 2 Ch. 415. **Mentd.** **Fry v. Tapson** (1884), 28 Ch. D. 268; **Magnus v. Queensland National Bank** (1887), 36 Ch. D. 25; **Colchester Union Grdns. v. Moy** (1893), 68 L. T. 564.

7067. ———.]—Three exors. join in a receipt for conformity, thinking it necessary, for money, part of the assets, paid to one of them, which he dissipated:—**Held**: the others were not liable.—**WESTLY v. CLARKE** (1759), 1 Dick. 329; 1 Eden, 357; 2 Keny. 541; 21 E. R. 295, L. C.

*Annotations:—***Consd.** **Sadler v. Hobbs** (1786), 2 Bro. C. C. 114; **Scurfield v. Howes** (1790), 3 Bro. C. C. 90; **Hovey v. Blakeman** (1799), 4 Ves. 596; **Chambers v. Minchin** (1802), 7 Ves. 186; **Crosse v. Smith** (1806), 7 East, 246.

7068. ——— Depends on whether representative is acting.]—**WALKER v. SYMONDS**, No. 6963, *ante*.

7069. Receipt given—Money not in fact received—Representative liable.]—Legacy to A. for life; remainder to B. & C., or in case one should die, living A., then to the survivor: B. & C. both die in the life of A. the legacy was vested, & went to the survivor. A trustee, joining in a receipt & reconveyance of a mortgaged estate, though he does not receive the money, is liable, & the receipt being in evidence, no inquiry can be directed as to the fact.—**SCURFIELD v. HOWES** (1790), 3 Bro. C. C. 90; 29 E. R. 425.

*Annotations:—***Mentd.** **Montford v. Cadogan** (1810), 17 Ves. 485; **White v. Baker** (1860), 2 De G. F. & J. 55;

PART VI. SECT. 5, SUB-SECT. 4.—C.

e. One executor only receiving money—Receipt given by both executors.]

—Where exors. are jointly charged, one only having received the money, & the other joined in the receipt, it is on the ground that the property is

under the control of both.—**DOYLE v. BLAKE** (1804), 2 Sch. & Lef. 231.—**IR.**

Maddison v. Chapman (1861), 1 John. & H. 470; *Re Hill to Chapman* (1885), 54 L. J. Ch. 595; *Re Pickworth, Snaith v. Parkinson*, [1899] 1 Ch. 642; *Re Poultney, Poultney v. Poultney*, [1912] 1 Ch. 245.

7070. ———.]—Testator having devised a real estate to his three exors. upon trust, to sell & apply the produce of the sale as part of his personalty, & having given to one of his exors. an option to purchase the estate at a certain price, the two other exors. conveyed it to him, & joined in a receipt for the purchase-money. The purchase-money was, in fact, not paid, & afterwards the third exor. became bkpt.:—*Held*: the two other exors. were answerable to the residuary legatee for the deficiency.—*GREGORY v. GREGORY* (1836), 2 Y. & C. Ex. 313; 6 L. J. Ex. Eq. 52; 160 E. R. 416.

SECT. 6.—ACCOUNTS.

SUB-SECT. 1.—DUTY TO KEEP ACCOUNTS.

7071. General rule.—*SHARPE v. SIMPSON* (1617), 1 Roll. Rep. 358; 81 E. R. 533.

7072. ———.]—The first duty of an agent, receiver, trustee, or exor., is to be constantly ready with his accounts, & neglect in this is a ground for charging him with interest.—*PEARSE v. GREEN* (1819), 1 Jac. & W. 135; 37 E. R. 327.

Annotations:—*Expld.* *Turner v. Burkinshaw* (1867), 2 Ch. App. 488. *Consd.* *Harsant v. Blaine, Macdonald* (1887), 56 L. J. Q. B. 511. *Refd.* *Springett v. Dashwood* (1860), 2 Giff. 521; *Re Whitehead, Ex p. Burnand's Exor.* (1860), 2 L. T. 776; *Fry v. Fry* (1864), 10 Jur. N. S. 983; *Blogg v. Johnson* (1867), 2 Ch. App. 225.

7073. ———.]—Exors. & devisees in trust to sell & pay legacies to testator's nephews & nieces in classes, & to distribute the residue also among testator's nephews & nieces, were empowered to postpone sale & conversion for five years, & ordered to pay the income to the persons entitled in the meantime. For five years before the bill was filed they held the estate in their hands, without suggesting any difficulties as to the ascertainment of the classes of legatees, kept no accounts, paid only a small part of the legacies, & to the residuary legatees neither principal nor interest, gave no information, & when applied to for accounts, sent no reply. Although illiterate men, & the estate large, they were ordered to pay the costs of the suit for administration, with the exception of costs of proving the pedigree.

It is said, on behalf of these exors., that they are illiterate men, & that they cannot keep accounts. If a testator appoints a person to discharge the duties of an exor., inasmuch as he is sworn to discharge his duties as exor., his first duty plainly is, if he cannot keep accounts, to provide some one who can; because in this ct. the first & primary duty of every exor. or trustee having money in his hands to be received & to be paid is, that an account should be kept to be produced to those interested in the account when it is properly demanded (*STUART, V.-C.*).—*WROE v. SEED* (1863),

4 Giff. 425; 9 L. T. 254; 9 Jur. N. S. 1122; 60 E. R. 773.

7074. Direction by testator—Absolving executor from accounting as to residue—Effect.—Testator gave several legacies & devised that the residue should be divided amongst several of his kindred by name, sixteen in all, in several proportions set down by him; but devised that the quantity of the residuary estate should be as his exor. voluntarily & without being thereto compelled by law should declare. The exor. declared what the sum of the residue was, & accordingly paid fifteen of those legatees, but the sixteenth exhibited a bill to discover the estate, supposing it more. Plea disallowed.

We must take heed that we make not such examples, under which, if men will be dishonest, they may shelter their dishonest dealings; & if the exor. would make no declaration, this ct. will have an account made (*LORD NOTTINGHAM*).—*GIBBONS v. DAWLEY* (1674), 2 Cas. in Ch. 198; 22 E. R. 909.

7075. Accounts must be kept distinct—From other accounts.—*FREEMAN v. FAIRLIE*, No. 7308, *post*.

7076. Position of infant executor.—If letters of administration be granted to an infant, under which he receives & disposes of assets of intestate, an account cannot be directed in respect of his receipts during his infancy.—*HINDMARSH v. SOUTHGATE* (1827), 3 Russ. 324; 38 E. R. 597, L. C.; *varying* (1822), 1 L. J. O. S. Ch. 24.

Annotation:—*Consd.* *Stott v. Meanock* (1862), 31 L. J. Ch. 746.

7077. ———.]—(1) The chief clerk in his certificate stated certain facts, but reserved the point to which they referred for the consideration of the ct.:—*Held*: the evidence used in chambers was admissible before the ct., who would consider it as the chief clerk himself had done.

(2) An exor., an infant, who never proved the will, received during his infancy assets of testator & paid them to the tenant for life, by whom they were lost:—*Held*: by reason of his infancy at the time of the receipt, he was under no liability to account for them.—*STOTT v. MEANOCK* (1862), 31 L. J. Ch. 746; 6 L. T. 592; 10 W. R. 605, L. JJ.

See, generally, INFANTS.

7078. Executor who has acted—But not proved the will.—An exor. & trustee, who had acted but not proved, refused, & insisted that he was not bound, to account, & he placed every impediment in pltf.'s way. Having failed in his contention, the ct. on making a decree for an account, directed him to pay the costs of suit to the hearing.—*BOYNTON v. RICHARDSON* (1862), 31 Beav. 340; 54 E. R. 1170.

7079. Executor illiterate—& incapable of keeping account.—*WROE v. SEED*, No. 7073, *ante*.

Accounts of mortgagees.—*See MORTGAGE.*

Accounts by trustees.—*See TRUSTS & TRUSTEES.*

PART VI. SECT. 6, SUB-SECT. 1.

7076 i. Position of infant executor.—In a suit for the partition of the real estate of an intestate, who was one of the exors. of his father's will, & who died a minor, it was claimed on behalf of infant legatees, who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such exor.:—*Held*: the exor. having been a minor, his estate was not liable to account

therefor.—*NASH v. MCKAY* (1868), 15 Gr. 447.—*CAN.*

i. Failure to keep proper accounts—Liability of executor for costs of proceedings.—In consequence of the unsatisfactory manner in which the accounts of the estate had been kept by the exor., which necessitated proceedings before the ct., the exor. was ordered to pay the taxed costs of petitioner or pltf. out of his private—*PARKER v. SIMMS* (1864), 5

Nad. L. R. 37.—*NFLD.*

g. Failure to file accounts—Penalty—When enforceable.—Under the rules of 1844 & 1863 the penalty upon an exor. for failing to file accounts, mentioned in the rules of 1844, was enforceable only where the judge, at the instance of some beneficiary, had fixed a time within which the exor. was to pass his accounts.—*ECOLLES v. MILLS* (1895), 14 N. Z. L. R. 143,—*N.Z.*

Sect. 6.—Accounts: Sub-sect. 2, A. & B. (a) & (b).]**SUB-SECT. 2.—WHAT ACCOUNTS MAY BE ORDERED.****A. Ordinary Account.**

7080. When appropriate—General rule.]—PARTINGTON v. REYNOLDS, No. 7182, post.

7081. —.]—Re WRIGHTSON, WRIGHTSON v. COOKE, No. 7088, post.

7082. Whether ordered—Where cross action pending—For account on footing of wilful default.]—Motion by pltf., who was trustee under a will, & had filed a bill for the administration of the estate, for the master to take the accounts, refused; some of defts. having suggested upon their answers, that pltf. ought to be charged with wilful default, & having since filed a cross bill seeking so to charge him.—WALLIS v. SAREL (1844), 3 L. T. O. S. 374; 8 Jur. 640.

7083. —.]—Where a suit commenced by will was instituted by an exor. for administration, against his co-exor., & the bill alleged wilful default, & sought consequent relief, & the latter subsequently commenced a second suit by an administration summons:—Held: the ct. would order the ordinary administration accounts to be taken, without waiting until the suit commenced by bill could be brought to a hearing.—PIFFARD v. VANRENEN, VANRENEN v. PIFFARD (1865), 5 New Rep. 399; 11 L. T. 766; 13 W. R. 425.

7084. — Representative out of jurisdiction.]—Where the administrator of a foreigner who died intestate in England went beyond the jurisdiction, & an administrator & *ad litem* of the intestate's estate was subsequently appointed under Probate Act, 1857 (c. 77), s. 74, the ct., in a suit instituted by the liquidator of a French assocn. on behalf of himself & other creditors of the intestate, made a decree for an account of the personal estate in England, the appointment of a receiver, etc., but gave no direction with respect to the administrator.—COLLAS v. HESSE (1864), 10 L. T. 221; 12 W. R. 565.

7085. Accounts under R. S. C., Ord. 15, r. 1—In administration action—Discretion of court.]—An action was brought in 1884 for the administration of the estate of a testator, who died in 1872, by an incumbrancer on three of the four shares of the residue, against the surviving trustee & the extrix. of a deceased trustee. The writ claimed only ordinary administration, but by the statement of claim various breaches of trust were alleged against the trustees, particularly deceased trustee, whose estate was then under administration by the ct. Pltf. applied under above rule

for an order for the ordinary administration accounts & inquiries, & special inquiries pointing to the alleged breaches of trust:—*Held*: the application should be refused; having regard to the relief claimed by the writ, only the usual administration accounts & inquiries could be obtained under the rule; & as the substantial question at issue appeared to relate to the alleged breaches of trust, which would have to be determined at the hearing, the usual accounts & inquiries might be unnecessary, & the ct., in the exercise of its discretion under R. S. C., Ord. 55, r. 10, ought to decline to order even the usual accounts at that stage of the action.—*Re GYHON, ALLEN v. TAYLOR* (1885), 29 Ch. D. 834; 54 L. J. Ch. 945; 53 L. T. 539; 33 W. R. 620, C. A.

B. Account on Footing of Wilful Default.

7086. Nature of account—Contrast to common account.]—PARTINGTON v. REYNOLDS, No. 7182, post.

7087. — For purposes of R. S. C., Ord. 3, r. 8.]—Re BOWEN, BENNETT v. BOWEN, No. 7089, post.

7088. — Wilful default distinguished from breach of trust.]—(1) In an administration action charging trustees with active breach of trust, but not with wilful default, where the common-form administration order is taken directing the usual accounts & inquiries only, it is not competent to pltf. to charge the trustees with breaches of trust committed before the issue of the writ or the judgment, but not alleged in the pleadings or proved at the trial, either for the purpose of obtaining relief against them as having committed breaches of trust, or for the purpose of removing the trustees.

(2) In regard to an active breach of trust, as distinguished from wilful default, a pltf. is not entitled to relief at the trial except in regard to what has been alleged in the pleadings & is proved at the trial, nor is he entitled to have inquiries directed with a view to ascertaining whether or not other breaches of trust have been committed than those alleged & proved. But in cases where wilful default is alleged & one instance is proved, pltf. is entitled to an inquiry on the footing of wilful default directed to ascertain whether there are any other instances besides the one which has been proved.

It is well known that in a case of wilful default, if wilful default is pleaded, & if a case is established, then the accounts are directed on that footing. But why is that? It is because there are two

PART VI. SECT. 6, SUB-SECT. 2.—A.

7080 i. When appropriate—General rule.]—Where an exor. or administrator applies for an order to administer the estate of a testator or intestate, an account will be directed to be taken of what he has received, or of what, but for his wilful default, he might have received.—LEDGERWOOD v. LEDGERWOOD (1859), 7 Gr. 584.—CAN.

h. Under administration decree—Amounts for which executors chargeable.]—Testator devised his farm to minor & directed that no timber be cut for the use of the farm. It was the duty of the executors to prevent the extrix. from cutting the timber for other purposes.

Under the ordinary administration decree the master may take an account of timber cut with which defts. are chargeable.—*STEWART v. FLETCHER* (1871), 18 Gr. 21.—CAN.

k. Farm stock & implements.]—Testator gave legacies payable in eight & thirteen years, & devised lots to his sons R. & D., subject to charges, the devisees to get possession thereof when his youngest child attained twenty-one. At that time D. & R. were to get one-half of the stock & implements which would then be on the lots, the other half to be divided amongst other legatees. The youngest child had not yet attained twenty-one. An account was directed to be brought

in of the proceeds of the old stock left thereon by testator, & also those subsequently produced from the produce of the lots; & also an account of the stock or implements left by testator which still remained on the land.—*DAVIDSON v. OLIVER* (1882), 29 Gr. 433.—CAN.

l. Fit & reasonable accounts—Strict accounts impossible.]—Where it is not possible to furnish accounts according to the strict course owing to the parties who kept the accounts having done so for their own purpose, & not anticipating an adverse claim, such accounts will be directed as are fit & reasonable.—*Re FLANAGAN, FLANAGAN v. FLANAGAN* (1915), 49 L. L. T. 95.—IR.

perfectly distinct classes of accounts which are directed in cases of this kind, one is the common account, & the other is the account on the footing of wilful default (WARRINGTON, J.).—*Re WRIGHTSON, WRIGHTSON v. COOKE*, [1908] 1 Ch. 789; 77 L. J. Ch. 422; 98 L. T. 799.

7089. Power to order—Under R. S. C., Ord. 15, r. 1.]—(1) A claim against an exor. for an account on the footing of wilful default is not a "case of ordinary account" within R. S. C., Ord. 3, r. 8, & consequently a summary order for such an account cannot be made under Ord. 15, r. 1.

(2) By Ord. 35, rr. 1a, 4, a district registrar has power to make an order for an account under Ord. 15, r. 1, & if the order so directs (but not otherwise) he can then proceed to take the account himself.

(3) In making a report to the ct. under Jud. Act, 1873 (c. 66), s. 66, of the result of an account in an administration action, the district registrar ought to adopt the form of a chief clerk's certificate, & to state in the report the persons who were present before him, & the materials upon which he proceeded.—*Re BOWEN, BENNETT v. BOWEN* (1882), 20 Ch. D. 538; 51 L. J. Ch. 825; 47 L. T. 111.

(b) *When Ordered.*

7090. General rule.]—(1) In an administration suit the pleadings raised questions of wilful default, & liability to pay interest on balances in hand against exors.; but the decree taken at the original hearing neither contained any declaration against the exors., nor any inquiries as to wilful default, but was merely a decree for the common account of what had been received:—*Held*: the ct. could not, on further directions, make any decree for wilful default; but the question of interest on balances in hand was still open.

(2) General principle on which the ct. proceeds in making declarations in directing inquiries as to wilful default, & interest on balances in the hands of exors. or trustees.

The rule on this subject is this: if the pleadings do not raise the point, it cannot be raised either at the original hearing or on further directions, but if pltf.'s pleadings do, as in this case, raise the point whether deft.'s are liable for wilful default, it is the duty of pltf., if he can make a case for it, to get a declaration by the decree, or if he cannot make a sufficient case for an immediate decree, to get an inquiry of such a character, that on the result of it, the ct. may on further directions make a declaration (*per CUR.*).

(3) The balances remaining in the hands of the exors. were very small. Testatrix died in 1823. Pltf. became a bkpt. in 1829; & in 1834 procured his assignees to reassign all his interest to him. Neither he nor his assignees up to that time had made any application for payment. In 1835 pltf. filed his bill for an account, & allowed it to be dismissed for want of prosecution in 1840; in 1842 he filed the present bill, & asked for interest on balances:—*Held*: he was not entitled to it.

Defts. insist that applying the rule to which I have referred pltf. cannot claim interest on balances because there was no declaration or inquiry as to balances at the hearing. But

correctly applying the rule, pltf. has a right to raise the question. It is true there was no declaration at the hearing, but there was that which is the first step towards such a declaration—a direction to take the common account of what had been received. The direction to take an account, if properly answered by the master, ought to show what personal estate has been received from time to time, & the state of the receipts & of the payments should be shown upon the schedule, & then, on that report with the schedule, the ct. may hear it argued whether there are any balances, in respect of which the ct. may either make an immediate declaration or direct further inquiry (*per CUR.*).—*JONES v. MORRALL* (1852), 2 Sim. N. S. 241; 21 L. J. Ch. 630; 20 L. T. O. S. 30; 61 E. R. 333.

Annotation:—*As to (2) & (3) Consd. Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

7091. Whether after order for common account.]

—A creditor who makes out a *prima facie* case of misconduct in trustees is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor & conducted without collusion, a common decree for an account has been previously made against them.—*SHEPHERD v. TOWGOOD* (1823), Turn. & R. 379; 37 E. R. 1147.

Annotation:—*Folld. Berrow v. Morris* (1847), 10 Beav. 437.

7092. —.]—A case was alleged on the pleading to charge exors. for what they might, but for their wilful default, etc., have received; at the hearing the common accounts only were directed against them: the case coming on for further directions, on the master's report:—*Held*: the exors. could not be charged as for their wilful default, etc., & no inquiry could then be directed on the subject, although the master's report laid a foundation for such an inquiry.—*GARLAND v. LITTLEWOOD* (1839), 1 Beav. 527; 8 L. J. Ch. 369; 48 E. R. 1045.

Annotations:—*Refd. Terrell v. Matthews* (1841), 11 L. J. Ch. 31; *Brooker v. Brooker, Re Brooker's Estate* (1857), 26 L. J. Ch. 411.

7093. —.]—*JONES v. MORRALL*, No. 7090, *ante*.

7094. — As supplementary to previous order—Upon summons in chambers.]—*PARTINGTON v. REYNOLDS*, No. 7182, *post*.

7095. — Facts subsequently disclosed.]—After a decree on an administration summons the ct. will in a proper case make an order for a receiver & injunction to protect the property. Under the improved jurisdiction the judge in chambers may add to the decree a direction & inquiry so as to charge deft. as for wilful neglect & default, if during the prosecution of the usual decree to account facts appear which make such an inquiry & direction necessary for the purpose of justice.—*Re BROOKER'S ESTATE, BROOKER v. BROOKER* (1857), 3 Sm. & G. 475; 26 L. J. Ch. 411; 28 L. T. O. S. 354; 3 Jur. N. S. 381; 5 W. R. 382; 65 E. R. 743.

7096. — On taking accounts.]—I think the ct. has gone as far as this, that although the pleadings do not contain a charge [of wilful default], yet if some facts in taking the accounts emerge

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for the first time which show that the exors. have committed wilful default, the ct. will, without putting the parties to the expense of a supplemental action, give leave for an inquiry on that footing to be made, which of course is in the nature of supplemental relief, because of new facts having been discovered since the decree was made (KAY, J.).—EDMONDS v. ROBINSON (1885), 29 Ch. D. 170; 52 L. T. 339; 33 W. R. 471; *sub nom.* EDMUNDS v. ROBINSON, 54 L. J. Ch. 586.

7097. — Relief previously claimed for wilful default—But not dismissed—On order for common account.]—When the statement of claim in an administration action against an exor. alleges that he has committed wilful default, but the judgment at the trial gives no relief on that footing (the claim to such relief not being, however, dismissed), the ct. can at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts & inquiries to be taken & made on that footing.—*Re* SYMONS, LUKE v. TONKIN (1882), 21 Ch. D. 757; 52 L. J. Ch. 709; 46 L. T. 684; 30 W. R. 874.

Annotations:—*Consd.* Edmonds v. Robinson (1885), 29 Ch. D. 170. *Refd.* *Re* Barclay Barclay v. Andrew, [1899] 1 Ch. 674; *Re* Wrightson, Wrightson v. Cooke, [1908] 1 Ch. 789.

7098. At any time during action—Whether proper.]—JOB v. JOB, No. 6924, *ante*.

7099. — Necessity for amendment before order.]—I will here say a word upon the case of *Job v. Job*, No. 6924, *ante*, which was recently before me, & which has led to some misapprehension. I there said that in an administration action, an order charging an exor. with wilful default may be made at any time during the progress of the action. Now an order charging an exor. with wilful default could not be made unless he was so charged in the pleadings, therefore the charge, unless originally pleaded, must be introduced by amendment, that is, of course, by amendment at any stage of the action at which amendments may be made, that is, before judgment. The general rule is that in every case an order charging wilful default must be based upon a charge of wilful default in the pleadings (JESSEL, M.R.).—MAYER v. MURRAY (1878), 8 Ch. D. 424; 47 L. J. Ch. 605; 26 W. R. 690.

Annotations:—*Consd.* Barber v. Mackrell (1879), 12 Ch. D. 534. *Expld.* *Re* Symons, Luke v. Tonkin (1882), 21 Ch. D. 757. *Refd.* *Re* Wrightson, Wrightson v. Cooke, [1908] 1 Ch. 789.

7100. —.]—In an action for ordinary administration it is competent for the ct. to allow a case of wilful default, though not stated in the pleadings, to be raised at any time during the action, but allegations of fraud & wilful default ought not generally to be adjourned, but should be disposed of at the hearing.—*Re* ARMITAGE, SMITH v. ARMITAGE (1883), 24 Ch. D. 727; 52 L. J. Ch. 711; 49 L. T. 236; 32 W. R. 88.

Annotations:—*Refd.* *Re* Stevens, Cooke v. Stevens, [1898] 1 Ch. 162; *Re* Barclay, Barclay v. Andrew, [1899] 1 Ch. 674; *Re* Wrightson, Wrightson v. Cooke, [1908] 1 Ch. 789.

7101. Necessity for leave of court—To action on footing of wilful default—After common account

condoned. An account could not be directed to be taken on the footing of a wilful default.—ELLIOTT v. COLTER (1919), 45 O. L. R. 361; 16 O. W. N. 115.—CAN,

PART VI. SECT. 6, SUB-SECT. 2.—B. (c).

7105 i. Necessity for specific allegation—& proof of one instance of wilful default.]—To justify a decree with

ordered.]—Residuary legatees filed a bill against the exor., charging him with wilful default, for which some grounds appeared by his answer. No evidence was entered into, & the common accounts were directed. The widow, who was a deft., & was interested in the estate, afterwards filed a supplemental bill, without leave, to charge the exor. with wilful default:—*Held*: the proceeding was regular, & a decree was made, supplemental to the former proceedings.—BERROW v. MORRIS (1847), 10 Beav. 437; 16 L. J. Ch. 506; 10 L. T. O. S. 281; 11 Jur. 790; 50 E. R. 650.

7102. — — —.]—Where a pltf. has obtained a common administration judgment against a deft., he cannot maintain a subsequent action against the same deft. charging him with wilful default in the administration of the same estate, unless he has obtained the leave of the ct. to bring such action. The practice in this respect has not been altered or varied by Jud. Acts or the Rules thereunder.—LAMING v. GEE (1878), 10 Ch. D. 715; 48 L. J. Ch. 196; 40 L. T. 33; 27 W. R. 227.

Annotations:—*Consd.* Edmonds v. Robinson (1885), 29 Ch. D. 170. *Mentd.* *Re* Wrightson, Wrightson v. Cooke, [1908] 1 Ch. 789.

7103. — — —.]—A pltf. who has obtained a common order for administration of an estate against the exor. may obtain the leave of the ct. to bring a fresh action charging wilful default against the exor. without proving that he did not acquire the information on which he founds his fresh action in time to utilise it in the former proceeding in which he obtained the common order for administration, proof of which was required in *Laming v. Gee*, No. 7102, *ante*, on pltf., who was an undischarged bkpt., giving security to the satisfaction of the master for the exor.'s costs of the fresh action.—*Re* KURTZ, EMERSON v. HENDERSON (1904), 90 L. T. 12.

7104. Grounds for making order—Improper expenditure by executor—Whether sufficient.]—Proof of improper expenditure of money by exors. will not support a decree against them for an account on the footing of wilful neglect or default.

A bill by residuary legatees prayed an account against defts., the exors., on the footing of wilful neglect & default, but made no case of misconduct against them, except that they had improperly defended an action in which they had failed, & the costs of which they claimed to retain out of the estate. The ct., at the hearing, although of opinion that the action ought not to have been defended, gave defts. their costs of the depositions which had been taken relative to that subject, on the ground that, having no connection with a case of wilful neglect & default, it was not a proper matter to be put in issue at that stage of the suit.—SMITH v. CHAMBERS (1847), 2 Ph. 221; 41 E. R. 926; *sub nom.* CHAMBERS v. SMITH, 16 L. J. Ch. 291; 9 L. T. O. S. 33; 11 Jur. 359, L. C.

What must be proved.]—See Sub-sect. 2, B. (c) *post*.

(c) Pleading.

7105. Necessity for specific allegation—& proof of one instance of wilful default.]—LORD ELDON often said that, as a general rule, in order to obtain

wilful default against an exor., some act of wilful default in not getting in assets must be alleged & proved.—HARTIGAN v. O'SHANASSY (1872), V. R. 42.—AUS,

an inquiry as to wilful default against an exor., you must allege a case for such an inquiry—must pray for it, & prove one act at least of wilful default, & that, doing so, you may have a general decree as to wilful default. That is the course of the ct. (KNIGHT-BRUCE, L.J.).—*COOPE v. CARTER* (1852), 2 De G. M. & G. 292; 21 L. J. Ch. 570; 19 L. T. O. S. 119; 42 E. R. 884, L. J.J.

Annotations:—*Consd. Sleight v. Lawson* (1857), 3 K. & J. 292. *Reid. Massey v. Massey* (1862), 2 John. & H. 728. *Mentd. Bright v. Legerton* (1861), 2 De G. F. & J. 606.

7106. ———.]—LORD ELDON'S rule that, in order to obtain an inquiry as to wilful neglect & default against an exor. or a trustee, pltf. must allege & prove at least one act of wilful neglect or default is still the rule of this ct., & was not intended to be relaxed by *Coope v. Carter*, No. 7105, *ante*.

Shortly after testator's death in 1825, an inventory & appraisal was made by his exors., or one of them, of all & singular the goods & chattels, rights & credits of testator, showing that the same were of the value if £28,665, odd. Upon bill filed in 1856, for an account, & for an inquiry as to wilful neglect & default, in case the estimated amount had not been realised, defts. failed, as to a large portion of the estimated amount, to show that it had been realised:—*Held*: pltf. was not entitled, at the hearing, either to an inquiry, expressly directed to wilful neglect or default, or even to a preliminary order of the kind indicated in *Coope v. Carter*, No. 7105, *ante*, viz., an inquiry short of wilful neglect & default, but upon which a new order, expressly so directed, might be founded at a future stage; the ct. being of opinion, that, upon the pleadings, the fact of wilful neglect & default could not be treated as in issue between the parties; & that, even if it could be so treated, there was no evidence upon it.—*SLEIGHT v. LAWSON* (1857), 3 K. & J. 292; 26 L. J. Ch. 553; 29 L. T. O. S. 379; 5 W. R. 589; 69 E. R. 1119.

Annotation:—*Apld. Massey v. Massey* (1862), 2 John. & H. 728.

7107. ———.]—*PARTINGTON v. REYNOLDS*, No. 7182, *post*.

7108. ———.]—In order to obtain an inquiry, with a view to a decree for wilful default at a future stage of the suit, pltf. must rest upon one or more specific charges. The observations in *Coope v. Carter*, No. 7105, *ante*, were not meant to let in general allegations of default, but to meet the case of specific allegations imperfectly proved at the hearing.

Where a widow & extrix., who was empowered by will to carry on testator's trade, did so for a short time, & her co-exors., in answer to an allegation that the book debts had not been got in, stated that the widow had got in some, that they believed the rest were bad, but that they had taken no steps themselves to recover any:—*Held*: a sufficient case was not made to justify any inquiry as to wilful default.—*MASSEY v. MASSEY* (1862), 2 John. & H. 728; 1 New Rep. 15; 32 L. J. Ch. 13; 7 L. T. 311; 11 W. R. 19; 70 E. R. 1252.

7109. ———.]—The rule still remains, that an account against exors. on the footing of wilful

neglect & default, will not be ordered without evidence of at least one instance of wilful default.—*Re YOUNGS, DOGGERT v. REVETT, Re YOUNGS, VOLLM v. REVETT* (1885), 30 Ch. D. 421; 53 L. T. 682; 33 W. R. 880, C. A.

Annotation:—*Mentd. The Millwall*, [1905] P. 155.

7110. ———.]—*Re WRIGHTSON, WRIGHTSON v. COOKE*, No. 7088,

7111. ———.]—Certain shares, held by testator as mtgee., were proved to have been transferred after testator's death, but they were not accounted for by the exors., & it was certain that the surviving trustee had not received anything in respect of them. The ct., in an administration suit, refused to make the shares an item in the account, as a charge of wilful default could not be introduced into it.—*SHUTTLEWORTH v. BRISTO* (1863), 9 L. T. 317; 12 W. R. 40.

7112. General allegation of breaches of trust—*Whether pleadable*.]—A legatee of leaseholds claiming an account on the footing of wilful default from the exors., by his statement of claim stated that defts. had in various ways misapplied part of the rents of the leaseholds, & thereby injured pltf. & committed breaches of trust, & went on to state one particular breach of trust:—*Held*: the general allegation of breaches of trust ought to be struck out, unless pltf. furnished particulars within a week.—*Re ANSTICE, ANSTICE v. HIBBELL* (1885), 54 L. J. Ch. 1104; 52 L. T. 572; 33 W. R. 557.

SUB-SECT. 3.—ENFORCEMENT OF LIABILITY.

A. By Whom E

7113. *Whether by co-representative*.]—*APRIZ v. FLOWER* (1661), 1 Sid. 33; 82 E. R. 953.

7114. ———.]—*Semble*: a bill filed by one exor. in his own name, & that of an infant *cestui que trust*, against another exor., praying accounts against deft., but not against himself, nor offering to pay into ct., what he held of testator's assets, is not a proper form of suit.—*ASHLEY v. ALLDEN, JONES v. ASHLEY* (1852), 20 L. T. O. S. 14; 16 Jur. 460.

7115. *Beneficiary*.]—When a person is co-exor. & debtor, the money is assets in his hands, & therefore, unless there is something special in the case, they cannot bring a bill to compel him to pay the money to them; but the proper bill had been to have an account, & it should have been brought by those entitled under the will (LORD HARDWICKE, C.).—*LUCAS v. SEALE* (1738), *West temp. Hard.* 556; 25 E. R. 1083, L. C.; *subsequent proceedings* (1740), 2 Atk. 56, L. C.

7116. ——— *Legatee*.]—An inventory & account may be demanded of an exor. by a residuary legatee who has given a release.—*KENNY v. JACKSON* (1827), 1 Hag. Ecc. 105; 162 E. R. 523. *Annotation*:—*Follid. Acaster v. Anderson* (1848), 13 Jur. 44.

7117. ——— *Misconduct need not be shown*.]—Residuary legatees may sustain a bill for an account against the exor. & the surviving partner

PART VI. SECT. 6, SUB-SECT. 3.—A.

71161. *Beneficiary — Legatee*.]—Legatees applied for an administration order, upon the ground that extrix. who for several years before the death of

testator had managed his business affairs, had refused to account for her dealings with his moneys:—*Held*: the legatees were entitled to the usual administration order, under which the master could make all the necessary

inquiries.—*Re BAGWELL, ANDERSON v. HENDERSON* (1896), 17 P. R. 100.—CAN.

o. ——— *Residuary legatee*.]—A residuary legatee is entitled to such an

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sect. 4, A.]**

of testator, though collusion between the exor. & the surviving partner is neither charged nor proved.—**BOWSHER v. WATKINS** (1830), 1 Russ. & M. 277; 39 E. R. 107.

Annotations:—**Expld.** *Davies v. Davies* (1837), 2 Keen, 534. The decision was far from establishing the general proposition that in every case a bill might be filed against an exor. & surviving partner of testator without charging & proving fraud or collusion (**LORD LANGDALE, M.R.**). **Consd.** *Yeatman v. Yeatman* (1877), 7 Ch. D. 210. **Refd.** *Holland v. Prior* (1834), Coop. temp. Brough. 426; *Cropper v. Knapman* (1836), 2 Y. & C. Ex. 338; *Ambler v. Lindsay* (1876), 35 L. T. 93; *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198. **Mentd.** *Bolton v. Powell, Howard v. Earle* (1851), 16 Jur. 24; *Brett v. Beckwith* (1856), 26 L. J. Ch. 130.

7118. ———.]—A legatee has a clear right to have a satisfactory explanation of the state of testator's assets, & an inspection of the accounts, but he is not entitled to a copy thereof, at the expense of the estate.—**OTTLEY v. GILBY** (1845), 8 Beav. 602; 14 L. J. Ch. 177; 4 L. T. O. S. 411; 50 E. R. 237.

Annotation:—**Refd.** *Springett v. Dashwood* (1860), 3 L. T. 542.

7119. ———.]—**KIRKMAN v. BOOTH**, No. 5978, *ante*.

7120. ——— Residing out of jurisdiction.]—The attorney, to whom administration had been granted on behalf of the relict of a deceased, being cited at the instance of the relict residing abroad to exhibit an inventory & account, appeared under protest, alleging that the ct. has not jurisdiction to require an account between a principal & agent:—**Held**: the attorney was bound to comply with the citation.—**BAILEY v. BRISTOWE** (1850), 2 Rob. Eccl. 145; 7 Notes of Cases, 386; 15 L. T. O. S. 71; 14 Jur. 298; 163 E. R. 1272.

7121. Next friend of infant—If not guilty of misconduct.]—A testator by his will expressly excluded his wife from the guardianship of his children, & directed that, if she should obtain possession of them, the provision he had made for their maintenance should cease; & he appointed his exors. to be their guardians. After testator's death his widow, as the answer alleged, forcibly removed one of the daughters from a school at which her father had placed her in his lifetime, & took the child abroad. She then filed a bill, as next friend of the children, against the exors., for an account of testator's estate. The ct. directed the account to be taken, but referred it to the master to inquire into the alleged misconduct of the mother, & ordered all proceedings under the decree to be stayed till the report was made.—**ARNOTT v. BLEASDALE** (1831), 4 Sim. 387; 58 E. R. 145.

7122. Person interested in the estate.]—On motion by a deft., interested in the estate of testator in the cause, to add to the decree a

direction to take the common accounts of the estate:—**Held**: deft. had a right to have those accounts taken, & the accounts having been furnished to him by the exor. since the notice of motion was given, & he expressing himself satisfied with them, no order was made on the motion, but the costs of it were ordered to be costs in the cause.—**MURGATROYD v. CALDWELL** (1864), 10 L. T. 410.

7123. Creditor — Whether before claim established.]—A decree may be obtained in a creditor's suit, for a reference to the Master to take the usual accounts of the personal estate & of the debts of an intestate, without entering into evidence to prove pltf.'s debts; notwithstanding the bill may pray a sale of the intestate's real estate, & the heir-at-law of the intestate may be an infant, the form of the decree being, that pltf. shall be at liberty to exhibit an interrogatory to prove his debt.—**AYLES v. COX** (1842), 11 L. J. Ch. 408.

7124. ———.]—The ct. will not give discovery where it would be oppressive & vexatious, & of no use to the person asking for it; but each case must depend on its particular circumstances, & having regard to the status of an exor., there can seldom be a case in which he will be protected from a discovery of his accounts.

A bill was filed against an exor. to establish a lien on testator's estate for administration & an account, & the usual interrogatories as to accounts were administered. The exor. submitted that he ought not to answer as to the accounts till the lien was established:—**Held**: he must answer at once, but he need not go into minute details, & a fair general account would be sufficient.—**THOMPSON v. DUNN** (1870), 5 Ch. App. 573; 18 W. R. 854, L. C. & L. J.

Annotations:—**Consd.** *Re Sutcliffe, Alison v. Alison* (1881), 50 L. J. Ch. 574. **Mentd.** *Newry v. Kilmorey* (1870), 24 L. T. 15; *Elmer v. Creasy* (1873), 42 L. J. Ch. 807.

B. Effect of Lapse of Time.

See, generally, LIMITATION OF ACTIONS.

7125. Remedy barred—After twenty years from death.]—A father, administrator *durante minore ætate* of his daughter, who was extrix. & residuary legatee of her grandmother's estate, agreed, when she married pltf., that he should have £800, which in the settlement was called a portion. The ct. refused to decree an account of the grandmother's personal estate, as she had been dead twenty years, but directed the father's representative should account for his personal estate as to the £800 only, & interest at 4 per cent. from the marriage.—**WOOD v. BRIANT** (1742), 2 Atk. 521; 20 E. R. 713, L. C.

Annotations:—**Mentd.** *Chave v. Farrant* (1810), 18 Ves. 8; *Plunkett v. Lewis* (1844), 3 Hare, 316.

7126. ——— If Statute of Limitations pleaded.]—An administrator cannot resist a creditor's bill

account as is necessary for the purpose of ascertaining what the residuary share is, to which he became entitled under the will.—**KHETRAMANI DASER v. DHIRENDRA NATH ROY** (1913), 1 L. R. 41 Cal. 271.—**IND.**

p. ——— Daughter of testator — Son acting as executor under family arrangement.]—The eldest son of a farmer, in virtue of a family arrangement, obtained himself confirmed as exor. & entered upon the management of the movable estate. In an action of count & reckoning at the instance of

a sister, who denied that she was a party to the arrangement, but did not object to it till her mother's death, twenty years after its date:—**Held**: the heir was not bound to account with her, on the footing that collation had taken place.—**MITCHELL v. MITCHELL** (1852), 14 Dunl. (Ct. of Sess.) 318; 24 Sc. Jur. 150; 1 Stuart, 246.—**SCOT.**

q. Executor who has not proved.]—Testator appointed his wife, his son, & two other persons of whom appct. was one, to be his exors., his wife & son being named as managing exors.

The two latter applied for probate. Appct. called upon the managing exors. for an inventory & account of the deceased's estate. Appct. had no beneficial interest in the estate:—**Held**: appct. was entitled to an inventory & account.—**JEHANGIR RUSTOMJI DIVECHA v. BAI KUKIBAI** (1903), 1 L. R. 27 Bom. 281.—**IND.**

PART VI. SECT. 6, SUB-SECT. 3.—B.

7126 i. Remedy barred—If Statute of Limitations pleaded.]—In Aug. 1877, land was settled upon trust for N.

for an account, on the ground of length of time, without either pleading or claiming the benefit of the above statute.—*COCKSHUTT v. POLLARD* (1817), Wils. Ex. 132; 159 E. R. 851.

7127. —.]—Lapse of time will bar the right of the next of kin of an intestate to an account against the administrator.—*KOHLER v. REYNOLDS* (1857), 26 L. J. Ch. 415; 5 W. R. 422.

Annotation:—*Expld. Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423.

SUB-SECT. 4.—ASSETS TO WHICH LIABILITY EXTENDS.

A. In General.

7128. Under usual decree for account—General rule.]—Copyhold estates were covenanted to be surrendered to A. upon trust, out of the rents to pay the interest of a sum of £1,000 lent by A., & to apply the surplus of the rents in reduction of the principal for ten years, & then upon trust to sell & pay off the residue of the mtgc. debt, & invest the surplus, upon trust, for the wife of the mtgor., & her children. The rents of the mortgaged estates were more than sufficient to pay the interest of the mortgage debt, but the mtgor. was allowed to continue to receive them, & after more than twenty-one years, the representatives of the mtgee. filed a bill for an account & sale:—*Held*: as no cross bill had been filed by the wife & children to have the benefit of the trusts of the mtgc. deed, the representatives of A. were only liable to account for what they had actually received, & not for what they or the mtgee. might have received without wilful default, while the mtgor. continued to receive the rents.—*BEARE v. PRIOR* (1843), 6 Beav. 183; 12 L. J. Ch. 262; 49 E. R. 795.

7129. —.]—In taking the accounts under the usual order obtained on summons an exor. & trustee can only be charged with money actually received by him, & not with money which he might have received but for his wilful neglect or default.—*BLAKELY v. BLAKELY* (1855), 24 L. T. O. S. 322; 1 Jur. N. S. 368; 3 W. R. 288.

7130. —.]—*PARTINGTON v. REYNOLDS*, No. 7182, *post*.

7131. — Partnership transactions—Between testator & executor.]—Under the usual decree against an exor. to account, the Master is not at liberty to investigate a disputed account arising out of partnership transactions between testator & the exor., the latter swearing that the balance is in his favour; but, under such circumstances, pltf. may have relief by supplemental bill, without exhibiting an interrogatory in the original suit for the examination of the exor.

during his life, or until he should be declared bkpt., with remainder to his children. N., who had been adjudicated insolvent in May, 1867, & did not obtain his certificate of discharge until Sept. 1909, received the rents & profits until his death in Apr. 1915. This suit was brought in Aug. 1915, asking for an account as against N.'s exor. of the rents of the property received by N. since the date of the settlement in 1877:—*Held*: there being no evidence of fraud or concealment on N.'s part, his exor. was entitled to rely upon Stat. Limitations

as a defence, & pltf. were entitled only to an account of the rents received by N. during the period of six years prior to the institution of the suit.—*MACINTOSH v. MACINTOSH* (1916), 17 S. R. N. S. W. 11; 34 N. S. W. N. 124.—AUS.

PART VI. SECT. 6, SUB-SECT. 4.—A.

r. Produce of estate—Applied to maintenance of testator's children—Claim by creditors.]—Testator had been in partnership with J., & died, appointing A., P. & L. his exors.

Where one of two exors. was a partner with testator, the residuary legatees may sustain a bill for an account of the partnership transactions against the exors., though collusion between them is neither charged nor proved.—*CROPPER v. KNAPMAN* (1836), 2 Y. & C. Ex. 338; 6 L. J. Ex.

On footing of wilful default.]—See Sub-sect. 4, C.,

7132. Produce of estate—During minority of person entitled.]—Defts., exors. to their father, being guardian in socage to pltf. [during his minority], were ordered to answer for profits taken by him.—*BURGH v. WENTWORTH* (1576), Cary, 54; 21 E. R. 29.

7133. — Real estate situated abroad—Account praying for personal estate.]—A testator directed his real estate to be sold by his Jamaica exors., & the produce remitted to A. & B., his English exors. B. & C. were the consignees & agents of testator, & of his exors. The assets, including £2,253, part of the produce of the real estate, were remitted from Jamaica to B. & C. on account of the exors. in England, & the amount was the credit of the estate of testator.

the death of B., A. instituted a suit for an account of the receipts of B. & C., on account of the personal estate of testator since his death, but the heir-at-law was not made a party. The bill specified the item of £2,253 which the answer stated to be the produce of the real estate. The decree directed an account of the dealings & transactions in the bill mentioned, & of the receipts of B. & C. on account of testator's personal estate since his death, & the Master, in taking the accounts, charged C. with the £2,253. Deft. C. obtained a rehearing of the cause, & excepted to the report, & contended, either that the decree was wrong in authorising an account of the real estate in the absence of the heir, or that the Master had been wrong in including this item, but the ct. overruled the objection.—*PRINGLE v. CROOKES* (1843), 7 Beav. 257; 49 E. R. 1063.

7134. Assets held by testator as husband—On marriage to widow executrix.]—*ORFORD (EARL) v. DASTON* (1702), Colles, 229; 1 E. R. 262; *sub nom.* *DARSTON v. ORFORD (EARL)*, Prec. Ch. 188; 3 P. Wms. 401, n., H. L.

Annotations:—*Mentd.* *Morrice v. Bank of England* (1736), Cas. temp. Talb. 217; *Maltby v. Russell* (1825), 2 Sim. & St. 227; *Re Radcliffe, European Assco. Soc. v. Radcliffe* (1878), 7 Ch. D. 733; *Re Wells, Molony v. Brooke* (1890), 45 Ch. D. 569.

7135. Money received before testator's death—By executrix as wife.]—Bill by the heirs & residuary legatees of A. against the widow & extrix. to have an account of his estate. It being proved that A. being very old & infirm for seven years before his death, did not receive money himself, though he signed receipts & executed leases, etc., but the

Testator had, besides his share of the partnership assets, personal property & real estate, which he devised to his four sons, then infants, & appointed A. their guardian:—*Held*: the exors. were liable to account to the creditors of testator for the rents received by them & applied to the maintenance education of the children.—*HARRISON v. PATTERSON* (1865), 11 Gr. 105.—CAN.

s. Proceeds of sale of chattels—Use bequeathed for limited period—Immediate sale.]—Testator bequeathed

Sect. 6.—Accounts: Sub-sect. 4, A. & B. (a).]

money was usually paid to deft., the ct. decreed deft. to account for what money she received for seven years before her husband's death, but that the Master should be easy in taking the account & allow for housekeeping, etc., without vouchers.—*BUCKLE v. MILMAN* (1715), 2 Eq. Cas. Abr. 6; 22 E. R. 5, L. C.

7136. Assets received after decree.]—In decrees against a mtgee. on a bill for redemption, or against an exor. to account, it is the course of the ct. to direct it without future words; & yet if the person decreed to account receive anything subsequent to the decree, it is inquirable before the Master, & they must bring such sums to account.—*BULSTRODE v. BRADLEY* (1747), 3 Atk. 582; 26 E. R. 1136, L. C.

7137. Debts collected by third person—As agent for representative.]—A testator directed that the business should be carried on by E. P. The exors. permitted E. P. to get in the outstanding debts. There being no such direction in the will, the executors were liable.

If there had appeared the slightest presumption in the will that testator intended that E. P. should collect the debts due before his death, the exors. would have been held discharged as they appear to have acted *bond fide*; but as there was no such intention hinted at in the will, the exors. must answer for this money as received by their agent (*per CUR.*).—*PISTON v. DUNBAR* (1792), 1 Anst. 107; 145 E. R. 815.

7138. Assets in England & India—Held by creditor as administrator—Administration afterwards revoked.]—A creditor of a person who died intestate in India took out letters of administration to deceased in that country. He then came to England, & obtained letters of administration from the Prerogative Ct. Afterwards one of the intestate's next of kin procured that administration to be revoked, & administration to be granted to himself:—*Held*: the Indian administrator was compellable to account to him for assets possessed in India as well as in this country in a suit instituted by him as personal representative only of the intestate, & to which the other next of kin, who were resident in India, were not parties.—*SANDILANDS v. INNES* (1829), 3 Sim. 263; 57 E. R. 997.

Annotation:—*Reid. Weatherby v. St. Giorgio* (1843), 7 Jur. 717.

7139. Partnership transactions—During testator's lifetime.]—Motion for leave to file a claim to have the accounts of a testator's estate taken, the exor. being charged with wilful default. Claimant was interested under a will, & it was also sought to take accounts of a partnership in which testator was engaged. Leave was given.—*CRAMER v. JENNINGS* (1850), 15 L. T. O. S. 201; 14 Jur. 518.

his stock & implements to his son H.; he to have the use of them for ten years, & at the end of that time to replace them. The stock & implements were sold by the exors., at H.'s request, & the proceeds were paid to him:—*Held*: the exors., with H.'s consent, having done what they should have done at the end of the period, all that H. could have was the interest for ten years upon the proceeds of the sale; & H. should repay the proceeds, for which the exors. were bound to

account.—*Re MCINTYRE, MCINTYRE v. LONDON & WESTERN TRUSTS CO.* (1904), 24 C. L. T. 268; 7 O. L. R. 548; 3 O. W. R. 258.—*CAN.*

t. Sum received on compromise of action—Brought by administrator.]—A. an administrator, brought an action against B. for possession of the estate of deceased. A compromise of the action was made by which the estate was divided among A., B. & other claimants:—*Held*: A. was bound to

account to the next-of-kin for the sum he received for the compromise.—*MCGREGOR v. MCGREGOR* (1886), 5 N. Z. L. R. C. A. 20.—*N.Z.*

7140. Receipts by joint executors—Subsequent death of one.]—Claim against the representative of deceased exors. of a testator. Since the claim was filed, one of the two exors. of a deceased, but not the last surviving exor. of the original testator had died:—*Held*: the accounts must be taken of the joint receipts of the surviving executor.

The accounts must be taken of the joint receipts of the two & of the separate receipts of the surviving exor. (*KNIGHT-BRUCE, V.-C.*).—*ROBSON v. JEFFERSON* (1850), 15 L. T. O. S. 325; 14 Jur. 845.

7141. Receipts during infancy.]—*STOTT v. MEANOCK*, No. 7077, *ante*.

7142. Receipts in dual capacity—As representatives & trustees.]—In an administration suit the decree had directed an account to be taken of the receipts of testator's exors., & another account of the receipts of the trustees of the will. There were three trustees, two of whom were also exors. The exors. in their account discharged themselves of the sums received by them mainly by means of payments made to the trustees, & the sums thus paid over to the trustees appeared in their accounts as receipts by them. The chief clerk had required separate accounts to be taken of the receipts & payments of the exors., & of the receipts & payments of the trustees. The order of Oct. 28, 1875 (ct. fees) schedule, provides for the payment of a ct. fee of 6d. for every £50 found to have been received by exors., trustees, & others on taking their accounts:—*Held*: separate accounts were properly taken under the decree & separate sums were properly found to have been received from the exors. & from the trustees, & a double ct. fee was payable; a fee on the gross receipts of the exors., & a fee on the gross receipts of the trustees.—*ARMITAGE v. ELWORTHY* (1879), 13 Ch. D. 91; 41 L. T. 608; 28 W. R. 283, C. A.

7143. Unauthorised payments — Voluntarily made.]—After a suit against an exor. in Chancery, he shall not be allowed payments made voluntarily without suit.—*BRIGHT v. WOODWARD* (1685), 1 Vern. 369; 1 Eq. Cas. Abr. 240; 23 E. R. 528, L. C.

7144. — Six years before action brought—Trustee Act, 1888 (c. 59), s. 8.]—*Re WILLIAMS, JONES v. WILLIAMS*, No. 6989, *ante*.

Interest on balances improperly retained.]—See Sub-sect. 6, C. (b), *post*.

B. Profits of Dealings with Assets.**(a) In General.**

7145. General rule—No profit allowed.]—The rule of the ct. is imperative, that, in the absence of any contract for that purpose, no person can, by acting as trustee, derive any pecuniary benefit to himself.—*CROSSKILL v. BOWER, BOWER v. TURNER* (1803), 32 Beav. 86; 1 New Rep. 379;

PART VI. SECT. 6, SUB-SECT. 4.—B. (a).

a. Purchase of assets — For own benefit—In name of wife.]—An exor. sold property of the estate for \$800, his wife being the purchaser. On

32 L. J. Ch. 540; 8 L. T. 135; 9 Jur. N. S. 267; 11 W. R. 411; 55 E. R. 34.

Annotations:—*Mentd.* Barfield v. Loughborough (1872), 8 Ch. App. 1; Yourell v. Hibernian Bank, [1918] A. C. 372.

See, generally, TRUSTS & TRUSTEES.

7146. Investment of funds—Resulting interest.—LINCH v. CAPPY (1680), 2 Cas. in Ch. 35; 22 E. R. 834, L. C.

7147. ———.]—Exor. shall answer interest if he has made of testator's estate.—RATCLIFFE v. GRAVES (1683), 1 Vern. 196; 2 Cas. in Ch.

Annotations:—*Mentd.* Thruxton v. A. G. (1685), 1 Vern. 340; Bilson v. Saunders (1727), Bunb. 240.

7148. ———.]—Although a trustee or exor. is not directed to put money out at interest; yet if he makes interest he shall account for it.—LEE v. LEE (1706), 2 Vern. 548; 23 E. R. 955.

7149. ——— **Loan to co-representative—At reduced rate of interest.**—Testator directed his exors. to lay out the residue of his estate in the purchase of lands or upon heritable or personal securities, at such rate of interest as they should think reasonable. The exors. lent the fund to one of themselves on bond at 4 per cent. when 5 per cent. might have been made by heritable or govt. securities. The discretion given by the will to the exors. might have been soundly exercised by their lending the money to any other person upon such terms as they thought reasonable; but a trustee contracting with himself, cannot spare himself, & he shall therefore pay interest at 5 per cent. for the money in his hands.—FORBES v. ROSS (1788), 2 Cox, Eq. Cas. 113; 2 Bro. C. C. 430; 30 E. R. 52, L. C.

Annotation:—*Refd.* Tebbs v. Carpenter (1816), 1 Madd. 290.

7150. ——— **Mixed with own funds—Whole of profit made.**—Exors. employing the estate of their testator, mixed up their own moneys, in carrying on their own business:—*Held*: they were liable to account not only for the trust property so employed but also for the whole of the profit made upon it.—DOCKER v. SOMES (1834), 2 My. & K. 655; 3 L. J. Ch. 200; 39 E. R. 1095, L. C.

Annotations:—*Consd.* Vyse v. Foster (1874), L. R. 7 H. L. 318. *Refd.* Wedderburn v. Wedderburn (1838), 4 My. & Cr. 41; Macdonald v. Richardson, Richardson v. Marten (1858), 1 Giff. 81. *Mentd.* Crosley v. Derby Gas-Light Co. (1838), 3 My. & Cr. 428; Costa Rica Ry. v. Forwood, [1900] 1 Ch. 756.

7151. Purchase of assets—For own benefit.—Trustee or exor. buying in debts for less than is due shall not take the benefit of it himself. Otherwise of one purchasing in his own right.—ANON. (1707), 1 Salk. 155; 91 E. R. 143, L. C.

Annotation:—*Mentd.* Anon. (1679), 2 Cas. in Ch. 4.

7152. ———.]—HALL v. HALLET, No. 6054, ante.

7153. ———.]—An exor. cannot buy for his own benefit debts due from testator's estate.—*Ex p.* JAMES (1803), 8 Ves. 337; 32 E. R. 385, L. C.

Annotations:—*Mentd.* Oliver v. Court (1820), Dan. 301; Austin v. Chambers (1838), 6 Cl. & Fin. 1; Carter v. Palmer (1842), 8 Cl. & Fin. 657; Aberdeen Ry. v. Blaikie (1854), 2 Eq. Rep. 1281; Imperial Mercantile Credit

Assocn. v. Coleman (1870), 6 Ch. App. 562, n.; Panama & South Pacific Telegraph Co. v. India Rubber Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 515; Hickley v. Hickley (1876), 2 Ch. D. 190; Luddy's Trustee v. Peard (1886), 33 Ch. D. 500; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130; Nugent v. Nugent, [1908] 1 Ch. 546; Christoforides v. Terry, [1924] A. C. 566.

7154. ——— **Effect of consent of parties entitled.**—An exor. purchasing assets belonging to the estate of his testator, with the assent of the parties then interested, will not, after a length of time, be answerable for the profit he has made; but he will when he has purchased with a fraudulent intention.—WHATTON v. TOONE (1820), 5 Madd. 54; 56 E. R. 815; *sub nom.* WATSON v. TOONE, 6 Madd. 153.

Annotation:—*Mentd.* Silkstone & Haigh Moor Coal Co. v. Edey, [1900] 1 Ch. 167.

7155. ——— **Sale set aside—Whether price returnable to representative.**—Purchase by a trustee & exor. from his *cestui que trust* of a portion of an unascertained residue set aside.

An exor. purchased a share of the residue, &, in an administration suit, he was ordered to pay the assets into ct., minus the amount of the purchased share. Afterwards, in another suit, the purchase was set aside:—*Held*: the exor. was not entitled, on setting aside the transaction, to a decree for repayment of the consideration money, but it must be paid into ct. in the administration suit.—SMEDLEY v. VARLEY (1857), 23 Beav. 358; 53 E. R. 141.

7156. ———.]—B. was a member of a firm of three partners, & also the surviving member of another firm of two partners, which was the sole or chief creditor of the first firm. B.'s exor. purchased the estate of the first firm for his own benefit with the result that nothing was left for B.'s widow & universal legatee:—*Held*: in a suit by the widow against the exor., such sale was avoidable & a decree should be made for a general administration of B.'s estate declaring that the sale be set aside with certain special directions.—BENINGFIELD v. BAXTER (1886), 12 App. Cas. 167; 56 L. J. P. C. 13; 56 L. T. 127, P. C.

Annotations:—*Refd.* Hiddingh v. Denyssen, Hiddingh v. Denyssen, Denyssen v. Hiddingh (1887), 12 App. Cas. 624. *Mentd.* Meldrum v. Scorer (1887), 56 L. T. 471.

7157. Goods supplied to estate—By representative in capacity as merchant—How price determined.—Testator, a victualler, directed his trade to be carried on by his exors., a brewer & spirit merchant, who had been in the habit of serving him in his lifetime, & supplies were furnished for that purpose by them. The ct. would not declare that the exors. were entitled to receive the cost price only for these supplies; but directed an inquiry whether the supplies were proper, & furnished at the ordinary market price.—SMITH v. LANGFORD (1840), 2 Beav. 362; 48 E. R. 1221.

Annotation:—*Consd.* *Re* Sykes, Sykes v. Sykes, [1909] Ch. 241.

7158. ———.]—Where an exor., in carrying on the business of testator, has supplied such business with goods, the *onus* lies upon the exor. to show, as to goods not of his own manufacture, what was the cost price, & as to goods of his own manufacture, what would be a fair allowance in respect of their cost, including in such

passing of the accounts the judge found that the property was worth \$1,800 & ordered the exor. to account for the

difference:—*Held*: the exor. having really sold the property to himself secretly for an inadequate price was

liable to account for its true value.—*Re* DALY, DALY v. BROWN (1907), 39 S. C. R. 122.—CAN.

Sect. 6.—Accounts: Sub-sect. 4, B. (a).]

allowance a fair proportion of establishment expenses & interest on capital, treating the manufactory as part of his capital.—*Re WILLIAMS, MORGAN v. WILLIAMS* (1892), 40 W. R. 636; 36 Sol. Jo. 462.

7159. Employment of assets in trade.]—The exor. carried on a trade in brewing with testator's stock; decreed to account for the same, & likewise for the personal estate.—*LUNTLEY v. ROYDEN* (1678), Cas. temp. Finch, 381; 23 E. R. 209.

7160. —.—An administratrix to the effects of a ropemaker directed to include in her account the profits arising from four apprentices, & to give security to the full amount of the inventory.—*PITT v. PITT* (1758), 2 Lee, 508; 161 E. R. 421.

Annotation:—Reid. Moseley v. Rondell (1871), 19 W. R. 619.

7161. —.—Exors. charged with the profits made by them from the employment of testator's assets in any trade or business since testator's decease.—*PALMER v. MITCHELL* (1809), 2 My. & K. 674, n.; 39 E. R. 1101.

Annotations:—Consd. Docker v. Somes (1834), 2 My. & K. 655. *Reid. Macdonald v. Richardson, Richardson v. Marten* (1858), 1 Giff. 81.

7162. —.—A person having a charge for life on residue, has, to the extent of that charge, the rights of a residuary legatee, & is entitled to have the residue ascertained & secured within, if possible, one year after the death of testator. It is the duty of the exor. to do all in his power to effect that object.

In a case in which the will gave no specific directions as to the payment of debts, the exor., who was also the ultimate residuary legatee, having taken on himself, after the trustees named in the will had renounced, to administer the estate, did not ascertain & secure the residue at the end of the year, but worked part of the property, a coal-mine, to a profit for several years, when it ceased to be of any value. On a bill, at the suit of the person having the charge on the residue, praying that the will might be established & accounts taken:—*Held*: the exor. was not, after assuming to act as a trustee, entitled to postpone the sale of the property to the prejudice of the person having the charge on the residue; having postponed it, he was chargeable with the value of the mine at the end of a year from testator's death, with interest thereon, & that value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years, till it became unproductive, such annual profits to be treated as deferred payments.—*WIGHTWICK v. LORD* (1857), 6 H. L. Cas. 217; 26 L. J. Ch. 825; 29 L. T. O. S. 303; 3 Jur. N. S. 699; 5 W. R. 713; 10 E. R. 1278, H. L.; *affg. S. C. sub nom. LORD v. WIGHTWICK* (1853), 4 De G. M. & G. 803, L. JJ.

7163. — *Executor becoming partner in own right—Firm in which testator was partner.]*—Testator was a member of a partnership at will in a bank, without any provision entitling the exor. of a deceased partner to an interest in the good-

will of the concern. The credit, in which the bank was, rendered capital unnecessary, & at testator's death the property of the concern exceeded its liabilities by a very small amount, testator's share in which was far exceeded by the balance due from him to the bank on his private account, as a customer. After his death the surviving partners admitted into the firm his son, who was his exor., but who was not admitted into the firm in that character, & the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at testator's death. In a suit against the exor. for the administration of testator's estate:—*Held*: he was not accountable to testator's estate for the profits which he had received as a partner in the bank.—*SIMPSON v. CHAPMAN* (1853), 4 De G. M. & G. 154; 43 E. R. 466, L. JJ.

Annotations:—Consd. Wedderburn v. Wedderburn (No. 4) (1856), 22 Beav. 84; *Macdonald v. Richardson, Richardson v. Marten* (1858), 1 Giff. 81; *Vyso v. Foster* (1872), 8 Ch. App. 315, n.; *McDonald v. Richardson, Richardson v. Marten* (1864), 10 L. T. 166; *Yates v. Finn* (1880), 13 Ch. D. 839.

7164. — *By surviving partners of testator—Proportionate share of trade profit.]*—The exors. of a testator, who were also his surviving partners, & had continued to employ his share of the partnership capital in trade:—*Held*: answerable for a proportionate share of the profits of the trade notwithstanding that the capital of the partnership at the time of testator's decease consisted only of debts due to the partnership.—*WEDDERBURN v. WEDDERBURN* (1838), 4 My. & Cr. 41; 8 L. J. Ch. 177; 3 Jur. 596; 41 E. R. 16, L. C.; *subsequent proceedings* (1856), 22 Beav. 84.

Annotations:—Consd. Willett v. Blandford (1842), 1 Hare, 253. *Reid. Portlock v. Gardner* (1842), 1 Hare, 594; *Egg v. Devey* (1847), 10 Beav. 444; *Travis v. Milne, Milne v. Milne* (1851), 9 Hare, 141; *Simpson v. Chapman* (1853), 4 De G. M. & G. 154; *Wedderburn v. Wedderburn* (No. 4) (1856), 22 Beav. 84; *Clements v. Hall* (1857), 24 Beav. 333; *Vyso v. Foster* (1872), 8 Ch. App. 315, n. *Mentd. Alfrey v. Alfrey* (1849), 1 H. & Tw. 179; *Swinborne v. Nelson* (1853), 16 Beav. 416; *Hart v. Clarke* (1854), 19 Beav. 349; *Bright v. Legerton* (1861), 2 De G. F. & J. 606; *Edinburgh (Lord Provost) v. Lord Advocate* (1879), 4 App. Cas. 823.

7165. — *—*—*Under arts. of partnership entered into in 1872, C. N. & his brothers, E. N. & G. N., with two other persons, became partners for a term of ten years for the carrying on of an already existing business consisting of the manufacture & sale of isinglass, gelatine, & gluc. Under the provisions of the arts. as modified by a declaration of trust executed by the brothers N. in March, 1877, the capital of any one of the brothers dying during the term was to remain in the business till the expiration of the term, & was then to be held by the survivors on trust to dispose of it as his will should direct. C. N. died in Aug. 1877, having by his will of the preceding March appointed E. N., G. N., & another exors., & bequeathed to them his capital & shares of profits of the business. Until the expiration of the partnership term the shares of profits were to be divided between testator's children, with provisions for maintenance & accumulation, & thereafter the capital & shares of profits were to be held by the exors. on trust to enter into such arrangements as they might think*

7159 i. Employment of assets in trade.]—K. having left bonds in the hands of a firm at C., with directions to apply the interest & principal when received to a specific purpose, appointed G., a partner in the firm, his exor. The

will was proved by G., & the firm, acting under his authority as exor., assigned the bonds, & used in their trade the money received upon the assignments. G. ceased to be a partner in the firm before all the bonds

had been assigned:—*Held*: G. was accountable to the residuary legatee of K. for the moneys received upon the bonds.—*GRAHAM v. KEBLE* (1820), 2 Bli. 126; 6 Pat. App. 610.—SCOT.

desirable for carrying on the business in partnership with such persons as they might think proper. Testator declared his ultimate object to be the introduction of one or more of his sons into the business, but made provision for the division of the profits on his share among all his children. He left numerous children, most of whom were infants at his death, & on the determination of the partnership in 1882 his share, with accumulations, amounted to about £30,000. The two surviving brothers N. formed a new partnership with another person, & until 1887 employed testator's share in the business, paying his children interest thereon at 10 per cent. The profits made were much larger. In 1887 the business was converted into a limited co., & the children were allotted 10 per cent. preference shares to the value of the £30,000 at par.

In an action by the children of C. N. against E. N., G. N. having died, claiming a declaration that deft. was bound to make good the profits made between 1882 & 1887 attributable to the share of C. N. employed in the business & also claiming a share in the goodwill:—*Held*: (1) pl'ts. were not entitled to anything in respect of goodwill; (2) pl'ts. were not entitled to more than the 10 per cent., which they had received.—*SMITH v. NELSON* (1905), 92 L. T. 313.

7166. ———.]—*TOWNEND v. TOWNEND*, No. 7322, *post*.

7167. ———.]—(1) Where an exor. & surviving partner of a testator demanded an allowance from the legatees, for his professional services as an accountant, & said that he would not prove the will until the allowance was made to him, such a bargain will find no favour with the ct., & the amount of the allowance will be ordered to depend strictly upon the services rendered.

(2) Where a surviving partner, who was also an exor., of a testator retained part of testator's estate in such a way that it was impossible to consider testator's interest as terminated by his death, & continued the business for a period of several years, at the end of which he entered into a fresh partnership, he was ordered to account with the residuary legatees for a moiety of the profits up to the end of the period, & from & after that date for interest at 5 per cent. on the estimated value of testator's share in the business at the end of the period.—*MCDONALD v. RICHARDSON, RICHARDSON v. MARTEN* (1864), 10 L. T. 166; *previous proceedings* (1858), 1 Giff. 81.

7168. ——— *When liability arises.*]—Surviving partners, & exors. who are not partners, but have continued their testator's assets in the business, are liable to account for profits made in respect of the value of a deceased partner's share only where there is no absolute contract for vesting in the survivors the share of deceased partner or only an option to take to his share on certain conditions, & the surviving partners neglect to perform such conditions or to liquidate the affairs of the partnership.

A. was partner in a firm under articles, which provided that the surviving partners should purchase the shares of a deceased partner at a valuation. There was nothing to show that time was of the essence of the contract. A. died, having by will given his real & personal estate to three exors. in trust for his children on their attaining the age of twenty-five, & with trusts in the meantime for investing in real or Govt. securities. One

of his exors. was partner at the date of testator's will, & at his death another of his exors. became a partner; the third never was a partner. The value of testator's share in the firm was ascertained in the mode prescribed, but the exors. allowed it to remain in the firm until the children arrived at the prescribed age, & the children were credited in the books of the firm with the ascertained value of their father's share with compound interest at 5 per cent. The arrangement was most beneficial to the firm, & it was very advantageous to the children:—*Held*: the exors. who were or afterwards became partners, were not liable to account for the profits made by them individually or by their firm generally through the use of their testator's capital, nor were the exors. who had assented to such employment under any such liability.—*VYSE v. FOSTER* (1874), L. R. 7 H. L. 318; 44 L. J. Ch. 37; 31 L. T. 177; 23 W. R. 355, H. L.

Annotations:—*Folld. Smith v. Nelson* (1905), 92 L. T. 313. *Consd. Hordern v. Hordern*, [1910] A. C. 465. *Reid. Davis, Davis v. Davis*, [1902] 2 Ch. 314. *Mentd. Stuart v. Gladstone* (1879), 10 Ch. D. 626; *Price v. Price* (1880), 42 L. T. 626; *Jesse v. Lloyd* (1883), 48 L. T. 656; *Re Wilcoxon, Ex p. Andrews* (1884), 25 Ch. D. 505; *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408; *Re Hulkes, Powell v. Hulkes* (1886), 33 Ch. D. 552; *Conway v. Fenton* (1888), 40 Ch. D. 512; *Hale v. Shel-drake* (1889), 60 L. T. 292; *Re De Teissiers S. E., Re De Teissiers Trusts, De Teissier v. De Teissier*, [1893] 1 Ch. 153; *Hunter v. Dowling* (1893), 62 L. J. Ch. 617; *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Re Hawker's S. E.* (1897), 66 L. J. Ch. 341; *Re Montagu, Derbishire v. Montagu*, [1897] 1 Ch. 685; *Rowley v. Ginnever* (1897), 66 L. J. Ch. 669; *Stevenson v. Akt. Für Carlton Nagen Industrie*, [1918] A. C. 239.

See, generally, PARTNERSHIP.

7169. ———.]—A partner in a firm having by will made his co-partner his exor., the exor., after his partner's death, improperly employed the assets in trade; & a bill was filed against him by the devisees under the will. After testator's death the exor. took two persons into partnership with him, & these persons were not made parties to the suit, though they appeared as witnesses to prove the amount of profits received by the exor.:—*Held*: the exor. was accountable for the profits improperly made by him, though the subsequent partners were not made parties to the suit.—*MACDONALD v. RICHARDSON, RICHARDSON v. MARTEN* (1858), 1 Giff. 81; 32 L. T. O. S. 237; 5 Jur. N. S. 9; 65 E. R. 833.

Annotations:—*Reid. Vyse v. Foster* (1872), 8 Ch. App. 315, n. *Mentd. Lazarus v. Mozley* (1859), 1 L. T. 3.

7170. ——— *Alternative liability to be charged with interest—At option of person entitled.*]—It is still the rule of the ct. that a trustee who employs trust moneys in trade or speculative transactions must account for the profit he makes by such employment or, at the option of the *cestui que trust*, be charged with interest at the rate of 5 per cent.—*Re DAVIS, DAVIS v. DAVIS*, [1902] 2 Ch. 314; 71 L. J. Ch. 539; 86 L. T. 523; 51 W. R. 8.

7171. Profits made by testator—As trustee for plaintiff.]—An exor. decreed to account for the profits of lands received by testator before his death, in trust for the pl'tf.—*ASTREY'S CASE* (1680), Freem. Ch. 55; 2 Eq. Cas. Abr. 8; 22 E. R. 1055.

7172. Presentation to benefice—Secret condition for own benefit.]—It is a universal proposition, & of great moment to the safety & property of mankind, that a trustee ought strictly to pursue the tenor of his trust, without perverting it directly or indirectly to his own personal advantage.

Sect. 6.—Accounts: Sub-sect. 4, B. (a) & (b), & C.; sub-sect. 5, A.]

Where an exor. entrusted with the disposition of some church preferments, made a presentation to A. under a secret condition for his own benefit, the presentation was set aside, & he was decreed to present a more proper person.—*RICHARDSON v. CHAPMAN* (1760), 7 Bro. Parl. Cas. 318; 3 E. R. 206, H. L.

7173. Occupation of house—For administration purposes—Whether rent chargeable.]—M., by his will devised all the residue of his real & personal estate amongst his eight children, their heirs & assigns, to be equally divided between them, share & share alike, with benefit of survivorship at twenty-one. Testator died, the exors. renounced, & W., one of the sons, took out administration with the will annexed, & entered into possession of a house belonging to testator in the island of St. Kitts, & managed the whole affairs for the rest of the family. Two of his sisters & a brother occasionally resided with him, & he carried on business, with his brother as a merchant, on the island, but had separate premises, & only resided in the house in question occasionally. A suit was instituted for the administration of M.'s estate. The answer insisted that W., as M.'s administrator, ought to be charged with occupation rent during the period he so occupied testator's house, & with money laid out on unnecessary repairs:—*Held*: *pltf.*, as tenant in common with the others, was entitled to reside, to manage the affairs rent free.

I hardly see how *pltf.* could have carried on the administration without residence, more particularly as he acted for the rest of the family. He might charge the estate with rent paid by him for another house where he was obliged to reside for the purposes of administering to the estate, & therefore he is entitled to set off so much as would have been thus incurred against the occupation rent he is charged with (*WIGRAM, V.-C.*).—*M'MAHON v. BURCHELL* (1845), 1 Holt, Eq. 186; 71 E. R. 716; *subsequent proceedings* (1846), 2 Ph. 127, L. C.

7174. Sale of goodwill.]—A., a surgeon dentist, carrying on his profession at a house held by him as tenant from year to year in the town of H., died, having appointed B., his widow, his extrix., who alone proved the will. Within a few days after A.'s death, two agreements were entered into between B., & C., a surgeon dentist, in which B. was described as one of the exors. of A., the effect of which was that C. should give B. £500 for the goodwill of the business of A., & the advantage of being introduced to the patients of A., & take A.'s house, & purchase his furniture & surgical instruments at a certain price. Evidence was entered into on B.'s behalf that the agreement as to the £500 was not entered into by B. in the character of extrix., & that it was the intention of the parties that the sum should be paid to her, for her own benefit, as the price of her personal influence with the patients of A., & her personal exertions in introducing them to C. The master having found that the whole of the £500 belonged to B.:—*Held*: on exceptions, the whole or a part of the £500 belonged to the estate of A.; & it was referred back to the master to review his report, with this declaration.—*SMALL v. GRAVES* (1850), 3 De G. & Sm. 706; 19 L. J. Ch. 157; 15 L. T. O. S. 179; 14 Jur. 662; 64 E. R. 670.

Annotation:—*Reid. Corbin v. Stewart* (1911), 28 T. L. R. 99.

7175. Insurance of assets—Premiums paid out of own money—Proceeds of insurance.]—Where an exor. reinsures goods, etc., belonging to his testator, pays the premiums out of his own pocket, & on a fire occurring receives the money; if he once treats such money as belonging to the estate, he cannot afterwards claim it for his own benefit.—*LAMPRELL v. GRIGGS* (1858), 32 L. T. O. S. 116; 7 W. R. 25.

7176. Agreement with solicitors—For share of profit costs.]—A decree for the administration of T.'s estate was made on May 18, 1878. B. was one of the exors. L., a beneficiary, had the conduct of the proceedings. The order on further consideration was not made until June 27, 1887, when, amongst other things, the costs due to S. & H., who had during a great part of the action been the solrs. of L. & B. & other parties, were ordered to be taxed & paid. S. & H. had agreed with B., whose business as a solr. they had purchased during testator's life, to pay him half their profit costs. The costs due to S. & H. were certified on Aug. 4, 1888, at £1,860, & in Dec. 1889, they paid £716 14s. 11d. to B. as the sum due to him under the agreement. This was a summons in the administration action taken out by L. that B. might be ordered to pay this sum into ct., on the ground that he ought to account for it as part of testator's estate:—*Held*: the money had ceased to be part of testator's estate when it was properly paid to S. & H., & though the facts alleged might give a good ground for an action against B. to make him account for the money as profit made out of his trust, the ct. had no jurisdiction to make the order asked for upon a summons in an administration action.—*Re THORPE, VIPONT v. RADCLIFFE*, [1891] 2 Ch. 360; 60 L. J. Ch. 529; 64 L. T. 554.

7177. Introduction of estate business to solicitors—On commission basis.]—*VIPONT v. BUTLER*, [1893] W. N. 64.

(b) Leases and Mortgages.

See, generally, TRUSTS & TRUSTEES.

7178. Lease renewed by representative.]—*ANON.* (1685), 2 Cas. in Ch. 207; 22 E. R. 913.

7179. —.]—On a question as to leases renewed by an extrix. after the term had expired, whether for her own benefit, or for the benefit of the estate of testator, & a secret trust to her exors., they were declared to result for the next of kin.—*BROMFIELD v. CHICHESTER, RAW v. DUTHELLY* (1773), 2 Dick. 480; 21 E. R. 356; *sub nom. RAW v. CHICHESTER*, Amb. 715; 1 Bro. C. C. 198, n., L. C.

Annotations:—*Consd. Re Biss, Biss v. Biss*, [1903] 2 Ch. 40. *Reid. Pickering v. Vowles* (1783), 1 Bro. C. C. 197; *Randall v. Russell* (1817), 3 Mer. 190; *Webb v. Lugar* (1836), 2 Y. & C. Ex. 247; *Mill v. Hill* (1852), 3 H. L. Cas. 828. *Mentd. Bradford v. Brownjohn* (1868), 37 L. J. Ch. 198.

7180. —.]—There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested: as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a

partnership lease, or by a mtgee. of a mortgaged lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.

A lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During that tenancy the lessee died intestate, leaving a widow & three children, one being an infant. The widow took out administration to her husband's estate, & she & the two adult children, one of whom was a son, continued to carry on the business under the existing yearly tenancy. The widow & son each applied to the lessor for a new lease for the benefit of the estate, which he refused to grant, but, having determined the yearly tenancy by notice, he granted to the son "personally" a new lease for three years at a still further increased rent. In an action which had in the meantime been instituted by the three children, including the infant, against the administratrix for administration of intestate's estate, the administratrix applied to have the new lease treated as having been taken by the son for the benefit of the estate, & for an account of the rents & profits received by him:—*Held*: the evidence showed that the right or hope of renewal had been determined by the lessor before the son intervened, so that the new lease could not be treated as an accretion to the estate of deceased, & also the son had in no way abused his position nor stood in any fiduciary relation towards nor owed any duty to the other persons interested in the estate, & he was, therefore, entitled to retain the lease for his own benefit.—*Re Biss, Biss v. Biss*, [1903] 2 Ch. 40; 72 L. J. Ch. 473; 88 L. T. 403; 51 W. R. 504; 47 Sol. Jo. 383, C. A.

Annotation:—*Reid. Griffith v. Owen*, [1907] 1 Ch. 195.

7181. Purchase of equity of redemption.—The exor. of a mtgee. purchased the equity of redemption of the mortgaged estate in his own name, with the money due on the mtge., & a small advance beyond it:—*Held*: he was a trustee of the purchase for the benefit of testator's estate.—*FOSBROOKE v. BALGUY* (1833), 1 My. & K. 226; 2 L. J. Ch. 135; 39 E. R. 667.

C. On Footing of Wilful Default.

See, also, Sub-sect. 2, B., *ante*.

7182. General rule.—(1) The only administration decree which can be obtained upon summons in chambers under 15 & 16 Vict. c. 86, s. 45, is the usual decree to make an exor. or administrator account for the personal estate which he may have received. The ct. cannot, in any stage of a suit, engraft upon such a decree, whether made upon bill, or upon claim or upon summons in chambers a decree to make an exor. or administrator account for what he might, without his wilful neglect or

default, have received, a decree of this nature being totally different in its principle from the usual decree.

(2) There are two different modes of accounting to which an exor. or administrator may be subjected by the ct., & accordingly there are two different forms of decree in use to compel him to account. One is a decree compelling him to account only for what he has received of testator's or intestate's estate; the other is a decree compelling him to account, not only for what he has received, but also for what he might, without his wilful neglect & default, have received. These are two perfectly different decrees. The one supposes no misconduct, the other is entirely grounded on misconduct. To obtain the account of what the exor. or administrator has received, pltf. (whether he be creditor, or legatee, or residuary legatee or next of kin) needs not to allege or prove anything special with respect to the estate of deceased, or the dealings or intromissions therewith. To obtain the other decree, pltf. must allege & prove that there is some part of deceased's estate which ought to have been, & might have been, received by deft. & which he has omitted to receive by his own wilful default & neglect (*KINDERSLEY, V.-C.*).

(3) Whenever the term "usual" decree is used, it denotes exclusively that decree by which the exor. or administrator is required to account merely for what he has received. Whenever the usual decree only is made, pltf. in taking the accounts under that decree cannot charge deft. with a single farthing beyond his actual receipts. I include in the term "actual receipts" what may have been received by any other person by the order, or for the use of deft. Pltf. cannot be permitted to show that there is some part of deceased's estate which deft. ought to have got in, & might easily have got in, & has failed to get in by his own wilful default & neglect, however gross & culpable his misconduct & however clear the proof of it. Any such attempt would be instantly & peremptorily rejected (*KINDERSLEY, V.-C.*).—*PARTINGTON v. REYNOLDS* (1858), 4 Drew. 253; 27 L. J. Ch. 505; 31 L. T. O. S. 7; 4 Jur. N. S. 200; 6 W. R. 388; 62 E. R. 98.

Annotations:—*As to* (2) *Reid. Re Stevens, Cooke v. Stevens*, [1897] 1 Ch. 422. *Generally, Reid. A.-G. v. Köhler* (1861), 5 L. T. 5; *Re Gosman* (1880), 15 Ch. D. 67.

SUB-SECT. 5.—ALLOWANCES IN ACCOUNT.

A. In General.

See R. S. C., Ord. 33, r. 8.

7183. Payment of just debts—By person wrongfully taking out administration.]—*ARMSTRONG'S CASE* (1691), Nels. 173; 21 E. R. 818.

Remuneration due to representative.]—*See* Part V., Sect. 6, *ante*.

PART VI. SECT. 6, SUB-SECT. 5.—A.

b. Erection of tombstone.]—Where a will contains no direction as to erecting a tombstone to testator, the ct. will not allow exors. the expense of erecting one.—*KNIGHT v. KNIGHT* (1885), 11 V. L. R. 659.—*AUS.*

c. —.]—Testator's sister erected a marble slab to his memory. His widow, the acting extrix., having in hand no funds of the estate, gave her

note to the sister for the price, but she had not paid the note, when she made her claim for it in an administration suit:—*Held*: the amount should be allowed to the extrix.—*MENZIES v. RIDLEY* (1851), 2 Gr. 544.—*OAN.*

d. Legacy charged on land devised.]—Where a legacy is charged on land devised, it should not be included as a payment by the exor., in his account with the estate.—*WETMORE v. KET-*

CHUM (1862), 10 N. B. R. (5 All.) 408.—*OAN.*

e. Unauthorised expenditure—Improving real estate.]—Executrix, who had an annuity charged on the income of the estate expended money in good faith in improving the real estate, & in other unauthorised ways:—*Held*: her expenditure in improvements should be allowed so far as it had enhanced the value of the estate.—

Sect. 6.—Accounts: Sub-sect. 5, A., B. & C.

Interest on balances due to representative.]—See Sub-sect. 6, B., *post*.

Expenses of administration.]—See Sub-sect. 5, B., *post*.

— **Employment of agents & solicitors.]—See** Sub-sect. 5, C. & D., *post*.

B. Expenses of Administration.

7184. Expenses in carrying on business—Resulting loss.]—Testator's estate, consisting partly of a West India plantation, was administered under the ct., & a large balance was due to a deceased consignee, which was ordered to be paid by his successor. This failing:—*Held*: as against testator's creditors, the representatives of deceased consignee were entitled to be paid out of the general assets of testator.

I look on this as similar to a case of the management of real estate, where there is a suit for the administration of a testator's estate, consisting of various properties, all of which are to be administered for the benefit of creditors. If the ct. appoints a person to manage the business & carry it on, & there should be a loss, then, in taking the accounts, this will be allowed to him. But the creditors could not in such an event, say, "you must bear it personally, & the rest of the estate is not liable" . . . It is the duty of the ct. to protect its officer . . . & to see that he is indemnified, in respect of all proper expenses, out of the other property of testator (ROMILLY, M.R.).—*LYNE v. THOMPSON* (1862), 30 Beav. 542; 54 E. R. 999.

See, further, Part V., Sect. 7, ante.

Payments out of own money—To defray estate expenses.]—See Part IV., Sect. 4; Part V., Sect. 7.

7185. Funeral expenses — Estate insolvent.]—Even in an insolvent estate the personal representative will be allowed a sum expended for funeral expenses, according to the situation of life in which deceased had lived.—*PITCHFORD v. HULME* (1825), 3 L. J. O. S. Ch. 223.

7186. — — —.]—The expenses which exors. will be justified in incurring about the funeral of deceased when his estate turns out insolvent, must be reasonable, according to the circumstances of each particular case, with reference to testator's condition in life. Where in an action against the personal representative of the voluntary grantor of an annuity *plene administravit*

was pleaded, deft. claimed an expenditure of £103 on the funeral of deceased, who died worth £2,987, but whose rank in life did not appear. *Semble*: that sum could not be allowed to the personal representative on *plene administravit*, against a claim for an arrear on the annuity deed.—*EDWARDS v. EDWARDS* (1834), 2 Cr. & M. 612; 4 Tyr. 438; 3 L. J. Ex. 204; 149 E. R. 905.

See, also, BURIAL, Vol. VII., pp. 525, 526, Nos. 48–62.

7187. Payment of legacies.]—Under a decree for an account, & applying personal estate in payment of debts & funeral expenses & directing the clear surplus to be paid over, making to the parties all just allowances, the master ought to allow payment in discharge of legacies.—*NIGHTINGALE v. LAWSON* (1784), 1 Cox, Eq. Cas. 23; 29 E. R. 1045, L. C.; *subsequent proceedings* (1785), 1 Bro. C. C. 440.

Annotation:—Reid. Wilkes v. Saunton (1877), 7 Ch. D. 188.

7188. Payment of annuity—Out of rents—Contrary to testator's instruction.]—Devise of annuity of £50 to be purchased by exor., who, till the purchase, was to pay annuitant £40 a year. Exor., instead of purchasing, paid £50 a year from testator's rents. Annuitant entitled to £40 the first year, & to £50 a year afterwards. Though the ct. might have charged exor. with the overpayment from the estate, the master on a general account with just allowances cannot.—*BROWNE v. SPOONER* (1791), 1 Ves. 291; 30 E. R. 349, L. C.

7189. Maintaining establishment—Under discretion in will.]—(1) The ct. controls a trustee in the exercise of a power to appoint new trustees, though given in very large words.

(2) A trustee & exor., though taking under the will a commission as a satisfaction for his trouble, entitled to allowances under a general trust to set & manage, as he should think proper, & out of the rents & profits to pay all rates & taxes, charges of repairs, stewards, bailiffs, & gamekeepers, salaries & expenses, & all other charges & expenses he should think proper, but he was not allowed to appoint an establishment, gamekeepers, etc., except as the due management required. Inquiry therefore directed as to that.—*WEBB v. SHAFTESBURY (EARL), SHAFTESBURY (EARL) v. ARROWSMITH* (1802), 7 Ves. 480; 32 E. R. 194, L. C.

Annotations:—As to (1) *Reid. Cafe v. Bent* (1843), 3 Harc. 245; *Skeat's Settlement, Skeats v. Evans* (1889), 42 Ch. D. 522. *As to* (2) *Reid. Bethell v. Abraham* (1873), L. R. 17 Eq. 24.

MORLEY v. MATTHEWS (1868), 14 Gr. 551.—CAN.

f. Payment of claims for which estate not liable.]—If an exor. or administrator pays a claim for which the estate is not liable he cannot charge the payment against the estate.—*Re MILLARD'S ESTATE*, [1924] 1 D. L. R. 805; 56 N. S. R. 533.—CAN.

PART VI. SECT. 6, SUB-SECT. 5.—B.

g. Maintenance of infant—Out of proceeds of sale of real estate.]—Testator devised his lands to his wife for life, & in the event of her death or marriage, to his children, to be applied for their benefit in the way the exors. should see best. The exors., having sold the real estate, as the will empowered them to do, & applied a large portion of the proceeds in support & maintenance of

the children:—*Held*: the exors. were entitled to be allowed the amount so expended for maintenance, in passing their accounts.—*GRUMMET v. GRUMMET* (1875), 22 Gr. 400.—CAN.

h. Costs of defending action.]—The ct., although it considered pltf. entitled to be paid his demand, thought the exor. was justified in having resisted payment without the sanction of the ct., & that in the administration of the estate the exor. would be entitled to be paid his costs of litigation.—*GRIFFITH v. PATERSON* (1873), 20 Gr. 615.—CAN.

k. — Reasonableness of defence.]—Where pltf.' costs of an action brought against an exor. as such were ordered to be paid by the exor., & were so paid, the allowance to the exor., on his passing his accounts,

of the sum so paid, & also his own costs of defending the action, was affirmed—there being nothing to show that the action was unreasonably defended.—*Re DINGMAN* (1915), 9 O. W. N. 272; 35 O. L. R. 51.—CAN.

l. Cost of probate—Advertising for creditors, etc.]—S. assigned to deft. certain promissory notes for his sole use, except such as might be used in liquidation of necessary expenses in connection with his board & funeral expenses, & appointed deft. his exor.:—*Held*: the exor. was entitled to be allowed the expenses of taking out probate of the will, of advertising for creditors, of medicine & medical attendance for testator in passing his accounts.—*SMITH v. ROSE* (1870), 24 Gr. 438.—CAN.

m. Repairs.]—Extrix. under a will

7190. — Payment of rent.]—There being a gift of leasehold property with growing crops, etc., charged with £1,000 to C., the exor. paid the apportioned rent due at testator's death out of the estate, & that sum was disallowed by the chief clerk in chambers. Upon application to vary the chief clerk's certificate:—*Held*: the payment must be allowed.—*TOMSON v. JUDGE* (1857), 5 W. R. 396.

7191. Maintenance of infant.]—(1) As against creditors an administrator cannot be allowed for disbursements, in the schooling, feeding, or clothing of intestate's children, subsequently to his decease.

(2) *Seem*: he is entitled for the reasonable charges of collecting intestate's debts.—*GILES v. DYSON* (1815), 1 Stark. 32, N. P.

Annotation:—*Generally*, *Mentd.* *Stearn v. Mills* (1833), 4 B. & Ad. 657.

7192. —.]—Sums paid by an exor. out of an infant's property for his maintenance cannot be allowed by the master under a direction "to make all just allowances."—*COTHAM v. WEST* (1839), 1 Beav. 380; 3 Jur. 949; 48 E. R. 987; *previous proceedings* (1837), Donnelly, 199.

7193. —.]—In a creditor's suit for the administration of testator's estate, where the personal estate was insufficient for payment of debts, & the master had found that the exor. & trustee had made advances for the maintenance of testator's children, but had refused to allow him to retain the amount of such advances & of a balance in his hands, arising from the rents of the real estate, the ct., on the trustee & exor. submitting to account, relieved him from paying the balance into ct. until the amount of the proceeds of the real estate should be ascertained.—*LITTLEBOY v. HILL* (1845), 9 Jur. 986.

7194. Collecting debts.]—*GILES v. DYSON*, No. 7191, *ante*.

7195. Stockbroker's fees—For identification on transfer of stock.]—An exor., upon transferring stock to a legatee, paid one-sixteenth per cent. to a stockbroker for identifying him at the bank. He was allowed the payment in passing his accounts.—*JONES v. POWELL* (1843), 6 Beav. 488; 1 L. T. O. S. 409, 431; 7 Jur. 781; 49 E. R. 914.

7196. —.]—A party [an exor.] who had been ordered to transfer large sums of stock into ct., paid the broker at the rate of 1s. 3d. per cent. for identifying him on making the transfer:—*Held*: the payment, which amounted to £28 2s. 6d. was proper, & ought to be allowed in taxing the

party's costs.—*DAVENPORT v. POWELL* (1844), 14 Sim. 275; 14 L. J. Ch. 115; 60 E. R. 363.

7197. Insurance of estate debtor's life—Payment of premiums discontinued.]—An exor. may have an express discretion given to him by his testator's will; he may also have a general discretion as exor.; but he cannot under that say, "I will do whatever in my discretion as exor. I think fit." If he deals with the assets of his testator in a mode not ordinarily allowed to exors., he must prove that he was in such a position with regard to the estate & those interested in it, as to render such peculiar dealing with the assets necessary & unavoidable. Where, therefore, an exor. effected a policy of assurance for seven years on the life of a debtor to his testator's estate, without consulting the *cestuis que trust*; paid some of the premiums on the policy out of testator's assets, then without referring to his *cestuis que trust*, & although an administration suit was pending, without applying for the direction of the ct., at his own discretion, & because, as he alleged, testator's estate was deficient, discontinued the payment of the premiums, whereby the policy was lost, & debtor died within the seven years:—*Held*: the effecting the policy was, under the circumstances, an exercise of sound discretion, but the letting it drop was unwise, & the exor. must be declared liable for the amount that would have come to the estate if the policy had been duly kept up, but he was allowed in his accounts those sums which he had actually paid in respect of the premiums.—*GARNER v. MOORE* (1855), 3 Drew. 277; 3 Eq. Rep. 1017; 24 L. J. Ch. 687; 26 L. T. O. S. 11; 3 W. R. 497; 61 E. R. 909.

Annotation:—*Mentd.* *Garner v. Briggs* (1858), 4 Jur. N. S. 230.

7198. Payment to officials abroad—To facilitate work—On contract with foreign government.]—*Re STEVENS, STEVENS v. STEVENS* (1880), 5 T. L. R. 613, C. A.

C. Employment of Agent.

See Trustee Act, 1925 (c. 19), s. 23.

(a) In General.

Employment of solicitor.]—*See* Sub-sect. 5, D. (a), *post*.

7199. General rule.]—(1) Exors. will not be allowed to charge for the employment of an agent except in very special circumstances. An exception to the master's report, by which he had reduced an exor.'s charge for the employment of an agent at 5 per cent. to 2½ per cent., overruled.

Generally speaking, exors. are not allowed to employ an agent to perform those duties which,

which was subsequently set aside, having expended \$536.35 in repairs to the real estate, & testator's will having given her a life estate in all the real estate, & having also given her the income of all investments of which testator was possessed, & also the principal of such investments as she might require to use for her own benefit:—*Held*: the \$536.35 was properly allowed to her.—*HILL v. HILL* (1884), 6 O. R. 244.—CAN.

n. Payments made bond fide under void will.]—The exor. under a will which has been set aside as void, will be entitled, in taking the accounts, to credit for an amount paid out bond fide under the probate of the void will.—*CULLEN v. MCNEIL* (1908), 42 N. S. R. 346; 4 E. L. R. 135.—CAN.

o. Payments made for preserva-

tion of property.]—Pltf. claimed to recover one quarter of the amount found by a Surrogate Ct. judge to be in the hands of defts. as exors. The judge had, in taking the accounts, allowed the parties for all the payments made by them during the father's lifetime in order to preserve the property, & had deducted the amount of these payments from the amount for which the exors. were chargeable:—*Held*: the evidence before the judge warranted this, & his approval was final.—*TYRELL v. TYRELL* (1918), 43 O. L. R. 272.—CAN.

p. Probate action brought by exors.—Caveat—Money paid to compromise.]—A brother of testator, who was supposed to be the heir-at-law, but to whom nothing had been left, entered a caveat against probate

being granted. The exors. brought an action to establish the will, & compromised the suit. In an action to administer the estate of testator the assets were found insufficient to pay the legacies:—*Held*: the exors. were not entitled to credit for the sums of money spent in compromising the suit.—*GRAHAM v. M'CASHIN*, [1901] 1 I. R. 404.—IR.

PART VI. SECT. 6, SUB-SECT. 5.—C. (a).

q. Accountant—Employment of—Due to neglect of executors to keep proper accounts.]—Where the services of an accountant are principally made necessary by the neglect of the exors. to keep proper accounts the exors. will not be allowed the accountant's fees.

Sect. 6.—Accounts: Sub-sect. 5, C. (a) & (b), D. (a) & (b); sub-sect. 6, A., B. & C. (a).]

by accepting the office of exors., they have taken upon themselves (LEACH, M.R.).—WEISS v. DILL (1834), 3 My. & K. 26; 40 E. R. 10.

7200. Under special circumstances—Accountant.] HENDERSON v. M'IVER (1818), 3 Madd. 275; 56 E. R. 510.

7201. ———.]—A partner, on retiring from his firm left his capital, £15,000, in the business under an agreement with the continuing partners that it should be a debt due from them to him & bearing interest until repayment. The agreement contained a stipulation that the outgoing partner should have free access to the books at all times, & various provisions intended to satisfy the outgoing partner from time to time of the solvency of the business. The outgoing partner subsequently died, having by his will bequeathed his residuary estate, which included his capital in the business, to a trustee upon trusts for one life & others in remainder:—*Held*: the trustee was at liberty to employ accountants & valuers for an audit & stocktaking once a year, if desired, or oftener if special circumstances so required.

The trustee says that in order to make that investigation he will have to employ an accountant at a cost of about £213. The question is who is to pay for that? It must be borne by the estate. It does not exactly come under the head of debts or testamentary expenses. The suggestion made [by counsel] was the true one, namely that an expense of this kind is part of the costs, charges & expenses properly incurred by the exor. in the performance of his duty (LINDLEY, L.J.).—*Re BENNETT, JONES v. BENNETT*, [1896] 1 Ch. 778; 65 L. J. Ch. 422; 74 L. T. 157; 44 W. R. 419; 40 Sol. Jo. 335, C. A.

Annotation:—*Apld. Re Sherry, Sherry v. Sherry*, [1913] 2 Ch. 508.

7202. ———.]—WEISS v. DILL, No. 7199, *ante*.

7203. ——— Debt collector.]—Exors. held, in the circumstances, justified in appointing an agent to get in testator's debts, & in allowing him a salary for his trouble.—HOPKINSON v. ROE (1838), 1 Beav. 180; 48 E. R. 908.

Annotation:—*Reid. Jones v. Powell* (1843), 6 Beav. 488.

7204. Collector of rents.]—Testator gave annuities to his trustees for their trouble in the execution of his will, & died possessed of several houses, let at weekly rents. The trustees were justified in paying a person to collect these rents, & did not, therefore, lose their annuities.—WILKINSON v. WILKINSON (1825), 2 Sim. & St. 237; 57 E. R. 337.

Annotation:—*Distd. Re Muffet, Jones v. Mason* (1887), 56 L. J. Ch. 600.

(b) *Representative Acting as Agent.*

See Part V., Sect. 6, ante.

D. Employment of Solicitor.

See Trustee Act, 1925 (c. 19), s. 23.

(a) *In General.*

7205. General rule.]—HARBIN v. DARBY (No. 1), No. 6336, *ante*.

—KNIGHT v. KNIGHT (1885), 11 V. L. R. 659.—AUS.

r. Clerk.]—The general powers of an exor. include the engagement of clerks to keep the books of the estate & to carry on its affairs.—RATTRAY v.

YOUNG, Cass. Dig. 2nd ed. 149.—CAN.

PART VI. SECT. 6, SUB-SECT. 5.—D. (a).

s. Retaining fee—Paid in adminis-

7206. ———.]—*Re CHAPPLE, NEWTON v. CHAPMAN*, No. 6337, *ante*.

7207. Management of testator's affairs.]—If an exor. employs a solr. to do business for him in the management of his testator's affairs, he shall be allowed what he pays the solr. for such business.—MACNAMARA v. JONES (1784), 2 Dick. 587; 21 E. R. 399, L. C.

(b) *Representative Acting as Solicitor.*

See Part V., Sect. 6, ante.

SUB-SECT. 6.—INTEREST.

A. In General.

7208. General rule.]—(1) An exor. & trustee having for several years retained funds in his hands uninvested which he ought to have invested:—*Held*: not to be chargeable with interest at five per cent., or upon the principle of annual rests, but with simple interest only at four per cent., there being no circumstances to lead to the conclusion that he had made any profit by his misconduct.

(2) The ct. will only charge an exor. or trustee with the interest which he has received, or which he ought to have received, or which it is fairly to be presumed that he did receive, & misconduct on the part of an exor. or trustee will not, generally speaking, warrant such a presumption.

(3) Generally speaking, every exor. & trustee who holds money in his hands is bound to have that money forthcoming; he is, therefore, chargeable with it, & is almost always to be charged also with interest at four per cent.; it is presumed that he must have made interest, & four per cent. is that rate of interest which this ct. has usually treated it right to charge. In later times, however, the ct. has charged exors. with five per cent., & sometimes with compound interest (LORD CRANWORTH, C.).—A.-G. v. ALFORD (1855), 4 De G. M. & G. 843; 3 Eq. Rep. 952; 24 L. T. O. S. 265; 1 Jur. N. S. 361; 3 W. R. 200; 43 E. R. 737, L. C.

Annotations:—*As to* (1) *Expld. Berwick-upon-Tweed Corpn. v. Murray* (1857), 7 De G. M. & G. 497. *Distd. Townend v. Townend* (1859), 1 Giff. 201. *Apld. Burdick v. Garrick* (1870), 5 Ch. App. 233. *Reid. Penny v. Avison* (1856), 28 L. T. O. S. 142; *Price v. Price* (1880), 42 L. T. 626. *As to* (2) *Apld. Gilroy v. Stephens* (1882), 51 L. J. Ch. 834; *Re Hulkes, Powell v. Hulkes* (1886), 33 Ch. D. 552; *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674. *Reid. Vyse v. Foster* (1872), 8 Ch. App. 309; *Silkstone & Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167. *As to* (3) *Reid. Blogg v. Johnson* (1867), 2 Ch. App. 225; *Phillips v. Homfray* (1890), 44 Ch. D. 694.

7209. Claim for interest—Whether specific claim necessary.]—Exors. charged with interest on balances, though not prayed by the bill.—TURNER v. TURNER (1819), 1 Jac. & W. 39; 37 E. R. 290.

Annotations:—*Consd. Davenport v. Stafford* (1851), 14 Beav. 319. *Reid. Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162. *Mentd. Whetton v. Cradock* (1836), 1 Keen, 267; *Cochrane v. Robinson* (1837), 1 Jur. 863.

7210. ———.]—JONES v. MORRALL, No. 7090, *ante*.

tration suit.]—A retaining fee paid by exors. to their solr. in an administration suit may be a reasonable disbursement.—CHISHOLM v. BARNARD (1864), 10 Gr. 479.—CAN.

7211. Delay in accounting—Whether sufficient to charge representative with interest.]—Mere delay in taking accounts is not sufficient to charge an exor. with interest on the balance retained in his hands. A bill was filed by the exor. of a tenant for life under a will against the exor. of testator for an account of income due at the decease of the tenant for life, & considerable delay took place in taking the accounts, but ultimately a large balance was found to have been due from deft. at the death of the tenant for life, & he was ordered to pay the amount so found due to pltf. The delay in taking the accounts not being attributable to deft. :—*Held* : he was not liable to pay interest, except from the date of the order.—**BLOGG v. JOHNSON** (1867), 2 Ch. App. 225 ; 36 L. J. Ch. 859 ; 16 L. T. 306 ; 15 W. R. 626, L. C.

B. Right to Interest.

7212. Money loaned to estate—Prior to receiving assets.]—**MACARTE v. GIBSON** (1725), Cas. temp. King, 50 ; 25 E. R. 217.

7213. — To meet creditors' demands—Special circumstances.]—An exor. borrowed money, or advanced it out of his own pocket, to pay some of his testator's creditors who were importunate, & threatened to bring actions, etc. :—*Held* : he was entitled to an allowance of interest for the money so advanced or borrowed.—**SMALL v. WING** (1730), 5 Bro. Parl. Cas. 66 ; 2 E. R. 537, H. L.

Annotations :—**Mentd.** **Bernard v. Mountague** (1816), 1 Mer. 422 ; **Astley v. Essex** (1871), 6 Ch. App. 898 ; **Metcalfe v. Hutchinson** (1875), 45 L. J. Ch. 210.

7214. — In executing trusts of the will.]—By the will of a trader, the residue of his real & personal estate, including his stock in trade & effects used therein & the goodwill of his business, was bequeathed to a trustee & exor., upon ordinary trusts for sale & conversion. The exor. had from time to time out of his own moneys advanced various sums in excess of the balance in his hands. The ct., in administration, allowed the exor. per cent. on the balances appearing due to him at the end of each year, without including any interest in the computation of such balances.—**FINCH v. PESCOTT** (1874), L. R. 17 Eq. 554 ; 43 L. J. Ch. 728 ; 30 L. T. 156 ; 22 W. R. 437.

7215. Costs paid by representative—Suit pending with regards to estate.]—(1) The ct. will not allow an exor. interest on costs paid by him, pending a suit regarding the estate.

(2) Where interest is allowed it is only from the time of the balance having been struck on the general report.—**GORDON v. TRAIL** (1820), 8 Price, 416 ; 146 E. R. 1248.

Annotation :—*As to* (1) **Refd.** **Spackman v. Holbrook** (1860), 6 Jur. N. S. 881.

7216. — To be retained out of assets.]—A bill, instituted by testator, was revived by his exors., & was afterwards dismissed with costs, to be paid by the exors., & retained out of the assets. The state of the assets required the exors. to pay a

considerable sum out of their own moneys :—*Held* : they were not entitled to interest thereon.—**LEWIS v. LEWIS** (1850), 13 Beav. 82 ; 51 E. R. 32.
Annotation :—**Refd.** **Spackman v. Holbrook** (1860), 6 Jur. N. S. 881.

7217. Time from which interest calculated.]—**GORDON v. TRAIL**, No. 7215, *ante*.

C. Liability for Interest.

(a) Misapplication of Assets.

7218. Payments improperly made—Payment to the Crown—Failing claims by next of kin—Subsequent claims substantiated.]—A., on behalf of the Crown, took out administration to the estate of B., who, it was alleged, had died without leaving any next of kin ; & as such administrator, sold out a sum of stock belonging to B., & paid the proceeds into the Treasury. Some years after a suit was instituted by the next of kin of B. against A., & a decree obtained in his favour :—*Held* : interest was payable on the proceeds of the sale of the stock since the time of the sale.—**TURNER v. MAULE** (1849), 3 De G. & Sm. 497 ; 18 L. J. Ch. 454 ; 14 L. T. O. S. 62 ; 14 Jur. 165 ; 64 E. R. 578.

Annotations :—**Apprvd.** **A.-G. v. Köhler** (1861), 9 H. L. Cas. 655. **Refd.** **Re Dewell, Edgar v. Reynolds** (1858), 4 Drew. 269.

7219. — On authority of warrant under sign manual.]—The nominee of the Crown taking out administration to the estate of an intestate is under the same obligation as any other administrator. 15 & 16 Vict. c. 3, only dispenses with the necessity of his giving the usual bond to the ordinary, but imposes on him all the duties & liabilities of a private administrator. If he improperly pays to the Crown part of intestate's effects, though such payment is made under authority of a warrant under the sign manual, he makes himself personally liable to restore it to parties afterwards proving themselves legally entitled. Upon his death that liability only continues against his personal representatives, & not against his successor in office. But that successor may make himself personally liable for the acts of his predecessor, as by taking out letters of administration *de bonis non* to the same estate. Where the nominee of the Crown had improperly paid money, thus coming to his hands, to the then Sovereign, & the succeeding nominee of the Crown had taken out letters of administration *de bonis non* to the same estate, & in a suit by the next of kin against him, had only contested the fact of claimants being truly the next of kin, & denied, if they were so, liability to pay interest on the sum claimed :—*Held* : this was in substance an admission of liability to pay the principal to the next of kin, & claimants having satisfactorily established their title to that character, the liability to pay interest followed, as of course, on the liability to pay the principal.—**A.-G. v. KÖHLER**

PART VI. SECT. 6, SUB-SECT. 6.—A.

7211 i. Delay in accounting—Whether sufficient to charge representative with interest.]—It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the master's office.—**Re KIRK PATRICK, KIRKPATRICK v. STEVENSON**

(1883), 10 P. R. 4.—CAN.

PART VI. SECT. 6, SUB-SECT. 6.—B.

7214 i. Money loaned to estate—In executing trusts of will.]—An exor. is entitled to interest on moneys advanced by him out of his own means, & properly expended in the management of the estate.—**MENZIES v. RIDLEY** (1851), 2 Gr. 544.—CAN.

t. Right of administrator *de bonis*

non—**Against representatives of deceased administrator.]—**An administrator *de bonis non* having obtained a decree against the representatives of a deceased administrator for an account of his dealings with the estate :—*Held* : he was entitled to charge the representatives with interest in the same manner, & to the same extent, as one of the next of kin might have done.—**MCLENNAN v. HEWARD** (1862), 9 Gr. 178.—CAN.

Sect. 6.—Accounts: Sub-sect. 6, C. (a) & (b).]

(1861), 9 H. L. Cas. 654; 5 L. T. 5; 8 Jur. N. S. 467; 9 W. R. 933; 11 E. R. 885, H. L.

*Annotations:—*Apld. *Re Gosman* (1880), 15 Ch. D. 67. *Consd. Re Hulkes, Powell v. Hulkes* (1886), 33 Ch. D. 552. *Reid. Eames v. Hacon* (1880), 16 Ch. D. 407; *Re Sharpe, Re Bennett, Masonic & General Life Assce. Co. v. Sharpe*, [1892] 1 Ch. 154.

7220. — Under mistake of law.]—An exor., under a *bond fide* belief that on the true construction of the will they were entitled thereto, sold out stock, retained one-third & paid two-thirds to the co-exors. It having been declared in the suit that the next of kin were entitled to this fund, & that the exor. was bound to restore it:—*Held*: he was only liable to pay interest on the one-third retained by himself.—*SALTMARSH v. BARRETT* (No. 2) (1862), 31 Beav. 349; 31 L. J. Ch. 783; 7 L. T. 87; 8 Jur. N. S. 737; 10 W. R. 640; 54 E. R. 1173.

*Annotation:—**N.F. Re Hulkes, Powell v. Hulkes* (1886), 33 Ch. D. 552.

7221. — Whether interest claimable by persons so paid.]—Although as a general rule exors. are liable to be charged with interest at 4 per cent. on sums improperly paid or improperly retained by them, they are not liable for interest to the legatee, or his representatives, to whom, with full knowledge on his part & in common mistake, the payments which he must refund have thus been erroneously made.—*Re HULKES, POWELL v. HULKES* (1886), 33 Ch. D. 552; 55 L. J. Ch. 846; 55 L. T. 209; 34 W. R. 733; 35 W. R. 194.

*Annotation:—**Reid. Re Sharpe, Re Bennett, Masonic & General Life Assce. Co. v. Sharpe*, [1892] 1 Ch. 154.

7222. Securities improperly realised.]—Money placed out [upon good securities] at interest, & called in by an exor. without any cause; he shall pay interest for it.—*HASLEWOOD v. BALDWIN* (1680), Cas. temp. Finch, 457; 23 E. R. 248.

7223. —.]—Exor., in trust for infants, unnecessarily calling in the property, out upon good security at 5 per cent., except a small part, keeping large balances in his hands, & using it as his own, charged with interest at 5 per cent. & costs.—*MOSLEY v. WARD* (1805), 11 Ves. 581; 32 E. R. 1214.

*Annotation:—**Reid. Eglin v. Sanderson* (1862), 3 Giff. 434.

7224. —.]—Exor. directed to lay out testator's personalty in the funds; unnecessarily selling out stock, keeping large balances in his hands, & resisting payment of debts by a false pretence of outstanding demands, charged with 5 per cent. interest & costs; but the ct. refused to make rests in the account.—*CRACKELT v. BETHUNE* (1820), 1 Jac. & W. 586; 37 E. R. 491.

7225. —.]—An administrator who had, without reason, sold out stock specifically bequeathed to an infant & retained the produce after an order for payment, charged with compound interest.—*WALROND v. WALROND* (1861), 29 Beav. 586; 54 E. R. 755.

7226. Money used for own purposes.]—Where an exor. keeps the money of his testator in his hands, without accounting for a long time, & employs it in his trade, he shall pay interest.—*NEWTON v. BENNET* (1784), 1 Bro. C. C. 359; 28 E. R. 1177, L. C.

*Annotations:—**Reid. Rooke v. Hart* (1805), 11 Ves. 58; *Tebbs v. Carpenter* (1816), 1 Madd. 290; *Docker v. Somes* (1834), 2 My. & K. 655.

7227. —.]—Administrator ordered to pay interest for money in his hands, of which he made interest.—*PERKINS v. BAYNTON* (1784), 1 Bro. C. C. 375; 28 E. R. 1305.

*Annotations:—**Consd. Rooke v. Hart* (1805), 11 Ves. 58. *Reid. Tebbs v. Carpenter* (1816), 1 Madd. 290; *Whatton v. Cradock* (1836), 1 Keen, 267.

7228. —.]—*HALL v. HALLET*, No. 6054, ante.

7229. —.]—An exor. keeping the fund, & using it for his own benefit, contrary to his trust, decreed to account with interest at 5 per cent. & costs.—*PIETY v. STACE* (1799), 4 Ves. 620; 31 E. R. 319.

*Annotations:—**Consd. Docker v. Somes* (1834), 2 My. & K. 655; *Vyse v. Foster* (1874), L. R. 7 H. L. 318. *Reid. Tebbs v. Carpenter* (1816), 1 Madd. 290.

7230. —.]—K. having left East-India bonds in the hands of a mercantile firm at Calcutta, with directions to apply the interest & principal when received to a specific purpose, by his will appointed G., a partner in the firm, one of his exors. After the death of K., the will was proved by G.; & the firm, acting under his authority as exor., assigned the bonds, & used in their trade the money received upon the assignments. G. ceased to be a partner in the firm before all the bonds had been assigned. Upon suit, by the residuary legatee of K. against G., & on appeal:—*Held*: he was accountable to the residuary legatee of K. for the moneys received upon the bonds, with 8 per cent. from the time of the deposit to the dates of the respective assignments by the firm, & with interest at 12 per cent., being the current rate in Calcutta, from the time of the assignments & receipt of the moneys to the date of the judgment upon appeal in the original suit, & with interest at 5 per cent. upon the accumulated sum, composed of principal & interest, from the last-mentioned judgment till payment, but the cost of remittance from India, & the property tax, were charges on the fund payable.—*GRAHAM v. KEBLE* (1820), 2 Bli. 126; 4 E. R. 274, H. L.

*Annotation:—**Mentd. Rowe v. Young* (1820), 2 Bli. 391.

7231. —.]—Deft. having stated in his answer, that, by carrying on business on a farm, & with stock, belonging to the assets of intestate, he had made profit, but that, as he had not kept any accounts, & had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits; it was ordered, that, in taking the account against him, annual rests should be made, & interest calculated at 5 per cent. upon those annual rests.—*WALKER v. WOODWARD* (1826), 1 Russ. 107; 38 E. R. 42.

*Annotations:—**Reid. Docker v. Somes* (1834), 2 My. & K. 655; *Tomlin v. Tomlin* (1841), 1 Hare, 236; *Tickner v. Smith* (1855), 25 L. T. O. S. 44. *Mentd. Forsyth v. Ellice* (1850), 2 Mac. & G. 209; *Elmer v. Creasy* (1873), 9 Ch. App. 69.

7232. —.]—Where two exors. have committed a *devastavit*, & joined in misapplying testator's assets, & upon reference to the master, he finds that two of the exors. have obtained part of the assets improperly, by signing joint receipts in favour of each other, while they had large balances in their hands respectively, & the report is not excepted to, the ct. will give interest on these sums at 5 per cent. against both exors.—*BICK v. MORLY* (1835), 2 My. & K. 312; 4 L. J. Ch. 63; 39 E. R. 962.

7233. —.]—A trustee wilfully applying trust moneys to his own use is chargeable with interest at 5 per cent.; but where, under the trusts of a doubtful will, the tenant for life, who was also a

trustee, neglected to make proper investments, she was held chargeable with interest at 4 per cent. only, & the decree was made without costs.—*MOUSLEY v. CARR* (1841), 4 Beav. 49; 10 L. J. Ch. 260; 49 E. R. 256.

Annotation :—*Mentd.* *Cooper v. Laroche* (1869), 38 L. J. Ch. 591.

7234. —.]—Trustees under a will decreed to pay interest at £5 per cent. *per annum*, on balances mixed by them with their own moneys, & used in their own business, although the will authorised them to invest the residue on “good private securities.”—*WESTOVER v. CHAPMAN* (1844), 1 Coll. 177; 63 E. R. 372.

7235. —.]—Exor. engaged in trade, & mixing the assets with his own at his bankers, charged with compound interest at 5 per cent.—*WILLIAMS v. POWELL* (1852), 15 Beav. 461; 16 Jur. 393; 51 E. R. 616.

Annotation :—*Reid.* *Knott v. Cottee* (1852), 16 Jur. 752.

Compare Nos. 7145–7149, *ante*.

7236. Permission to legatee's specific legatee—To retain assets.]—*SPODE v. SMITH*, No. 6878, *ante*.

7237. Improper investment.]—A testator by his will gave his residuary real & personal estate to trustees, upon trust for his wife for life, & after her decease upon trust for his children; & he directed that after the death of his wife, & during the minority of any of his children, the trustees should apply, towards the maintenance of his children, a certain portion of the income of their then expectant shares & accumulate the surplus income of each such share at compound interest. After the death of the widow, the sole surviving trustee neglected to accumulate the surplus income of each child's share, & invested large portions of testator's estate in exchequer bills & other securities not authorised by the trusts of the will :—*Held* : the investments which had been made, being improper investments, the exor. was chargeable in the same manner as if he had retained the moneys in his own hands, but under the circumstances of the case, as it did not appear that he had benefited himself by it, & had not employed the sums so retained in trade, he was chargeable only with interest at 4 per cent.

The usual course is to charge an exor., who has merely retained balances in his hands, with interest at four per cent.; but if he has acted improperly, for his own benefit, or has used the money in trade, then he is charged with five per cent. (*ROMILLY, M.R.*).—*KNOTT v. COTTEE* (1852), 16 Beav. 77; 16 Jur. 752; 51 E. R. 705.

Annotations :—*Consd.* *Re Salmon, Priest v. Uppleby* (1889), 42 Ch. D. 351. *Foll.* *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

(b) Assets Improperly Retained.

7238. General rule.]—Exor. keeping the money of testator longer than the exigencies of his affairs require shall pay interest. But one exor. shall not be answerable for the sums come to the hands of another, unless they have done joint acts. But each shall be liable to the whole costs.—*LITTLEHALES v. GASCOYNE* (1790), 3 Bro. C. C. 73; 29 E. R. 416, L. C.

Annotation :—*Reid.* *Tebbs v. Carpenter* (1816), 1 Madd. 290.

7239. —.]—Exor. keeping money of testator's in his hands, liable to interest & costs.—*FRANKLIN v. FRITH* (1792), 3 Bro. C. C. 433; 29 E. R. 627, L. C.

Annotation :—*Reid.* *Tebbs v. Carpenter* (1816), 1 Madd. 290.

7240. —.]—Exors. charged with interest upon balances in their hands.—*LONGMORE v. BROOM* (1802), 7 Ves. 124; 32 E. R. 51.

Annotations :—*Reid.* *Joel v. Mills, Hervey v. Mills* (1861), 30 L. J. Ch. 354. *Mentd.* *Penny v. Turner* (1848), 2 Ph. 493; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Miller v. Chapman* (1855), 24 L. J. Ch. 409; *Salisbury v. Denton* (1857), 3 K. & J. 529; *Little v. Neil* (1862), 31 L. J. Ch. 627.

7241. —.]—Exor. charged for withholding money, & not putting in his examination, with interest; but not beyond the general rate of the ct., viz. 4 per cent. & costs. For 5 per cent. a special case, beyond mere negligence, is necessary; as, that he employed the money in his trade.

An exor. is not charged with interest except upon one of two grounds; either, that he has made use of the money himself; or, that he has neglected to lay it out for the benefit of the estate (*GRANT, M.R.*).—*ROCKE v. HART* (1805), 11 Ves. 58; 32 E. R. 1009.

Annotations :—*Consd.* *Tebbs v. Carpenter* (1816), 1 Madd. 290. *Reid.* *Sutton v. Sharpe* (1826), 1 Russ. 146; *Docker v. Somes* (1834), 2 My. & K. 655; *Agabeg v. Hartwell* (1835), 4 L. J. Ch. 190; *Williams v. Powell* (1852), 15 Beav. 461.

7242. —.]—Interest against exors., for balances in their hands; with costs, upon the circumstances; not, of course, merely as charged with interest.—*ASHBURNHAM v. THOMPSON* (1807), 13 Ves. 402; 33 E. R. 345.

Annotation :—*Consd.* *Tebbs v. Carpenter* (1816), 1 Madd. 290.

7243. —.]—Exor. charged with arrears of rent unreceived, & balances in his hands, together with interest, at the rate of four per cent., & the costs of the suit, relating to such arrears & balances.—*TEBBS v. CARPENTER* (1816), 1 Madd. 290; 56 E. R. 107.

Annotations :—*Consd.* *Crackelt v. Bethune* (1820), 1 Jac. & W. 586. *Reid.* *Law v. Hunter* (1826), 1 Russ. 100; *Docker v. Somes* (1834), 2 My. & K. 655; *Buxton v. Buxton* (1835), 1 My. & Cr. 80; *Cotham v. West* (1837), Donnelly, 199; *Clough v. Bond* (1838), 3 My. & Cr. 490; *Heighington v. Grant* (1840), 5 My. & Cr. 258; *Massey v. Moss* (1842), 1 Hare, 319; *Heighington v. Grant* (1845), 1 Ph. 600; *A.-G. v. Alford* (1854), 2 Sm. & G. 488; *Pride v. Fooks* (1858), 4 Jur. N. S. 678; *Bell v. Turner* (1877), 47 L. J. Ch. 75; *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470; *Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479.

7244. —.]—Administration taken out in 1771. Distribution to a certain extent made, but a large sum retained on unfounded pretences. No effectual suit against the administrator till 1792, & that protracted, in a great measure, by the administrator's fault, in the ct. below till 1810 :—*Held* : notwithstanding the lapse of twenty years before effectual suit for account commenced, the administrator ought to be charged with the full legal interest on the sum remaining undistributed, about £16,000 or £17,000, during the whole period of retention, & the account should be taken with annual rests, & interest be charged on the annual balances.—*STACPOOLE v. STACPOOLE* (1816), 4 Dow, 209; 3 E. R. 1140, H. L.

Annotations :—*Reid.* *A.-G. v. Solly* (1829), 2 Sim. 518; *Knott v. Cottee* (1852), 16 Jur. 752.

7245. —.]—*KNOTT v. COTTEE*, No. 7237, *ante*.

7246. —.]—Exor. had retained balances in his hands, & a suit having been instituted to administer his testator's estate, the exor. became bkpt. :—*Held* : the exor. was to be charged with interest on the balances, but was entitled to his costs.—*COTTON v. CLARK* (1852), 16 Beav. 134; 20 L. T. O. S. 59; 16 Jur. 879; 51 E. R. 728.

Annotation :—*Reid.* *Re Basham, Hannay v. Basham* (1883), 52 L. J. Ch. 408.

Sect. 6.—Accounts: Sub-sect. 6. C. (b) & D.]

7247. —.]—Administrator unnecessarily retained a balance of £3,700 in his hands for three years. He was charged with interest, but was allowed his costs of an administration suit.—*HOLGATE v. HAWORTH* (1853), 17 Beav. 259; 51 E. R. 1033.

*Annotation:—*Reid. *Blogg v. Johnson* (1867), 2 Ch. App. 225.

7248. —.]—Exors. having left money lying at a bankers who paid 2½ per cent. for it, ordered to pay interest themselves on the balances from time to time at the rate of 4 per cent. *per annum*.—*WILLIAMS v. WILLIAMS* (1853), 1 W. R. 237, L. JJ.

7249. —.]—*A.-G. v. ALFORD*, No. 7208, *ante*.

7250. —.]—An exor. who had unnecessarily retained in his hands uninvested a balance of £655, for a year & a half, charged interest thereon.—*STAFFORD v. FIDDON* (1857), 23 Beav. 386; 53 E. R. 151.

Blogg v. Johnson (1867), 2 Ch. App. 225.

7251. —.]—Exor. charged on further consideration, with interest on balances retained in his hands for various periods, varying from six hundred & seventy to two hundred & twenty-nine days.—*JOHNSON v. PRENDERGAST* (1860), 28 Beav. 480; 54 E. R. 450.

*Annotation:—*Reid. *Blogg v. Johnson* (1867), 2 Ch. App. 225.

7252. —.]—Where trustees & exors., after payment of testator's debts, kept the balance of the personal estate at their bankers, the ct. charged them with interest on the balance at 5 per cent. from the date of the payment of the debts, but allowed them their costs.—*Re JONES, JONES v. SEARLE* (1883), 49 L. T. 91.

7253. *Whether interest always chargeable.*—It is very true, that it is not the rule of the ct. to charge an administrator with interest at all events; on the other hand, it must be admitted, that there are many cases in which an administrator shall be charged with interest.—*LANDEN v. GREEN* (1740), Barn. Ch. 389; 27 E. R. 690, L. C.

7254. —.]—An administrator is not in every case chargeable with interest on account of personal estate.—*WILKINS v. HUNT* (1740), 2 Atk. 151; 26 E. R. 495, L. C.

7255. —.]—The rule is not invariable that where interest is chargeable against exors. in respect of a balance retained by them in their hands they are also to be charged with the costs of the suit.—*EGLIN v. SANDERSON* (1862), 3 Giff. 434; 6 L. T. 151; 8 Jur. N. S. 329; 66 E. R. 479.

7256. *Money deposited in bank—Contrary to direction for investment—Failure of bank.*—

Testator directed his exors. to invest money, within six months after his decease. This was not done for many years. In the meantime, part of the money was lost, by the bkpcy. of a banker, in whose hands it was lodged. The surviving exor. directed the money to be properly laid out, but it was not done; & the banker having failed, the ct. ordered him to pay interest upon the balances from time to time in the hands of himself & his co-exors., & to repay the money lost by the bkpcy.—*NEWTON v. REID* (1831), 9 L. J. O. S. Ch. 273, L. C.

7257. — *As security for debt to estate—Due from person entitled.*—An exor. held chargeable with interest upon certain sums which he retained & mixed with his own moneys at his bankers, the sums being retained out of the income of testator's residuary estate in order to satisfy a debt which there was probable ground to believe was due to testator's estate from a person entitled to a share of such income, but which turned out not to be due to the extent supposed.—*MELLAND v. GRAY* (1845), 2 Coll. 295; 63 E. R. 741.

*Annotations:—*Reid. *Hollingsworth v. Shakeshaft* (1851), 14 Beav. 492; *Edgar v. Reynolds* (1858), 4 Jur. N. S. 399.

7258. *Money retained under claim of right.*—Exor. not charged with interest for a balance in his hands, retained under a fair misapprehension of his right to it.—*BRUERE v. PEMBERTON* (1806), 12 Ves. 386; 33 E. R. 146, L. C.

7259. —.]—*SALTMARSH v. BARRETT* (No. 2), No. 7220, *ante*.

7260. — *Special circumstances to be shown.*—An administrator is entitled to his costs of an administration action even though the action has been caused by a claim by him for the allowance of certain payments made by him out of the estate & subsequently disallowed in his accounts in the action; provided the claim was made under an honest mistake, & was neither fraudulent nor monstrous.

Nor, if he complies with an order for payment into ct. of the balance representing the payments so disallowed is he, in the absence of special circumstances, chargeable with interest thereon.—*Re JONES, CHRISTMAS v. JONES*, [1897] 2 Ch. 190; 66 L. J. Ch. 439; 76 L. T. 454; 45 W. R. 598.

*Annotation:—*Reid. *Re England's Settlement. Trusts, Dobb v. England*, [1918] 1 Ch. 24.

D. Rate of Interest.

See, generally, MONEY & MONEY-LENDING.

7261. *General rule.*—(1) Generally, an exor. improperly retaining balances, is charged with interest at four per cent.; but, if in addition, he commits a breach of trust, or changes money from a proper into an improper state of investment, he is charged five per cent.

McMILLAN v. McMILLAN (1874), 21 Gr. 369.—CAN.

PART VI. SECT. 6, SUB-SECT. 6.—D.

7261 i. *General rule.*—Although the rule is, that exors. or trustees will be charged with what they ought to have made out of the moneys of testator, come to their hands; still where such moneys had, before the repeal of the usury laws, been invested in first-class security, the ct., on appeal, considered the exors. were not called upon, at the risk of being charged with the extra amount of interest, to call in those moneys & re-invest the same at the

PART VI. SECT. 6, SUB-SECT. 6.—C. (b).

7253 i. *Whether interest always chargeable.*—The report in an administration suit, found £1,403 chargeable against an exor. Of this sum £1,247 was for the price of land, claimed & received by the exor., & his claim to this had long been acquiesced in by the other parties interested, till held otherwise in this suit. Under the circumstances the exor. was not charged with interest on the balance in his hands.—*BLAIN v. TERRYBERRY* (1860), 12 Gr. 221.—CAN.

7253 ii. —.]—*Held: the exors.*

should be charged with interest upon the residue in their hands from the time when it might have been distributed, or appropriated, down to the time of its actual payment.—*HAMILTON CITY BOYS' HOME v. LEWIS* (1883), 4 O. R. 18.—CAN.

7253 iii. —.]—*IRWIN v. KNOX* (1858), 8 I. Ch. R. 503.—IR.

a. — *Proceeds of sale not paid into court.*—Exors. with a discretionary power to sell testator's real estate were charged with interest where they kept the proceeds of a sale in their hands, without paying it into ct.—

(2) If he employ the trust money in trade, he will be charged either with the profits, or five per cent. compound interest.—*JONES v. FOXALL* (1852), 15 Beav. 388; 21 L. J. Ch. 725; 51 E. R. 588.

Annotations:—*As to* (2) *N.F. Vyse v. Foster* (1874), L. R. 7 H. L. 318. *Reid. Re Wilcoxon, Ex p. Andrews* (1884), 25 Ch. D. 505.

7262. ———.]—*A.-G. v. ALFORD*, No. 7208, *ante*.

7263. ———.]—*Re HULKES, POWELL v. HULKES*, No. 7221, *ante*.

7264. ———.]—In an administration action brought by the beneficiaries against the trustees, two special inquiries were directed by the judgment—whether the residuary estate & the accumulated income were properly invested; & what sums had been expended in maintenance. As the result of those inquiries, certain balances were found due from the trustees:—*Held*: (1) in a proper case it was competent for the ct., upon further consideration, to charge trustees with interest, whether simple or compound, on balances retained in their hands, although no case of wilful default had been raised by the pleadings, & the question of interest was not referred to in the judgment; (2) as the trustees had neglected to comply with the express trust for accumulation, they were chargeable with compound interest upon the balances in their hands, but at the rate of 3 per cent. only, & in ascertaining such balances, trust funds improperly invested were to be treated as remaining in their hands.—*Re BARCLAY, BARCLAY v. ANDREW*, [1899] 1 Ch. 674; 68 L. J. Ch. 383; 80 L. T. 702.

Annotation:—*As to* (2) *Consd. Re Whiteford, Inglis v. Whiteford*, [1903] 1 Ch. 889.

7265. Money not used to own advantage—Four per cent.]—*KNOTT v. COTTEE*, No. 7237, *ante*.

7266. ———.]—*A.-G. v. ALFORD*, No. 7208, *ante*.

7267. ———.]—Where an exor. died three months after his testatrix, having money of hers in his hands; but it did not appear that there was any agreement between testatrix & the exor. during her lifetime, or any payment of interest on the money by him to her, or that he had committed any breach of trust, or made any use or profit of the money in his business:—*Held*: his estate could only be charged four per cent. on the money.—*PENNY v. AVISON* (1856), 28 L. T. O. S. 142; 3 Jur. N. S. 62.

Annotations:—*Reid. Price v. Price* (1880), 42 L. T. 626. *Mentd. Avison v. Holmes* (1861), 4 L. T. 617.

7268. ———.]—The legal personal representative of deceased intestate set aside certain securities belonging to intestate's estate, as representing the interest therein of an infant next of kin. She did not herself receive the dividends on such securities, but allowed her solr. to do so, & he employed them in his business or otherwise for his own purposes. The capital having already been repaid to the beneficiary:—*Held*: inasmuch as the legal personal representative had not herself derived any

benefit from the funds in question, but the right course for her to have followed was to have directed the dividends to be paid into a bank & to be invested, when received, in consols, she must pay over to the next of kin the dividends which had accrued, together with compound interest thereon at 3 per cent., to be calculated from time to time with half-yearly rests.—*GILROY v. STEPHENS* (1882), 51 L. J. Ch. 834; 46 L. T. 761; 30 W. R. 745.

Annotation:—*Consd. Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

7269. Compound interest—When chargeable.]—*Exor.*, directed not to derive any advantage from keeping money in his hands without accounting for legal interest, & to accumulate for the *cestuis que trust*, infants. Decree, directing a computation of interest at 5 per cent. on all sums received by him, while in his hands; “& that the master do in such computation make half-yearly rests.” The object of that direction is to charge compound interest; & the decree, though perhaps going farther than usual, was held under the circumstances properly executed by a computation of interest upon each receipt from the day it was received; the balance of receipts, with the interest so calculated, & payments, being struck at the end of the half-year; & that balance, so composed of principal & interest, being carried forward as an item in the account, producing interest.—*RAPHAEL v. BOEHM* (1805), 11 Ves. 92; 32 E. R. 1023, L. C.

Annotations:—*Appld. Dornford v. Dornford* (1806), 12 Ves. 127. *Consd. Tebbs v. Carpenter* (1816), 1 Madd. 290; *Law v. Hunter* (1826), 1 Russ. 100. *Distd. A.-G. v. Solly* (1829), 2 Sim. 518. *Consd. Docker v. Somes* (1834), 2 My. & K. 655; *Cotham v. West* (1837), Donnelly, 199. *Folld. Heighington v. Grant* (1840), 5 My. & Cr. 266. *Consd. Feltham v. Turner* (1870), 23 L. T. 345. *Reid. Montgomerie v. Wauchope* (1816), 4 Dow, 109; *Binnington v. Harwood* (1825), Turn. & R. 477; *A.-G. v. Alford* (1855), 4 De G. M. & G. 843; *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674. *Mentd. Heighington v. Grant* (1845), 1 Ph. 600.

7270. *S. P. RAPHAEL v. BOEHM* (1807), 13 Ves. 407; 33 E. R. 347, L. C.

Annotations:—*Consd. Tebbs v. Carpenter* (1816), 1 Madd. 290; *Docker v. Somes* (1834), 2 My. & K. 655.

7271. *S. P. RAPHAEL v. BOEHM* (1807), 13 Ves. 590; 33 E. R. 415, L. C.

Annotations:—*Consd. Docker v. Somes* (1834), 2 My. & K. 655. *Mentd. Heighington v. Grant* (1845), 1 Ph. 600.

7272. ———.]—*Exor.*, under a direction to accumulate, having become bkpt., his estate was charged with interest at 5 per cent. with rests.—*DORNFORD v. DORNFORD* (1806), 12 Ves. 127; 33 E. R. 49.

Annotations:—*Consd. Tebbs v. Carpenter* (1816), 1 Madd. 290. *Appld. Moons v. De Bernales* (1826), 1 Russ. 301. *Reid. Heighington v. Grant* (1840), 5 My. & Cr. 258. *Mentd. Whitaker v. Wright* (1843), 2 Hare, 310.

7273. ———.]—A decree, directing the master to take accounts & “to compute interest after the rate of 5 per cent. on the balances which should appear to have been in the hands of deft. at the end of each year, & on taking the accounts to make annual rests & to charge deft. with interest after the rate & in manner aforesaid

rates which evidence showed money could have been loaned at.—*SMITH v. ROE* (1865), 11 Gr. 311.—*CAN.*

7261 ii. ———.]—The principle upon which the ct. acts in charging exors. with interest, is not that of punishment, but of compensating the *cestui que trust*, & depriving the trustee of the advantage he has wrongfully obtained.

—*INGLIS v. BEATTY* (1878), 2 A. R. 453.—*CAN.*

7261 iii. ———.]—*Re HONSBERGER, HONSBERGER v. KRATZ* (1885), 10 O. R. 521.—*CAN.*

7269 i. Compound interest—When chargeable.]—An exor. will not necessarily be charged with com-

pound interest in all cases except those in which there is a mere neglect to invest.—*INGLIS v. BEATTY* (1878), 2 A. R. 453.—*CAN.*

b. Cash on deposit—Required for early distribution.]—*Exors.* found a sum of money belonging to testator in the hands of a loan co. upon savings bank account, & allowed it to remain there

Sect. 6.—Accounts: Sub-sect. 6, D.; sub-sect. 7, A.]

upon such balances" carries compound interest.—*HEIGHINGTON v. GRANT* (1840), 5 My. & Cr. 258; 10 L. J. Ch. 12; 4 Jur. 1052; 41 E. R. 369, L. C.; *reversing*. (1839), 1 Beav. 228.

Annotations:—*Consd. Feltham v. Turner* (1870), 23 L. T. 345. *Mentd. Jesus College v. King* (1839), 3 Y. & C. Ex. 662; *A.-G. v. Carrington* (1843), 6 Beav. 454; *Hardy v. Hull* (1853), 17 Beav. 355; *Knight v. Purcell* (1879), 49 L. J. Ch. 120; *Saner v. Bilton* (1879), 48 L. J. Ch. 545.

7274. ———.]—*WALROND v. WALROND*, No. 7225, *ante*.

7275. ——— Retention of infant's fund—& failure to inform infant of rights.]—The trustee of a will held a fund upon trust, after the determination of a previous life interest, to transfer & pay the same to a child when & as he should attain twenty-one, with a proviso that in case the child should be under age at the determination of the life interest the income of the fund or any part thereof should or might be applied for or towards his maintenance, education & advancement, & the surplus, if any, should accumulate to & become part of the fund. After the child attained twenty-one, the life interest having previously determined, the trustee retained the fund without making any arrangement with the child or explaining to him his rights:—*Held*: the trustee must be taken to have continued to hold the fund after the child attained twenty-one, upon the same trusts & with the same obligations to accumulate as before, & he was liable to account for the fund with compound interest.—*Re EMMET'S ESTATE, EMMET v. EMMET* (1881), 17 Ch. D. 142; 50 L. J. Ch. 341; 44 L. T. 172; 29 W. R. 464.

Annotation:—*Reid. Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

Circumstances justifying higher percentage.]—*See Nos.* 6054, 7223, 7224, 7229–7232, 7235, 7241, 7252, *ante*.

SUB-SECT. 7.—PRACTICE AS TO TAKING ACCOUNT.

A. In General.

See R. S. C., Ord. 33, rr. 3, 4; &, generally, PRACTICE.

7276. Jurisdiction of master—On investigation of transactions—Affecting representative's right of retainer.]—Under the common decree against an administrator, directing his intestate's assets to be applied in a due course of administration, the master is not entitled to go into the consideration of transactions between the administrator & the other creditors which might affect the administrator's right of retainer for a debt

due to himself.—*SPICER v. JAMES* (1835), 2 My. & K. 387; 39 E. R. 992.

Annotation:—*Folld. Thompson v. Cooper* (1844), 1 Coll. 81.

7277. ——— To state special circumstances—When not authorised by decree.]—The master is not at liberty to state special circumstances, unless authorised by the ct.; & where in a creditor's suit the decree directed the usual accounts, & the master found the amount of the debt appearing to be due to pltf., but stated, without the authority of the ct., special circumstances, not supported by evidence, raising a doubt as to the amount of the apportionment to which pltf. would be entitled out of the intestate's estate, which was insolvent, upon the debt so found due, the ct. refused to enter into the consideration of such special circumstances. *Semble*: the decision would have been the same, had the special circumstances been supported by evidence before the master.—*GAYLER v. FITZJOHN* (1837), 1 Keen, 469; 48 E. R. 387.

7278. ——— To assess damages—Unliquidated claim for breach of covenant.]—Under a decree to take an account of testator's debts, & to compute interest on such of his debts as carried interest, the master has not jurisdiction to allow a compensation to a party, for unliquidated damages, on a breach of covenant; but, upon an application to the ct., proper directions will be given for the investigation of such a claim.—*COX v. KING* (1846), 9 Beav. 530; 8 L. T. O. S. 1; 10 Jur. 236; 50 E. R. 448.

Annotation:—*Reid. Norman v. Stibby* (1846), 9 Beav. 560.

7279. ——— Item involving breach of trust—Disallowed under common account—On originating summons.]—*Re NEWLAND, BUSH v. SUMMERS* (1904), 49 Sol. Jo. 14.

Compare No. 8175, *post*.

7280. Whether taken in district registry—Direction of court necessary.]—(1) In the Liverpool district registry an action was commenced by writ for the administration of real & personal estate, & statements of claim & defence having been filed, the action came on for trial. The district registrar issued an administration summons, & made, by consent, a decree for administration of the real & personal estate, directing accounts & inquiries, & reserving further directions. The accounts & inquiries having been prosecuted, on application for directions as to setting down the action on further consideration:—*Held*: the proceedings in the district registry were irregular, the district registrar having no power to make a decree, even by consent.

(2) The action coming on for trial as a short cause:—*Held*: having regard to R. S. C., 1875, Ord. 35, r. 1, it is only in default of appearance that a district registrar can make an order under

at 3½ per cent. *per annum*, for more than two years after obtaining probate. They afterwards closed the account, & invested the money at 4 per cent. in a debenture, but fearing that they would be called on to distribute the money, they put the money into a chartered bank at 3 per cent.:—*Held*: the exors. should not be charged with more interest than they actually received.—*Re MCINTYRE, MCINTYRE v. LONDON & WESTERN TRUSTS CO.* (1904), 24 C. L. T. 268; 7 O. L. R. 548; 1 O. W. R. 56; 3 O. W. R. 258.—*CAN.*

application for better accounts made.]—Where, on an application for an order *nisi*, on the ground that the accounts brought in were insufficient, the insufficiency consisted in the items being undated, the order *nisi* was refused. In such case, before applying, a warrant should be obtained from the master, calling upon the parties to bring in better accounts.—*MERKLEY v. CASTLEMAN* (1860), 1 Ch. Ch. 292.—*CAN.*

d. Final account—Position of executor—Pleading Statute of Limitations.]—An exor. or administrator, who has filed a petition for the settlement of his account, & has formally cited the

creditors & others interested to appear at such settlement, is not bound to file an appearance to all or any of the claims of the parties so cited. It is not necessary for an exor. or administrator in proceeding finally to settle his account, to file or deliver a written plea setting up Stat. Limitations to any claim coming up for adjudication.—*Re GIDNEY & ARMSTRONG* (1912), 11 E. L. R. 57.—*CAN.*

e. ——— What is — Passing of account by administrator of part of assets.]—A person resident in a foreign country died there, intestate, & letters of administration of his whole estate were issued to his widow by a ct.

PART VI. SECT. 6, SUB-SECT. 7.—A.

c. Insufficient accounts—How ap-

Ord. 15, r. 1, & that accounts & inquiries cannot be prosecuted in a district registry, except by the direction of the ct. or the judge of the Division, under Jud. Act, 1873 (c. 66), s. 66. An application for a decree, with liberty to adopt the proceedings in the district registry, was refused, but the usual administration decree was made, with a direction that the accounts & inquiries should be taken & made in the district registry, & that the sale of the real estate should take place in London under the supervision of the judge in chambers.—*IRLAM v. IRLAM* (1876), 2 Ch. D. 608; 24 W. R. 292; 3 Char. Pr. Cas. 263.

Annotation:—*As to* (1) *Folld. Re Smith, Hutchinson v. Ward* (1877), 5 Ch. D. 692.

7281. — District registrars have no power to appoint receivers, direct banking accounts to be opened & money to be paid into those accounts, nor have they any power to take accounts directed by the judge in actions commenced in the district registries, unless the judgment specially directs them to do so.—*Re SMITH, HUTCHINSON v. WARD* (1877), 6 Ch. D. 692; 36 L. T. 178; 25 W. R. 452.

Annotations:—*Folld. Finlay v. Davis* (1879), 12 Ch. D. 735; *Re Bowen, Bennett v. Bowen* (1882), 20 Ch. D. 538.

7282. — Not if needless expense results.]—When an action for the administration of the estate of testator, commenced in a district registry, has on the default of deft. been removed to London, the ct. will not direct accounts & inquiries to be taken in the district registry if it should appear that needless expense would be thereby incurred.—*WALKER v. ROBINSON* (1876), 34 L. T. 229; 24 W. R. 427; 3 Char. Pr. Cas. 266.

Annotation:—*Mentd. Re Capper, Robertson v. Capper* (1878), 26 W. R. 434.

7283. Where taken in district registry—Form of certificate.]—*Re BOWEN, BENNETT v. BOWEN*, No. 7089, *ante*.

7284. Method of taking—Accounts set forth in schedule form—Whether necessary.]—Administrator, disputing by his answer the foundation of the bill, viz. a balance of accounts against the intestate's estate, need not set forth an account of the personal estate, etc., by way of schedule.—*PHELIPS v. CANEY* (1798), 4 Ves. 107; 31 E. R. 55.

7285. — Patent error—Effect of.]—Where it appears clearly upon the accounts taken before the master that an error has been committed in the accounts, & in the principle upon which they have been taken, the ct. will direct the master to review his report after the cause has been heard upon further directions, provided that error be made apparent to the satisfaction of the ct. In such case, the party requiring the indulgence must pay all costs.—*EASUM v. EASUM* (1847), 9 L. T. O. S. 429, L. C.

7286. — In administration action.]—The practice is for certain persons to be selected before taking the accounts & inquiries in chambers to represent the different interests & for the costs of such persons only to be allowed out of the estate

as a matter of course.—*SHARP v. LUSH* (1879), 10 Ch. D. 468; 48 L. J. Ch. 231; 27 W. R. 528.

Annotations:—*Mentd. Re Clemow, Yeo v. Clemow*, [1900] 2 Ch. 182; *Re King, Travers v. Kelly*, [1904] 1 Ch. 363; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130; *Re Townend, Knowles v. Jessop*, [1914] W. N. 145.

7287. — Executor also a trustee—Necessity for distinct accounts.]—*ARMITAGE v. ELWORTHY*, No. 7142, *ante*.

7288. — Before official referee—Chancery practice to be followed.]—Where in an administration action the accounts are referred to an official referee, he is not bound to adopt procedure usual in the Chancery chambers, although he may do so if he finds it convenient, & likely to advance the ends of justice. Accounts in an administration action, after having been ineffectually prosecuted in chambers for two years, were referred to an official referee, under Jud. Act, 1873 (c. 66), s. 56, to inquire & report. The referee stated in his report the total amounts of receipts & payments, & found a balance, without detailing items; but the ct. was satisfied that the report contained sufficient materials to enable the parties to attack it on points of substance:—*Held*: the report ought not, by the circumstances of the case, to be remitted for want of particularity.—*Re TAYLOR, TURPIN v. PAIN* (1890), 44 Ch. D. 128; 59 L. J. Ch. 803; 62 L. T. 754; 38 W. R. 422.

7289. Interrogatory to representative—As to indebtedness to testator — Necessity for.] — The examination of an exor. under the usual decree for an account ought to contain an interrogatory whether he is indebted to testator, the debt from himself being assets. Liberty was therefore given upon the suggestion of co-defts. Legatees, without affidavit, to exhibit an interrogatory for that purpose; not to go into an account; which must be the subject of a distinct bill.—*SIMMONS v. GUTTERIDGE* (1806), 13 Ves. 262; 33 E. R. 292, L. C.

Annotations:—*Reid. Cropper v. Knapman* (1836), 2 Y. & C. Ex. 338; *Paris v. Hughes* (1836), 1 Keen, 1; *Tomlin v. Tomlin* (1841), 1 Haro, 236.

7290. — Special Interrogatory — Whether proper under usual order.]—If, in a creditor's suit, a decree is made in the usual form, no special interrogatory for the examination of defts., ought to be allowed, although a case for directing special inquiries is made on the record.—*MOORE v. LANGFORD* (1835), 6 Sim. 323; 4 L. J. Ch. 228; 58 E. R. 615.

Annotations:—*Consd. Hopkinson v. Bagster* (1841), 1 Y. & C. Ch. Cas. 13; *Brooker v. Brooker* (1857), 3 Sm. & G. 475. *Reid. Small v. Attwood* (1836), 2 Y. & C. Ex. 101; *Maw v. Pearson* (1863), 3 New Rep. 99.

7291. Certificate of the master—Reservation of question of fact.]—*STOTT v. MEANOCK*, No. 7077, *ante*.

7292. — Limited to scope of order.]—Solr. to pltf. in a creditor's action brought up debts. The estate was insolvent:—*Held*: the question

having jurisdiction in his place of abode. A part of his estate consisted of personalty in Ontario, & letters of administration in reference to that part were issued to a trust co. by a Surrogate Ct. in Ontario. The trust co. administered the Ontario assets, & had a balance in their hands after payment of expenses:—*Held*: the passing of the accounts of the Ontario administrators was not the passing of the final accounts, within Trustee Act,

R. S. O. 1914, s. 38 (2).—*Re LAW* (1915), 8 O. W. N. 550; 34 O. L. R. 222.—*CAN.*

f. Objection to amount allowed — By court to executors—How raised.]—The amount allowed by the Surrogate Ct. judge to the exors. for their care, pains & trouble, could not be questioned in an action for an account, nor otherwise than upon an appeal from the order of that judge.—*SPOULE v.*

MURRAY (1919), 45 O. L. R. 326; 48 D. L. R. 368; 16 O. W. N. 841.—*CAN.*

g. — By executors to claimant — Right of beneficiaries to examine claimant.]—An order was made, for the examination of an alleged creditor of a deceased's estate on his statutory declaration in support of his claim, on the application of beneficiaries who, on the administrator's application to

Sect. 6.—Accounts: Sub-sect. 7, A. & B.; sub-sects. 8 & 9. Sect. 7: Sub-sect. 1, A.]

whether solr. was trustee for the creditors of any profit on the purchase could not be raised by the certificate of the chief clerk, in the absence of any direction on the subject in the order under which the certificate was made.—*Re TILLET, FIELD v. LYDALL* (1886), 32 Ch. D. 639; 55 L. J. Ch. 841; 54 L. T. 604; 35 W. R. 6.

7293. Particular debt as item in account—Right to declaration.]—In a suit by residuary legatees of A. against the personal representatives of B., who was the exor. of A., for payment of a debt due from B. to A., the amount of which was not admitted, & also for an account of the personal estate of A., praying also, unless assets were admitted, an account of the personal estate of B., & that being insufficient, seeking to charge his real estate:—*Held*: pltf. was not entitled to a declaration, that a particular debt or sum constituted an item in the account to be taken, but evidence tending to show that debt. should be charged with such particular debt or sum, was admissible.—*TOMLIN v. TOMLIN* (1841), 1 Hare, 236; 66 E. R. 1019.

7294. Objection that debt statute-barred—Who entitled to take.]—(1) In taking the accounts in an administration suit any creditor may object that another creditor's debt is barred by Stat. Limitations.

(2) *Semble*: such an objection cannot be taken to pltf.'s debt, which is the foundation of the decree.—*FULLER v. REDMAN* (No. 2) (1859), 26 Beav. 614; 53 E. R. 1035.

Annotations:—As to (1) *Apld.* *Fox v. Garrett, Miles v. Fox* (No. 1) (1860), 28 Beav. 16. *Reid.* *Re Lacy, Howard v. Lightfoot* (1906), 51 Sol. Jo. 67.

7295. Accounts taken against two representatives—Affairs managed by third—Third representative considered agent.]—Three exors. & trustees, A., B. & C., were authorised to carry on testator's farm. A., with the concurrence of B. & C., managed the whole affairs relating thereto:—*Held*: in taking the accounts against B. & C., A. was to be considered their agent.—*TOPLIS v. HURRELL* (1854), 19 Beav. 423; 52 E. R. 414.

See, further, R. S. C., Ord. 55, rr. 65, 71.

7296. Passing accounts—Once yearly—On grounds of expense.]—By the decree made at the hearing of the cause in an administration action, no directions were given as to the attendance by defts., who were very numerous, at the subsequent proceedings. On motion to restrain a large number of them, whose interests were relatively small, from attending on the passing of the receiver's accounts, on the ground of it being a great saving to the estate, the ct. refused to make the order; but where the expenses of attendance on the passing of such accounts are very great, the ct. will direct them to be passed once a year only, & not half-yearly.—*DAY v. CROFT* (1851), 14 Beav. 29; 20 L. J. Ch. 423; 18 L. T. O. S. 22; 51 E. R. 198.

7297. Stay of proceedings—Where appeal pend-

ing.]—The ct. will not stay the taking of accounts in the master's office directed by the decree pending an appeal.—*WILLINK v. BENTICK* (1847), 9 L. T. O. S. 243.

7298. Application of assets due to representative—To replace misappropriation by representative.]—Where an annuity was given to an extrix. who was a married woman, to her separate use without power of anticipation, & such extrix. had misappropriated assets of testatrix, upon a suit for the administration of testatrix's estate:—*Held*: in taking the accounts, payments of the annuity which were in arrear were liable to be applied to make good the extrix.'s misappropriations; but the future payments, being subject to the restraint on anticipation were not so liable.—*PEMBERTON v. M'GILL* (1860), 1 Drew. & Sm. 266; 29 L. J. Ch. 499; 3 L. T. 207; 8 W. R. 290; 62 E. R. 380.

Annotations:—*Consd.* *Stanley v. Stanley* (1878), 47 L. J. Ch. 256; *Hood Barrs v. Heriot*, [1896] A. C. 174. *Reid.* *Sawyer v. Sawyer* (1885), 28 Ch. D. 595; *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559.

B. Proof of Account.

See R. S. C., Ord. 33, rr. 3–4A.

7299. Affidavit—Small items—Other proof lacking.]—A man may depose for small disbursements which he cannot make proof of.—*WELDON v. JAMES* (1634), Toth. 136; 21 E. R. 147.

7300. ———.]—The ct. not satisfied with the rule, that an accountant shall be allowed on his own oath all sums not exceeding 40s. so as the whole is not above £100.—*WHICHERLY v. WHICHERLY* (1687), 1 Vern. 470; 1 Eq. Cas. Abr. 11; 23 E. R. 596.

7301. ——— Books of account lost abroad.]—*HOLCOMB v. RIVIS* (1671), Nels. 139; 21 E. R. 810; *sub nom.* *HOLSTCOMB v. RIVERS*, 1 Cas. in Ch. 127.

7302. ——— Produce of foreign estate.]—The acting exor., to whom the produce of an estate in Antigua, belonging to an infant was consigned, was directed to account annually by affidavit.—*BROOKS v. OLIVER* (1761), Amb. 406; 27 E. R. 272.

7303. ——— Circumstances dispensing with vouchers.]—A sum of £27 for wages due to the servants of testator at his death, & another sum of £16 for keeping a house, for the repairs of which testator's estate was liable, were allowed to an exor. in passing his accounts, in the circumstances of the case, on his own affidavit & without vouchers.—*CATON v. RIDEOUT* (1850), 19 L. J. Ch. 408; 16 L. T. O. S. 278; 15 Jur. 308; *previous proceedings* (1849), 2 H. & Tw. 33, L. C.

7304. Ancient transactions—Accounts kept at that time—Presumption of accuracy.]—*CHALMER v. BRADLEY*, No. 6365, *ante*.

7305. ———.]—A trustee under the will of a testator who died in 1834, kept the trust accounts open to be inspected by the trustees of the trust, who all lived near together & in communica-

pass accounts, objected to the claim which the administrator had paid.—*Re WILSON*, [1921] 3 W. W. R. 249.—CAN.

h. Procedure to obtain accounts.]—Where an exor. fails to render accounts under Rule 512 of the Code, the proper form of procedure to compel perform-

ance is by action & not by summons.—*BALDERSTON v. CAMPBELL* (1891), 10 N. Z. L. R. 64.—N.Z.

PART VI. SECT. 6, SUB-SECT. 7.—B.

k. Right of creditor—To impeach claims of other creditors.]—In proceed-

ings to take accounts, unsecured creditors & the administrator sought to impeach the validity of receipts assigned to pltf. by testator in his lifetime, & on which he had received advances:—*Held*: the master's office had jurisdiction to try the question, & in the case of a creditor's administration reference, any creditor had a right

tion. In 1855 an examination of the books of account was made on behalf of two of them. The ct. under Improvement of Jurisdiction of Equity Act (c. 86), s. 54, allowed the books to be taken as *prima facie* evidence of accounts till that examination.—*BANKS v. CARTWRIGHT* (1867), 15 W. R. 417.

See, generally, EVIDENCE, Vol. XXII., pp. 361 *et seq.*

7306. Payments not usually receipted in writing—Special direction as to proof.]—Where testator directed his farming business to be carried on by his exors. after his decease, & they accordingly carried on same, & made numerous payments to servants for wages, & expended moneys in the purchase of live stock, seeds, & other agricultural produce for the use of the farm, for which receipts in writing were rarely given, the ct. directed it to be made a part of the decree, that as regarded any evidence of such payments the exors. were to be at liberty to apply to the ct., & the master to be at liberty to state circumstances specially.—*SKIPWORTH v. SKIPWORTH* (1840), 9 L. J. Ch. 182.

7307. Vouching every item—Whether necessary—Waiver by consent.]—*Re BROWN, BENSON v. GRANT* (1895), 39 Sol. Jo. 638.

7308. Production of books of account—Originals abroad—Copy of entries.]—(1) Exor. having paid legacies stands in a situation in which, at least for the security of the fund, it is not competent to him to allege that debts are unpaid.

(2) Admission by an exor. that the whole amount of the property is invested in India on public securities, either in his name, or in the name of the house in which he is a partner, but subject to his disposal, unless some part is in the hands of the said house at interest, which he believes may be the case, not a sufficient admission of money in his hands to order the payment into ct. of any part of it.

(3) It is the bounden duty of an exor. to keep clear & distinct accounts of the property which he is bound to administer. If therefore he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books, in which any part of those accounts may be inserted.

(4) Exor. in India, coming to England, & after twenty-one years, being called upon to account, alleging that he has left his books, etc., behind him in India, ordered to produce copies of all entries in such books, etc., within six months, though it is impossible he should do so, in order that the ct. may have an opportunity from time to time of seeing that he has used proper diligence.—*FREEMAN v. FAIRLIE* (1812), 3 Mer. 29; 36 E. R. 12, L. C.; *subsequent proceedings* (1817), 3 Mer. 24.

Annotations:—As to (2) Exord. Wood v. Downes (1812), 1 Ves. & B. 49. *Reid. Roy v. Gibbon* (1844), 4 Hare, 65; *Symonds v. Jenkins* (1876), 34 L. T. 277. *As to (3) & (4) Consl. Airey v. Hall* (1848), 2 De G. & Sm. 489. *Reid. Goodchap v. Weaving* (1852), 16 Jur. 586; *Macdonald v. Richardson, Richardson v. Marten* (1858), 1 Giff. 81; *Lasarus v. Mosley* (1859), 1 L. T. 3; *Liberia Republic v. Imperial Bank* (1873), L. R. 16 Eq. 179.

.]—See DISCOVERY, Vol. XVIII., p. 158, Nos. 1094, 1095.

SUB-SECT. 8.—SURCHARGE AND FALSIFICATION.

See, now, R. S. C., Ord. 33, r. 5; R. S. C., Ord. 55, r. 68.

7309. Surcharge—Whether chargeable—On summons in chambers—Under ordinary decree.]—Two exors. & trustees under a will which directed a general conversion, sold & realised a large amount, which was received by one by the direction of both. The one who undertook the sole management of the estate became bkpt., & a great loss occurred. A suit was instituted by summons in chambers, & under the common decree it was sought on summons to charge the non-acting exor. & trustee with two surcharges, on the ground of constructive receipt. Summons dismissed, with costs, on the ground that such a surcharge could not be made in such a form of suit.—*PETERSON v. PETERSON* (1867), 16 L. T. 377.

See, further, EQUITY, Vol. XX., p. 277, Nos. 359-369.

SUB-SECT. 9.—RE-OPENING SETTLED ACCOUNT.

7310. Grounds for re-openings—Fraud.]—By A.'s will in 1783, his widow, whom he appointed extrix., was to receive £400 a year for the maintenance of herself & their children, but only £60 a year for herself if she married again. She proved the will, & was appointed receiver of her children's fortunes; she married again in 1791, but concealing her marriage, passed her accounts as widow, taking credit for the £400 a year. On her death in 1794, B., her second husband, administered to her & to her first husband's estate; & having been also appointed receiver of the children's fortunes, passed his accounts in continuation of the widow's, without acknowledging their marriage. All the children having attained their majority in 1802, disputed B.'s accounts, which were then referred to arbitration. C., the eldest of the children, married before the award was made, & one of the arbitrators was a trustee of her settlement: her marriage also was concealed from the ct., & the accounts afterwards passed described her by her maiden name. B. paid her husband, as if under the award & in ignorance of the settlement, sums of money which ought to have been applied to the trusts of the settlement:—*Held*: all the accounts of A.'s estate should be taken again by the master without regard to the award, or to the accounts passed subsequently to C.'s marriage; B.'s estate should be charged with the difference between £60 & £400, which his wife had received: & consideration of the liabilities of C.'s husband, & of the trustee under their marriage settlement should be reserved until after the report.—*M'CAN v. O'FERRALL* (1841), 8 Cl. & Fin. 30; West, 593; 8 E. R. 12, H. L.

7311. Lapse of time—Effect on right to re-open—When accompanied by laches.]—*MORRISON v. MORRISON* (1847), 10 L. T. O. S. 242, L. C.

See, further, EQUITY, Vol. XX., pp. 271-276.

SECT. 7.—ON ADMISSION OF ASSETS.

SUB-SECT. 1.—WHAT CONSTITUTES ADMISSION.

Express Admission.

7312. By inventory.]—An inventory made by an exor., & found among his papers, is evidence of

*L. Verified account—Whether proof of claim.]—*An exor.'s verified account is not *prima facie* proof of his claim, but the claim, if disputed, must be

proved as any other claim.—*Re McNUTT'S ESTATE* (1892), 24 N. S. R. (12 R. & G.) 264.—CAN.

Sect. 7.—On admission of assets: Sub-sect. 1, A. B. & C. (a).]

assets.—PETRE (LORD) v. HENEAGE (1701), as reported in 12 Mod. Rep. 519; 88 E. R. 1491, N. P.

7313. ——(1) The inventory exhibited in the Ecclesiastical Ct. by an exor. for the purpose of obtaining probate is not generally *prima facie* evidence of his having received assets; (2) *Semble*: where the inventory only describes effects on a farm with which the exor. was acquainted it may be *prima facie* evidence, but this is rebutted if it appear that no effects actually came to the exor.'s hands though his co-exor. has, with his knowledge, intermeddled with the property; (3) a probate stamp is not *prima facie* evidence that the exor. has received assets to the amount covered by the stamp.—STEARN v. MILLS (1833), 4 B. & Ad. 657; 1 Nev. & M. K. B. 436; 110 E. R. 603; *sub nom.* STEEN v. MILLS & WRIGHT, 2 L. J. K. B. 106.

Annotation:—As to (3) *Consd.* Mann v. Lang (1835), 3 Ad. & El. 699.

7314. —— **Good & bad debts not distinguished.]**—Upon a *plene administravit* if an inventory be produced where there is one particular of good & bad debts, debt. shall be charged with the whole, because he doth not distinguish them, unless he can discharge any part of it by special evidence (HOLT, C.J.).—ANON. (1695), Comb. 342; 90 E. R. 517.

7315. —— **Onus on representative as to bad debts.]**—If in the inventory produced, the article concerning debts did not distinguish between sperate & desperate, it would be sufficient to charge the exor. with the whole *prima facie* as assets, & put it upon him to prove any of them desperate, as if the article were: "Item, for debts due & owing, which I admit myself to be charged with when recovered or received" (HARDWICKE, C.J.).—SMITH v. DAVIS (1737), Bull. N. P. 140 a.

7316. Promise to pay legacy—On demand.]—CAMDEN v. TURNER (1719), cited 1 Cowp. 293; 98 E. R. 1093.

Annotations:—*Foll.* Atkins v. Hill (1775), 1 Cowp. 284; Hawkes v. Saunders (1782), 1 Cowp. 289. *Apld.* Barnard v. Pumfrett (1841), 5 My. & Cr. 63.

7317. —— **Made under mistake.]**—(1) Decree for payment of legacies was made against an exor., without reference to the state of the assets, upon the ground of his having, by his acts & admissions, rendered himself personally liable for the payment.

(2) The ct. will relieve an exor. from an admission of his liability to pay legacies if made by mistake & incautiously if he recall the same within a reasonable time after discovery of the mistake.

(3) *Semble*: payment of interest upon a legacy or a declaration that a legacy is ready for a legatee at twenty-one:—*Held*: sufficient admission of assets.

(4) *Semble*: widow, extrix. of husband, having refused to pay legacies given under her husband's will & giving as the reason that the personal estate was out on mtgc., was a sufficient admission of assets.

(5) *Semble*: forbearance of a present demand on payment of interest is a sufficient consideration to make an exor. personally liable on a contract.

(6) These letters promising to pay legacies & this dealing with the legatees, was an assent to the legacies, & an admission to one legatee is an

admission to all (LORD COTTENHAM, C.).—BARNARD v. PUMFRETT (1841), 5 My. & Cr. 63; 10 L. J. Ch. 124; 41 E. R. 295, L. C.

Annotation:—As to (1) *Consd.* Postlethwaite v. Mounsey (1842), 6 Hare, 32, n.

7318. Memorandum in writing—Acknowledging legacy as debt—Due from representative to legatee.]—S. C. by her will bequeathed a legacy of £150 to S. H., when she should attain twenty-one. Testatrix died in 1811. The legatee did not attain twenty-one till several years afterwards, & she then married. In 1825, fourteen years after the death of testatrix, her exors. signed, & gave to the husband of the legatee a memorandum in the following words: "We separately & jointly acknowledge to owe to G. H. the sum of £150, being a legacy left to his wife by the late S. C., & £50 interest thereon":—*Held*: under the circumstances of the case, this memorandum amounted to an admission of assets by both the exors.—HOLLAND v. CLARK (1843), 2 Y. & C. Ch. Cas. 319; 7 Jur. 213; 63 E. R. 140.

7319. —— **& promise to pay interest.]**—DAVYS v. PRITCHARD, No. 7425, *post*.

7320. —— **& regular payments of interest.]**—(1) In Jan. 1863, P., the exor., wrote to the tenant for life under a will as follows: "In answer to your letter in reference to the trust moneys in which you have a life interest & the family of the late P. the ultimate benefit, I beg to say that the money is placed out on different mtgc. securities with moneys of my own, realising as much interest as possible. Had it not been for your sake the money should have been placed in the Govt. stocks years ago." From 1854 down to the time of his death in 1874 P. regularly paid to the tenant for life £28 a year by equal quarterly payments of £7 each. In the year 1868 P. passed his residuary account, showing no assets:—*Held*: the letter of Jan. 1863, & the quarterly payments regularly made by P. both before & after writing that letter, were, under the circumstances, such an admission of assets as to make his estate personally liable.

(2) There is therefore an admission quite sufficient to bind debt. unless it can be explained away in some way or other. It might be explained by showing that a mistake had been made or that there were no assets (NORTH, J.).—PAYNE v. TANNER (1886), 55 L. J. Ch. 611; 55 L. T. 258; 34 W. R. 714.

See, also, Sub-sect. 1, C., *post*.

7321. Credit given in books of account—Of amounts to which legatees entitled.]—(1) Testator directed that certain legacies should remain at interest in his business. His exor., who was his brother & partner, credited in his books the legatees, who were the exor.'s sons & had access to his books, with the amounts of the legacies, & with interest upon them, but in a deed between the parties the accounts were recited to be unsettled. He returned to the Stamp Office the estimated value of testator's estate at an amount more than sufficient for payment of the legacies, & paid duty upon them & upon a residue beyond:—*Held*: in the circumstances of the case, those acts did not amount to a conclusive admission of assets.

(2) One of the legatees had on his marriage assigned a part of his legacy to the trustees of his settlement, covenanting to pay the amount by instalments. It appeared, on the evidence, that the marriage was contracted & the settlement

made on the faith of representations by the exor. that the legacy was substantial & safe & would be paid, though at a future time:—*Held*: the estate of the exor. thereby became indebted for the whole amount.—*HUTTON v. ROSSITER* (1855), 7 De G. M. & G. 9; 3 Eq. Rep. 589; 24 L. J. Ch. 106; 25 L. T. O. S. 61; 3 W. R. 387; 44 E. R. 4, L. JJ.

Annotations:—*As to* (1) *Appld.* *Morewood v. Currey* (1879), 28 W. R. 213. *Refd.* *Cadbury v. Smith* (1869), L. R. 9 Eq. 37; *Payne v. Tanner* (1886), 55 L. J. Ch. 611.

7322. — — —.]—By articles of partnership, dated Jan. 1, 1839, it was provided that the capital of the partners should not be withdrawn until the expiration of seven years from the date of the articles, & in case of the death of one of the partners within the term, that a valuation of his share should be made, & the surviving partners should pay to his representatives the amount of such valuation within three years from the expiration of the term, & in the meantime give security for the same by a mtge. of a competent part of the partnership property. It was further provided that it should not be lawful for the representatives to commence any action for recovering payment of the share until the end of three years after the expiration of the term of ten years, nor to claim any participation in the profits made after the day up to which the valuation was made, the expressed intention being that the representatives of the partner so dying should take five per cent. on the value of the share in lieu of profits. It was provided, however, that nothing should prejudice the right of the representatives, within the term of seven years, to take any proceedings in order to obtain a fair valuation, or to obtain & enforce the mtge. security. In Apr. 1844, one of the partners died, having by will devised his real & personal estate, nearly all of which was assets of the partnership, to three trustees & exors., defts. A., B. & C., two of whom, A. & B., were his copartners, upon trust to raise the sum of £12,000, & invest the same in Govt. or real security, or in some railway co., & apply the proceeds towards the maintenance & education of pltf., his then infant daughter, & accumulate the surplus at compound interest, & upon his daughter attaining twenty-one, to pay the same to her separate use, & to stand possessed of the capital, in trust to pay her the proceeds during her life to her sole & separate use. On Dec. 31, 1844, a valuation was made, by which testator's share was ascertained to be £20,000 & upwards. After more than ten years had expired from the date of the articles, in June, 1853, certain hereditaments, consisting of freeholds, leaseholds & machinery, being part of the partnership assets, were, in alleged consideration of £12,000 conveyed by debt. B. to defts. A. & C. by way of mtge., subject to a proviso for redemption. Pltf. came of age in 1857, & in 1858 defts. A. & B. rendered to her an account of the trust-funds, in which they debited her with various items of expenditure for maintenance & education, with five per cent. interest thereon, & credited herewith the sum of £12,000 & interest at five per cent., with yearly rests up to May 6, 1853, & thenceforth with interest at four per cent. with yearly rests. Pltf.

prayed for an inquiry & an account of the profits made in the partnership business on £12,000 from testator's death, & for payment of what should be found due to her, alleging that the mtge. was an improper security:—*Held*: (1) pltf. was entitled to an account of the legacy of £12,000 with interest at 5 per cent. from one year after testator's death up to Jan. 1, 1849, with compound interest on the surplus, after allowing for sums expended for her maintenance & education; (2) she was entitled to an account of the profits made by the partners from Jan. 1, 1849, on the balance found due for principal at that date, with interest at 5 per cent. & annual rests, with a decree for payment of what should be so found due; (3) the entry of the sum of £12,000 in the account furnished by defts. must be taken as conclusive against them that they had such a sum in their hands.—*TOWNEND v. TOWNEND* (1859), 1 Giff. 201; 33 L. T. O. S. 143; 5 Jur. N. S. 506; 7 W. R. 529; 65 E. R. 885.

Annotations:—*As to* (1) *Refd.* *Vyse v. Foster* (1872), 8 Ch. App. 315, n. *Generally, Mentd.* *Re Chennell, Jones v. Chennell* (1878), 8 Ch. D. 492.

7323. — — — *How far conclusive*—*In favour of estate debtor.*]—(1) Payment by a debtor, for the express purpose of discharging his debt to an estate, to his own agent, who happens to be, but not to the debtor's knowledge, one of the exors. of the estate, is not sufficient to discharge the debtor.

(2) Although a residuary account signed by an exor. is *prima facie* evidence of receipt of the moneys credited in the account, it is evidence which is open to explanation, & the acknowledgment is not conclusive against him in favour of a debtor to the estate.—*MILLER v. DOUGLAS* (1886), 56 L. J. Ch. 91; 55 L. T. 583; 35 W. R. 122.

B. By Pleading or Judgment.

See Part VII., Sect. 2, sub-sect. 8, D., & compare No. 7405, post.

C. Conduct.

(a) *Payment of Legacies and Interest on Legacies.*

7324. *Payment of legacy.*]—*FREEMAN v. FAIRLIE*, No. 7308, *ante*.

7325. — — — *Part payment on account.*]—Part payment of a legacy on account is not an admission of assets to pay in full.—*SMITH v. STOTHARD* (1837), 1 Jur. 540.

7326. — — — *Whether conclusive.*]—*RIPPINGTON v. SPIERS*, No. 7353, *post*.

7327. — — —.]—(1) The mere payment of a legacy by an exor. of a will is not conclusive as an admission of assets.

(2) It is contended that by paying some of the legacies in full, the exors. admitted assets for payment of all the legacies, & are personally liable to pay the unpaid legacies in full. The mere payment of a legacy is not conclusive as an admission of assets. In the present case when the payments

PART VI. SECT. 7, SUB-SECT. 1.— C. (a).

7328 i. *Payment of legacy—Whether conclusive.*]—The principle that the payment of one legacy is an admission of assets for every other legacy is not a hard & fast rule, & in determining

the liability of exors. in this respect the ct. will examine the facts of each case.—*MARSDEN v. STEIN* (1906), 6 S. R. N. S. W. 368.—*AUS.*

7328 ii. — — —.]—Payment of a legacy in full is a *prima facie* admission of assets to pay all the legacies in full,

because, if the assets are not sufficient for this purpose, all the legacies must abate in proportion; but it is open to explanation. When an exor. pays some legacies, & makes provision for the others, he has not conclusively admitted assets.—*COLEMAN v. WHITEHEAD* (1852), 3 Gr. 227.—*CAN.*

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were made the exors. had reason to believe & did believe that there were ample assets, & in my judgment there is not here any admission (WARRINGTON, J.).—*Re SCHNEIDER, KIRBY v. SCHNEIDER* (1906), 22 T. L. R. 223.

7328. — Admitted in answer in creditor's suit.]—(1) The admission of an exor. by his answer, in a creditor's suit, that he had paid certain legacies bequeathed by testator, is not an admission of assets entitling pltf. to a decree against the exor. for payment of his debt without taking the account, when the bill does not specifically charge deft. with having made himself personally liable, but prays that an account may be taken, & the estate administered in a due course of administration.

(2) *Qu.*: whether such admission of the payment of legacies by the exor. is a conclusive admission of assets in any case.

(3) In both those cases, *Woodgate v. Field, Rogers v. Soutten*, Nos. 7389, 7429, *post*, the exor. admitted assets, which is equivalent to saying "Do not go to the expense of an account, for I admit that which it is the object of the account to establish" (WIGRAM, V.-C.).

(4) Admitting for the purposes of the argument, but not further, that payment of a legacy of £5, whilst debts remain unpaid, may be an admission of assets to pay all testator's debts, it is obvious that the circumstances under which such payment was made, may be material (WIGRAM, V.-C.).—*SAVAGE v. LANE* (1847), 6 Hare, 32; 17 L. J. Ch. 89; 11 Jur. 1053; 67 E. R. 1069.

Annotation:—As to (1), (2) & (4) Rejd. Re Schneider, Kirby v. Schneider (1906), 22 T. L. R. 223.

7329. — Under erroneous construction of will.]—(1) Payment of a legacy on an erroneous construction of the will, not *malâ fide*, is not an admission of assets on the true construction.

(2) Acting on an erroneous view of the effect of the will, the exors. handed over the balance, after reserving sufficient for payment of pltf.'s legacy, according to their construction, to the son mentioned in the will. That circumstance ought not to bind the exors. as an admission of assets on the true construction of the will (KNIGHT BRUCE, V.-C.).—*CLARK v. BATES* (1848), 2 De G. & Sm. 203; 11 L. T. O. S. 123; 12 Jur. 597; 64 E. R. 90.

7330. — Out of own moneys.]—CADBURY v. SMITH, No. 7364, *post*.

7331. Isolated payments of interest—How far effective in evidence.]—CORPN. OF CLERGYMENS SONS v. SWAINSON, No. 7334, *post*.

7332. — —.]—CAMPBELL'S CASE, No. 7335, *post*.

7333. — —.]—BARNARD v. PUMFRET, No. 7317, *ante*.

7334. Regular payments—Over long period of time.]—Payment of interest for a legacy by an exor. from time to time shall be evidence of assets, not so of a single instance of payment of interest.—CORPN. OF CLERGYMENS SONS v. SWAINSON (1748), 1 Ves. Sen. 75; 27 E. R. 901, L. C.

Annotations:—Rejd. Barnard v. Pumfrett (1841), 5 My. & Cr. 63. *Mentd. Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

7335. — —.]—(1) On an action brought *administravit*.

There was evidence that he had paid interest upon a legacy of testator's:—*Held*: payment was *primâ facie* evidence, & repeated payment, with length of time, very strong presumption, but though it imposed on the exor. the *onus probandi* to the contrary, yet it could not in any case be taken conclusively against all evidence possible to be given.

(2) Where there is a bond-debt unknown to the exor., & there has been a payment of interest on a simple-contract debt, before the bond-debt comes out (in which case, it would be *malâ fide* to pay the principal on the simple-contract, unless the bond-debt could be satisfied first) should the payment of interest on the simple-contract, under such circumstances, be conclusive against the exor.? Certainly not (LORD MANSFIELD, C.J.).—CAMPBELL'S CASE (1772), Lofft, 68; 98 E. R. 536.

7336. — —.]—Payment of interest by an exor., commencing six years after testator's death, & continuing seven years:—*Held*: to be such an admission of assets as to make the exor. personally liable.—A.-G. v. CHAPMAN (1840), 3 Beav. 255; 10 L. J. Ch. 90; 49 E. R. 99.

7337. — —.]—(1) Payment by the exor. of the interest of a legacy to the tenant for life under the will is not conclusive as an admission of assets by the exor. But such payment may be explained as having been made by mistake, or for other reasons or causes, & in that case the usual account of assets may be directed at the suit of parties interested in the estate.

(2) It would be difficult to hold that the payment of one legacy would, of itself, bind the exor. to pay all the legacies given by the will. Suppose a case in which small legacies were given to servants, & the exor. chose on his own responsibility to pay those legacies at once, without reference to the state of the assets it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the will (WIGRAM, V.-C.).—POSTLETHWAITE v. MOUNSEY (1842), 6 Hare, 33, n.; 67 E. R. 1070.

Annotations:—As to (1) Consd. Cadbury v. Smith (1869), L. R. 9 Eq. 37. *Rejd. Payne v. Tanner* (1886), 55 L. J. Ch. 611. *As to (2) Rejd. Re Schneider, Kirby v. Schneider* (1906), 22 T. L. R. 223.

7338. — —.]—(1) Testator bequeathed £500 to his exors., upon trust that they should lay out & invest the same in the public funds, or in such other security, or in such other manner as to them should seem expedient, at interest, & pay & apply the produce to a charitable purpose. One of the exors., who took the entire management of the estate, paid the debts & most of the legacies of testator, but neither specifically appropriated nor invested £500 for the charity. He paid interest, however, on £500 to the charity, at the same time receiving interest on the promissory note of a debtor to the estate who was in good credit, but whose debt was the only fund available for payment of the legacy. The exor. afterwards died. On the admission, by his representatives, that he had in his lifetime assented to the payment of the legacy to himself, as trustee:—*Held*: his estate was severally answerable as for a breach of trust.

(2) When I consider that T. H. lived & acted as exor. of his testator more than four years after that testator's death, receiving all that time interest from his debtor & paying interest on the legacy, I am bound to come to the conclusion that he committed a breach of trust & that his estate

was to that extent indebted at the time of his death (KNIGHT-BRUCE, V.-C.).—A.-G. v. HIGHAM (1843), 2 Y. & C. Ch. Cas. 634; 63 E. R. 284.

7339. ———.]—PARRY v. HUDDLETON (1854), 18 Jur. 992.

Compare Nos. 7346, 7355, *post*.

7340. Allowing legatees to retain interest—Out of rent payable to representative.]—SEVERS v. SEVERS, No. 7368, *post*.

(b) *Submission to Arbitration.*

See ARBITRATION, Vol. II., pp. 349, 350, Nos. 256–261.

(c) *Payment of Death Duties.*

7341. Amount of duty paid—How far conclusive—As to amount of assets received.]—STEARN v. MILLS, No. 7313, *ante*.

7342. ———.]—(1) Upon issue joined on a plea by an exor. of *plene administravit*, the amount of the stamp upon the probate is admissible in evidence. (2) It does not, of itself, furnish *prima facie* evidence of the amount of effects which have come to the exor.'s hands. (3) If there be evidence of a long acquiescence by the exor., without re-demanding any of the duty, it is *prima facie* evidence of such amount, but it is not of itself evidence of such amount.—MANN v. LANG (1835), 3 Ad. & El. 699; 1 Har. & W. 441; 5 Nev. & M. K. B. 202; 4 L. J. K. B. 210; 111 E. R. 579.

7343. ———.]—Testator gave his leasehold estate, held for lives, to his son & his heirs, subject to an annuity of £100 for his daughter for life, & charged with the payment after her death of £2,000 to her children, & appointed his son exor. Testator died in 1807, & his son proved his will, & his personal estate, exclusive of the leaseholds, was sworn under £2,000. In 1821 the son signed a document from the legacy duty office, professing to have retained the sum of £2,000, in respect of the legacy charged on the leaseholds, & on that document there was a formal receipt by the proper officer "for £20 for duty on account of the personal estate within mentioned." The lives in the lease having expired, & the lessors having declined to renew, on a bill filed by a child of testator's daughter, against the representatives of the son to have the £2,000 secured:—*Held*: (1) the entire leasehold interest was chargeable with its payment at the testator's death; (2) the conduct of the son with respect to the payment of the legacy duty, fourteen years after the death of testator, amounted to a sufficient admission of assets to answer the legacy of £2,000.

(3) Payment of probate duty is presumptive evidence of an admission, but not an absolute admission of assets to the extent covered by the amount of duty paid.—LAZONBY v. RAWSON (1854), 4 De G. M. & G. 556; 3 Eq. Rep. 89; 24 L. J. Ch. 482; 24 L. T. O. S. 175; 1 Jur. N. S. 289; 3 W. R. 34; 43 E. R. 624, L. C.

7344. ———.]—HUTTON v. ROSSITER, No. 7321, *ante*.

(d) *Other Cases.*

7345. Arrangement with creditors—Forbearance to sue—In consideration of future payment.]—An administrator agreed with a creditor of the intestate that if the creditor would forbear suing

him for a reasonable time he would pay him:—*Held*: the administrator's promise was a sufficient acknowledgment of the debt, & also implied that he had assets. The ct. would decide what was a reasonable time.—LINGHILL v. BROUGHTON (1617), Moore, K. B. 853; 72 E. R. 950.

7346. Payment of interest on bond.]—CLEVERLY v. BRETT (1772), 5 Term Rep. 8, n.; 101 E. R. 5. *Annotation*:—Consd. Pearson v. Henry (1792), 5 Term Rep. 6.

Compare Nos. 7334–7338, *ante*.

7347. Affirmation of testator's bequest—In representative's will.]—A. H. by will, gave money upon mtge. to a charity in Ireland. The wife, by her will, affirming that bequest:—*Held*: an admission of assets of testator, & therefore good, though out of land.—CAMPBELL v. RADNOR (EARL) (1783), 1 Bro. C. C. 271; 28 E. R. 1123.

Annotations:—*Reid*. Barnard v. Pumfrett (1841), 5 My. & Cr. 63. *Mentd.* Thorne v. Rooke (1841), 2 Curt. 799; Walsh v. Gladstone (1843), 1 Ph. 294; Lee v. Pain (1844), 4 Hare, 201; Wilson v. O'Leary (1871), L. R. 12 Eq. 525.

7348. Distribution of residue—How far conclusive—In favour of creditor.]—BEYNON v. GOLLINS (1783), Rom. 132, L. C.; *subsequent proceedings, sub nom.* BENYON v. GOLLINGS (1788), cited in 4 Ves. at p. 134, L. C.

Annotation:—Consd. Soady v. Turnbull (1866), 1 Ch. App. 494.

Compare No. 7323, *ante*.

7349. Admission of indebtedness to testator—At date of decease.]—(1) An exor. admitting himself to be a debtor to testator at his death will be ordered to pay the debt into ct.

(2) Where an exor. admits himself to have been a debtor to testator at the time of his death, this has always been held a clear admission of assets in his hands to the amount of the debt (LEACH, V.-C.).—ROTHWELL v. ROTHWELL (1825), 2 Sim. & St. 217; 57 E. R. 328.

Annotations:—*As to* (1) *Expld.* Lodwick v. Day (1844), 3 L. T. O. S. 4. *Reid*. Richardson v. Bank of England (1838), 4 My. & Cr. 165; *Re* Wright, Kirke v. North (1895), 13 R. 849.

7350. ———.]—RICHARDSON v. BANK OF ENGLAND, No. 7403, *post*.

7351. Payment into bank—To credit of executorship account.]—The circumstance that moneys were paid in by an exor. to his bankers, & placed to the exorship. account, is *prima facie* evidence that those moneys were in the exor.'s own hands as assets of the estate.—CROSSDALE v. PHILLIPS (1826), 5 L. J. O. S. Ch. 52.

7352. Compromise of action.]—A party being entitled to residuary estate under his father's will, filed a bill for an account against his mother, who was extrix. The suit was compromised, the extrix. covenanting to pay £800 to trustees, for the benefit of the son & his family, & to apply £400 in payment of some of his debts in full, & to pay the remainder among such of his creditors as would accept a composition. None of the creditors acceded to the arrangement, & £170 remained in the extrix.'s hands. The son then became insolvent:—*Held*: his assignees were not entitled to claim the £170 from the extrix.

It is said that this sum was in fact the money of [the son], & was a debt due to him, & that the assignees have therefore a right to maintain an action for it. That depends upon the circumstances of the transaction. A suit had been instituted against the mother by an imprudent &

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improvident son. It is quite obvious that this was an arrangement between them to put an end to that suit; & the question is whether the extent of her liability was determined by her covenant. There is no reason for assuming that the arrangement was founded on her liability (LORD LYNDHURST, C.).—*SHERWOOD v. WALKER* (1844), 13 L. J. Ch. 258; 2 L. T. O. S. 453; 8 Jur. 229, L. C.

7353. Delivery of household effects—To legatees.]—An exor., who does not admit assets will be held to have done so by delivering up household goods to legatees, paying legacies, consenting to a transfer of a mtge., etc.—*RIPPINGTON v. SPIERS* (1844), 3 L. T. O. S. 240.

7354. Consenting to transfer of mortgage.]—*RIPPINGTON v. SPIERS*, No. 7353, *ante*.

7355. Regular payment of annuities—Over long period.]—(1) Annuities given by a will were regularly paid by the exors. for six years, & irregular payments, on account, were made by them for the next four years. *Semble*: this of itself would be an admission of assets.

(2) This ct. does not bind exors. by an admission of assets, if new claims on the estate afterwards arise.—*PAYNE v. LITTLE* (1856), 22 Beav. 69; 52 E. R. 1033; *subsequent proceedings* (1858), 26 Beav. 1; (1859), 27 Beav. 83.

Compare Nos. 7334–7338, ante.

7356. Renewal of promissory note—Of amount due to testator.]—(1) An exor. had improperly invested money of his testator on a promissory note. On the exor.'s death, his extrix. renewed the note to herself. She was ordered, upon motion, to pay the sum into ct. as money received by her, & lent out again.

(2) If the extrix. chooses to renew a promissory note instead of calling in the money, she must be taken to have received it & lent it out again (ALDERSON, B.).—*BOULTER v. BRODERIP* (1841), 10 L. J. Ex. Eq. 93.

7357. ———.]—Testator died in 1829. Part of his assets consisted of a promissory note for £100 of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837 the exor. took the note of one of the five for the £100, & interest was paid until 1842. Subsequently nothing was done, & the debt became barred by the statute:—*Held*: the taking the second note was equivalent to payment of the first, & the exor. was charged with the £100.—*SPARKES v. RESTAL* (1856), 22 Beav. 587; 52 E. R. 1234.

7358. Non-appearance on motion—After service of notice.]—*FREEMAN v. COX*, No. 7405, *post*.

7359. Failure to answer affidavit—In which assets alleged.]—*Re BEENY, FRENCH v. SPROSTON*, [1894] 1 Ch. 499; 63 L. J. Ch. 312; 70 L. T. 160; 42 W. R. 377; 38 Sol. Jo. 235.

Annotation:—*Reid. Ellis v. Allen*, [1914] 1 Ch. 904.

Judgment in default of appearance or pleadings.]—*See Part VII., Sect. 2, sub-sect. 8, D., post.*

SUB-SECT. 2.—EXTENT OF ADMISSION.

7360. Admission to one person entitled—How far available to others.]—Admission of assets to one in

admission to all. Where general relief is prayed in one part, & particular in another, the bill must stand over to be amended.—*COOK v. MARTYN* (1737), 2 Atk. 2; 26 E. R. 399, L. C.

Annotation:—*Mentd. Palk v. Clinton* (1806), 12 Ves. 48.

7361. ———.]—*BARNARD v. PUMFRET*, No. 7317, *ante*.

7362. ——— Materiality of circumstances under which made.]—*POSTLETHWAITE v. MOUNSEY*, No. 7337, *ante*.

7363. ———.]—*SAVAGE v. LANE*, No. 7328, *ante*.

7364. ———.]—(1) The payment of one legacy under a will by exors., not as such but out of their own moneys, is not an admission of assets for the payment of others. Where one of two exors. who were also residuary legatees, had died, a payment by his representatives to the survivor out of the deceased exor.'s estate, in satisfaction of the surviving exor.'s claim as such residuary legatee:—*Held*: not to be an admission of assets for the payment of the other legacies under the will.

(2) J. W., by his will, gave his real & personal estate to trustees upon trust to convert the same & pay the income to F. W. for her life, & after her decease to pay the capital as she should appoint. F. W., by her will, in exercise of her power, appointed the property to her exors., who were also the trustees of the will of J. W. & her own residuary legatees, upon trust to pay certain charitable legacies, including £1,000 to the hospital at B. This legacy was not paid, & thirty years after the decease of F. W. a bill was filed against the surviving exor. & the representatives of one who had died, for its payment:—*Held*: as in the judgment of the ct. there had been no admission of assets for the payment of the legacy, & no trust had been created, & no sum set apart for the payment of the legacy, the claim was barred by Stat. Limitations.—*CADBURY v. SMITH* (1869), L. R. 9 Eq. 37; 24 L. T. 52; 18 W. R. 105.

Annotations:—*As to* (1) *Distd. Payne v. Tanner* (1886), 55 L. J. Ch. 611. *As to* (2) *Reid. Re Stephens, Warburton v. Stephens* (1889), 43 Ch. D. 39.

7365. ———.]—(1) Testator gave pecuniary legacies to his widow & other persons, & to his younger children as they came of age or married, & gave & devised to his eldest son certain real estates, purporting to include in such gift & devise a colliery which was, in fact, in settlement, & the plant of the colliery, & charging them with a sum of £50,000 to form part of his personal estate. Under the settlement the colliery with other real estates was subject to a charge of £20,000 for portions for the younger children. The personal estate of testator being insufficient to meet his liabilities & the legacies, an arrangement was made between the eldest son, the exors. & such of the parties interested as were then entitled to their legacies, whereby it was agreed that the eldest son, electing to take under the will, should take possession of the colliery & plant, & should provide the balance of the money necessary to pay off the legacies then payable, as well as those which should from time to time become due. Upon this basis certain of the legacies were paid in full, & the exors., having paid full duty upon all the legacies passed their residuary account showing all the legacies as paid in full. The eldest son subsequently failed to provide sufficient funds to meet all the legacies, & there were, in fact, insufficient assets to meet the whole of testator's

liabilities. One of the younger children, when he became entitled claimed payment in full of his legacy from the exors., upon the ground of their having admitted a sufficiency of assets:—*Held*: the exors. could not be held bound by the admission of assets in their account & the legatee could not establish a personal claim against them.

(2) The ct. will not view the principle of payment of one legacy being an admission of assets for every other legatee as a hard & fast rule, but will, according to the tendency of modern decisions, examine the facts of the case fairly & justly, so as not to subject exors. to liabilities which they have never contemplated.—*MOREWOOD v. CURREY* (1879), 28 W. R. 213.

7366. ———.—*Re SCHNEIDER, KIRBY v. SCHNEIDER*, No. 7327, *ante*.

7367. **Purposes for which available—Costs of suit.**—An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, & extends to costs, if the ct. thinks fit to give them.—*PHILANTHROPIC SOCIETY v. HOBSON* (1833), 2 My. & K. 357; 3 L. J. Ch. 97; 39 E. R. 980.

7368. **Admission confined to specified property—For payment of legacy—General assets not affected.**—Leasehold property was charged with two demonstrative legacies, being a fixed sum, to the extrix., & another fixed sum, the estimated remainder of its value, to a legatee, who had also the option of purchasing at the estimated value. The property was held of an ecclesiastical corpn. for forty years, renewable every fourteenth year, & the extrix. twice renewed the term out of her own money, but, at the end of thirty years, she declined to renew a third time. The extrix., on passing the residuary account, had valued the leasehold property at the price fixed by her testatrix. Upon this statement a very small general residue appeared. The legatee, who was also tenant of the property, did not exercise the option of purchasing, but he retained the interest on his legacy, & paid the balance of rent, which did not keep down the interest on her legacy to the extrix. On a suit by the legatee:—*Held*: there was an admission that the particular property, not the general assets, was sufficient for payment of the legacy, & the extrix. was not personally liable, but by the course of her conduct for thirty years, she had lost her priority.—*SEVERS v. SEVERS* (1853), 1 Sm. & G. 400; 21 L. T. O. S. 85; 17 Jur. 706; 1 W. R. 320; 65 Ch. R. 175.

SUB-SECT. 3.—WITHDRAWAL AND WAIVER.

7369. **When representative relieved—Discretion of court.**—Though the ct. is not strict in holding exors., who have acted fairly, to an admission of assets, yet in this case, circumstances tending to show that deft. had admitted assets several years before, & he having obtained a release which the ct. held to be fraudulent. A personal decree was made against him for the legacy & interest, with costs.

It is true on circumstances the ct. will not pin down an exor. to an admission of assets. But he must make a case for it; he must prove that mistake, that the circumstance on which he built

his admission failed (*STRANGE, M.R.*).—*HORSLEY v. CHALONER* (1750), 2 Ves. Sen. 83; 28 E. R. 55. *Annotations*:—*Reid. Barnard v. Pumfrett* (1841), 5 My. & Cr. 63; *Payne v. Little* (1856), 21 Beav. 69.

7370. ——— **Losses subsequent to admission.**—*ROBERTS v. ROBERTS* (1780), 2 Dick. 573; 21 E. R. 393, L. C.

7371. ——— **Mistaken admission.**—Notwithstanding an admission of assets by mistake the ct. will upon a strong & clear case permit an account.—*YOUNG v. WALTER* (1804), 9 Ves. 364; 32 E. R. 642, L. C.

Annotations:—*Mentd. Sharman v. Bell* (1816), 5 M. & S. 504; *Steff v. Andrews* (1816), 2 Madd. 6; *Huntig v. Ralling* (1840), 8 Dowl. 879; *Kirk & Randall v. East & West India Dock Co.* (1886), 55 L. T. 245.

7372. ———.—*DREWRY v. THACKER* (1819), 3 Swan. 529; 36 E. R. 963.

Annotations:—*Mentd. Lee v. Park* (1836), 1 Keen, 714; *Grand Junction Canal Co. v. Dimes* (1850), 2 H. & Tw. 92; *Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104; *Vincent v. Godson* (1850), 3 De G. & Sm. 717.

7373. ——— **Retraction within reasonable time.**—*BARNARD v. PUMFRETT*, No. 7317, *ante*.

7374. ——— **Under erroneous construction of will.**—*CLARK v. BATES*, No. 7329, *ante*.

7375. ———.—*PAYNE v. TANNER*, No. 7320, *ante*.

7376. ———.—(1) Admission of assets is merely a question of evidence, & an exor. may bring evidence to show that his admission was the result of a mistake in the account. But where an exor. had passed his residuary account, stating that a legacy was "retained in trust" out of the residue:—*Held*: he was not entitled to show that he had since discovered that the account had proceeded on a mistake, & there were not in fact assets for the legacy.—*BREWSTER v. PRIOR* (1886), 55 L. T. 771; 35 W. R. 251; 3 T. L. R. 205.

7377. ——— **Qualified admission—Explained by affidavit.**—Where an exor. admits that he has received a certain sum belonging to testator's estate, but adds that he has made payments, the amount of which he does not specify, the ct. will allow him to verify the amount of his payments by affidavit, & order him on motion to pay the balance into ct.—*ANON.* (1831), 4 Sim. 359; 58 E. R. 134.

7378. ——— **Payments to persons entitled—Relief to that extent.**—An exor. charged with the receipt of rents stated, in the schedule to his examination, that he had received, in respect of rents, after deductions to a certain amount for bills due from testator to the tenants, so much. The master charged the exor. with the whole amount, including the alleged deductions:—*Held*: although the exor. had, by this form of admission, charged himself with the aggregate sum, yet, as the whole statement must be read, he had also discharged himself, *prima facie*, by the evidence which it contained of the repayment to the tenants, which repayment it was open to the other parties to impeach.—*INGE v. KENNY* (1845), 4 Hare, 452; 14 L. J. Ch. 325; 9 Jur. 344; 67 E. R. 725.

—— **Admission not extending to all claimants.**—*See Sub-sect. 2, ante*.

7379. ——— **New claims subsequently arising.**—*PAYNE v. LITTLE*, No. 7355, *ante*.

7380. **Conduct disentitling representative**—

Sect. 7.—On admission of assets: Sub-sects. 3 & 4, A. & B.]

Fraudulent release.] — HORSLEY v. CHALONER, No. 7369, ante.

7381. — Adoption of agent's default—Resulting in loss of assets.]—An exor. & trustee, having adopted a loss, which happened through the failure of an agent, by suppressing the fact of his having allowed the agent to receive the money; by declaring to his co-trustees the money to be in his own hands; by taking securities & proving them on the agent's estate; by actually replacing the amount by an investment of his own money; & by charging himself, in an answer in Chancery, with the amount, as received by him, was not allowed, afterwards, to throw the loss on the trust estate, on the ground that the indemnity clause in the will would have saved him from liability:—*Held*: by his conduct, the sum lost was to be deemed not the money of the trust, but his own.—ABERCROMBIE v. GORDON (1831), 1 L. J. Ch. 33.****

7382. — Continued payment of interest.]—BREWSTER v. PRIOR, No. 7376, ante.

See, also, Sub-sect. 1, C., ante.

7383. Waiver of admission—By action for account—& appointment of receiver.]—An admission of assets, by the exor.'s answer, is waived by pltf. going on to an account of assets, & procuring a receiver to be appointed.—WALL v. BUSHBY (1785), 1 Bro. C. C. 484; 28 E. R. 1254, L. C.****

Annotation:—Mentd. Morison v. Morison (1838), 4 My. & Cr. 215.

SUB-SECT. 4.—EFFECT OF ADMISSION.

A. In General.

Admission by suffering judgment.]—See Part VII., Sect. 2, sub-sect. 8, D., post.

7384. Representative becomes liable—As debtor in equity.]—A legacy due from an exor. who admits assets is in equity a debt due from such exor.—JEFFS v. WOOD (1723), 2 P. Wms. 128; 24 E. R. 668.****

Annotations:—Refd. Ranking v. Barnard (1820), 5 Madd. 32; Gale v. Luttrell (1826), 1 Y. & J. 180; Campbell v. Graham (1831), 1 Russ. & M. 453; Courtenay v. Williams (1844), 3 Hare, 539; Jones v. Mossop (1844), 3 Hare, 568; Freeman v. Lomas (1851), 9 Hare, 109; Re Briant, Poulter v. Shackel (1888), 39 Ch. D. 471; Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726. Mentd. Barker v. Braham (1773), 2 Wm. Bl. 869; Gingell v. Purkins (1850), 4 Exch. 720.

7385. — Promise by testator—For payment by executor.]—WILLIAMSON v. LOSH (1776), cited in 7 Taunt. at p. 586; 129 E. R. 234; sub nom. LOSH v. WILLIAMSON, 1 Moore, C. P. at p. 318.****

Annotations:—Consd. Rann v. Hughes (1778), 7 Term Rep. 350, n.; Powell v. Graham (1817), 7 Taunt. 580.

7386. — For interest—Executor of receiver.]—Admission of assets to answer rents by the exor. of a receiver, makes him liable to interest, if made.—FOSTER v. FOSTER (1789), 2 Bro. C. C. 616; 29 E. R. 340, L. C.****

7387. — —.]—TEW v. WINTERTON (LORD) (1792), cited 4 Ves. at p. 605; 31 E. R. 311, L. C.****

Annotations:—Refd. Hovey v. Blakeman (1799), 4 Ves. 596. Mentd. Clarke v. Seton (1801), 6 Ves. 411; R. v. Mainwaring (1815), 2 Price, 67; Booth v. Leycester (1833), 3 My. & Cr. 459; Lainson v. Lainson (1853), 22 L. T. O. S.

150; Torre v. Browne (1855), 5 H. L. Cas. 555; Mackintosh v. G. W. Ry. (1865), 4 Giff. 683; Hill v. South Staffordshire Ry. (1874), L. R. 18 Eq. 154.

Compare Part VI., Sect. 6, sub-sect. 6, ante.

7388. Representative becomes liable—For immediate payment of claims—Admission during course of action.]—In an action against an administrator, deft., after obtaining time to plead upon the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*. The ct. gave leave to pltf. to sign judgment as for want of a plea, deft. having since the commencement of the action admitted by letter the possession of assets sufficient to cover the judgment, & also pltf.'s demand.—ROBERTS v. WOOD (1835), 3 Dowl. 797.****

7389. — — If claim established.]—In a suit by a creditor on behalf of himself & all other creditors, if the debt of pltf. be admitted or proved, & the exor. or administrator admits assets, pltf. is entitled at the hearing to an immediate decree for payment, & not to a mere decree for an account.—WOODGATE v. FIELD (1842), 2 Hare, 211; 11 L. J. Ch. 321; 6 Jur. 871; 67 E. R. 88.****

Annotations:—Refd. Savage v. Lane (1847), 6 Hare, 32; Field v. Titmuss (1851), 1 Sim. N. S. 218.

7390. — —.]—Upon a constructive admission of assets:—*Held*: residuary legatees were entitled to immediate payment of their legacies, & under circumstances, with interest beyond the time allowed by Stat. Limitations.—DINSDALE v. DUDDING (1842), 1 Y. & C. Ch. Cas. 265; 62 E. R.****

7391. — To personal decree.]—I have never doubted that a personal decree might be made against an exor. upon an admission of assets, guarding that decree, where necessary with proper reservations (WIGRAM, V.-C.).—SAY v. CREED (1844), 3 Hare, 455; 8 Jur. 893; 67 E. R. 460.****

7392. — —.]—DAVYS v. PRITCHARD, No. 7425, post.****

7393. Effect on power of court—Order for payment of income—Pendente lite.]—An allowance of income *pendente lite*, under 15 & 16 Vict., c. 86, s. 57, will only be made upon the admission by the exors. of assets.—KNIGHT v. KNIGHT (1852), 16 Beav. 358; 51 E. R. 817.****

7394. Representative of executor—Extent of liability.]—By admitting assets, the exor. of an exor. renders himself liable to the same decree as the exor. himself, if living, would have been liable to in respect of the personal estate of the original testator.—DAVENPORT v. STAFFORD (1852), 2 De G. M. & G. 901; 42 E. R. 1125, L. JJ.****

Annotation:—Mentd. Re Fryer's Estate, Martindal v. Picquot (1857), 26 L. J. Ch. 398.

7395. Right to production of documents—How affected.]—If in an administration suit by a legatee, whose legacy is charged on real estate, the exors. admit assets, the legatee is not entitled to the production of documents relating to testator's real estate.—FORBES v. TANNER (1863), 1 New Rep. 464; 9 Jur. N. S. 455; 11 W. R. 414.****

7396. Proceedings on administration summons—Not stayed.]—*Re* BEYNON, **BEYNON v. BEYNON, [1873] W. N. 186.**

Liability for payment into court.]—See Sub-sect. 4, post.

Effect on liability to account.]—See Sub-sect. 4, post.

B. Order for Payment into Court.

7397. Power of court to make order—Though no danger to fund—Nor misconduct by representative.]—*STRANGE v. HARRIS* (1791), 3 Bro. C. C. 365; 29 E. R. 586.

7398. — On motion improperly framed—Necessity for consent.]—(1) Where a bill was filed against an exor. & universal devisee of the estate of a party, who, as trustee, had committed a breach of trust by selling out stock to which pltf. was entitled for life, with remainder to his children, & the bill prayed an account of the real & personal assets of the party who had committed the breach of trust, the ct., on a motion for payment of the balance of such real & personal estate, admitted by deft. to be in his hands, into ct., refused to make the order, the bill not being one framed as in a creditor's suit, but, by consent made a special order.

(2) The ct. never administered the real assets of a testator on behalf of any one creditor, & I cannot make the order according to the notice of motion; but I will make this order, adult pltf. consenting, & the others not opposing. Declare that the suit is to be taken as a suit on behalf of pltfs. & all other creditors of J., deceased, & let deft. bring into ct. the balance he admits to be in his hands (*KNIGHT-BRUCE, V.-C.*).—*REEVE v. GOODWIN* (1846), 8 L. T. O. S. 251; 10 Jur. 1050.

7399. — On admission in other proceedings.]—A suit was instituted to administer the estate of C., who had appointed his wife & H., a solr., his trustees & exors. H. renounced probate of the will, but he did not disclaim the trusts, & he was not made a party to the suit. In another suit relating to a partnership in which C. was interested H. made an affidavit in which he admitted that he had received various sums, amounting to nearly £2,000, payable under the articles of partnership by L., C.'s partner, to the trustees of C.'s will, but he said that he had received those sums with the authority of testator's widow, & that he had duly accounted for them to her. Upon motion in the administration suit, & in the matter of H., made by pltfs., the infant children of C., H. was ordered to pay into ct. such part of the £2,000 as appeared by a schedule to his affidavit to have been received by him after the institution of the administration suit:—*Held*: there was jurisdiction to make the order.—*Re CLERIHEW'S ESTATE, CLERIHEW v. CLERIHEW, Re HOWARD* (1871), 24 L. T. 860; 19 W. R. 939, L. JJ.

Annotation:—*Mentd. Re Carroll, Brice v. Carroll*, [1902] 2 Ch. 175.

7400. — After execution issued—Limited to balance unrealised by execution.]—Where, in an action in Exchequer Div. to recover a sum of money admitted to have been received by deft. as trustee, & to which pltf. was entitled, pltf. had obtained final judgment & issued execution:—*Held*: the ct. had no jurisdiction to make an order directing deft. to pay in four days the balance of the amount of the judgment unrealised by the execution.—*DREWETT v. EDWARDS* (1877), 37 L. T. 622; 26 W. R. 122, L. JJ.

Annotation:—*Mentd. Re Oddy, Major v. Harness*, [1906] 1 Ch. 93.

7401. — Where fund not under representative's control—R. S. C., Ord. 55, r. 3 (d).]—Money will not be ordered to be paid into ct. by exors., administrators, or trustees under the above Ord., unless it is actually in their hands. It is not sufficient that it has been in their hands, & that they are responsible for it.—*NUTTER v. HOLLAND*, [1894] 3 Ch. 408; 63 L. J. Ch. 932; 71 L. T. 508; 43 W. R. 18; 38 Sol. Jo. 707; 7 R. 491, C. A.

Annotations:—*Consd. Crompton & Evans' Union Bank v. Burton*, [1895] 2 Ch. 711. *Reid. Pullinger v. Barnato, Barnato-Pullinger Pool* (1896), 12 T. L. R. 280.

7402. — On oral admission—R. S. C., Ord. 32, r. 6.]—The ct. has power to order money to be paid into ct. under the above Ord., upon an admission of a deft., even though made orally & not contained in any written document.—*Re BEENY, FRENCH v. SPROSTON*, [1894] 1 Ch. 499; 63 L. J. Ch. 312; 70 L. T. 160; 42 W. R. 377; 38 Sol. Jo. 235.

Annotation:—*Mentd. Ellis v. Allen*, [1914] 1 Ch. 904.

See, generally, PRACTICE.

7403. Order must be based on admission—Evidence not resorted to.]—There are cases in which the ct. has ordered the payment of a debt upon motion, such as where an exor. admits himself to owe a debt to the estate he represents; in those cases, the person to pay & the person to receive being the same, the ct. assumes that what ought to have been done has been done, & orders the payment not as of a debt by a debtor, but as of moneys realised in the hands of the exor. If, however, the practice of the ct. authorised the ordering a deft. to pay money into ct., the facts to give authority for such an order must be found admitted in the answer. For the purpose of paying money into ct., evidence cannot be resorted to. The ground must be found in deft.'s admission (*LORD COTTENHAM, C.*).—*RICHARDSON v. BANK OF ENGLAND* (1838), as reported in 4 My. & Cr. 165; 8 L. J. Ch. 1.

Annotations:—*Reid. Knight v. Haythorne* (1840), 4 Jur. 360. *Mentd. London Syndicate v. Lood* (1878), 8 Ch. D. 84; *Rodriguez v. Speyer*, [1919] A. C. 59.

7404. — What is sufficient admission—Money invested abroad—On public securities.]—*FREEMAN v. FAIRLIE*, No. 7308, *ante*.

7405. — Whether failure to answer affidavit—In which assets alleged.]—In an administration action notice of a motion was served upon deft., an exor., for payment into ct. of money, part of testator's estate, which it was shown by affidavit that he had received. Deft. did not appear on the motion:—*Held*: deft. not having disputed the affidavit, there was a sufficient admission that the money was in his hands, & he must be ordered to pay it into ct.

The principle on which the ct. has ordered payment of money into ct. has been that deft. must admit that the money is in his hands for the purpose of the application. The question is whether there is a sufficient admission on the part of deft. We have the affidavit of pltf. & the service of the notice of motion upon deft. This is a sufficient admission, the principle being to make deft. pay into ct. what he does not dispute to be owing from

PART VI. SECT. 7, SUB-SECT. 4.—B.

m. Power of court to make order—When exercised—Delay in paying legacy.]—A bill filed within a year of testator's death by an infant legatee against the exor. for payment into

ct. of a legacy bequeathed to him, payable three months after testator's death, was held to be premature. The exors., however, took no steps after a year from testator's death to secure the legacy, but by their answer admitted assets:—*Held*: the legacy

with interest thereon must be paid into ct.—*BAYLEE v. MORLEY* (1878), 4 V. L. R. 33.—*AUS.*

n. — Reference pending.]—Where an administrator by his accounts admitted in his hands

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him (JESSEL, M.R.).—*FREEMAN v. COX* (1878), 8 Ch. D. 148; 47 L. J. Ch. 560; 26 W. R. 689.

Annotations:—*Consd.* *Hampden v. Wallis* (1884), 27 Ch. D. 251. *Foll.* *Porrett v. White* (1885), 31 Ch. D. 52. *Consd.* *Hollis v. Burton*, [1892] 3 Ch. 226; *Neville v. Matthewman*, [1894] 3 Ch. 345. *Foll.* *Re Beeny, French v. Sproston*, [1894] 1 Ch. 499.

7406. ————.]—The only case in equity where money is ordered into ct. is where deft. by his pleading, or by some affidavit, or by some admission made before action—that is, by letters written by himself—has admitted that a certain amount of money claimed—it may be the whole or less than the whole—is actually in his hands. Where there is an admission of that kind, then the ct. has for many years been in the habit of directing a deft. who has made such admission to pay that amount into ct.—not that it decides the case against him, but it orders him to pay that money (which he admits is in his hands, & which the admission shows is really money upon which pltf. has a claim) into ct. to abide the result of the action, & the ct. has never really gone further than that. It never has been the practice of the Ct. of Ch. up to this time that a pltf. making a claim of that kind, & not obtaining such an admission, can, by filing affidavits against deft., obtain payment of the money into ct., unless deft. is foolish enough to answer such affidavit, & in the affidavit in answer makes an admission. It is possible that then you might get an order for payment of the money into ct. The case must be brought up at least to that. It must be not a mere contest upon affidavits as to whether the money is due or not, but there must be an admission by the man against whom the order is made. Now, that that is the rule, & always has been the rule, cannot be shown more clearly than by the early part of the judgment in *Freeman v. Cox*, No. 7405, *ante*. I am not for a moment meaning to say that the precedent which he made in the particular case before him may not have been perfectly right, but if it means that in every case where pltf. files an affidavit, there being no admission whatever by deft., & deft. declines to answer that affidavit, that is to be taken as an admission on which money may be paid into ct., all I can say is that I should not follow such a precedent. I do not believe there is any such practice, & I think a practice of that kind would be a very dangerous one (KAY, L.J.).—*HOLLIS v. BURTON*, [1892] 3 Ch. 226; 67 L. T. 146; 40 W. R. 610; 36 Sol. Jo. 625, C. A.

Annotations:—*Reid. Re Beeny, French v. Sproston*, [1894] 1 Ch. 499; *Nutter v. Holland* (1894), 71 L. T. 503.

———.]—practice, as settled in *Freeman v. Cox*, No. 7405, *ante*, with reference to what constitutes an admission by a deft., that he has money in his hands for which he is liable to account to pltf., on which he will be ordered on an interlocutory application to pay it into ct. will not be extended.

Testator gave a sum of £1,000 in trust for his daughter & her children & bequeathed the residue of his estate, which included a business, to his son, the exor. & trustee. The daughter & her children brought an action against the exor. & trustee of the will on the ground that he had committed a breach of trust by not properly investing the

£1,000, & an interlocutory application was made for an order that the trustee should pay the £1,000 into ct., on the ground that it was not properly invested, & he had admitted in certain letters that it was in his hands, & that he had allowed it to remain in testator's business, which he was carrying on for his own benefit. Ever since testator's death deft. had paid to pltf. £50 a year as interest on the £1,000. Deft. filed an affidavit in which he gave particulars of his receipts & payments with reference to testator's estate, & alleged that on the true construction of the will testator's business was specifically bequeathed to him, & that there were not sufficient assets without it to provide for the £1,000, & that he had paid the £50 a year to pltf., his sister, out of his own pocket, in order to carry out the wishes of testator, his father:—*Held*: even if the letters contained the alleged admission, yet, having regard to the affidavit, there was not an unequivocal admission by deft. that he had the £1,000 in his hands, & there appeared to be a *bonâ fide* dispute as to whether he had received sufficient assets to pay the £1,000, in full, & therefore he ought not to be ordered to pay the £1,000 into ct.

At first such an order could only be made on an admission in the answer of deft. to the bill that he had the money in his hands. Then a further step was taken, & it was held that an admission in an affidavit was sufficient. SIR GEORGE JESSEL took a further step & held in *Freeman v. Cox*, No. 7405, *ante*, that an allegation in an affidavit that deft. had the money, which was not answered, was sufficient. Beyond that I am not prepared to go (LORD HERSCHELL, C.).—*NEVILLE v. MATTHEWMAN*, [1894] 3 Ch. 345; 63 L. J. Ch. 734; 71 L. T. 282; 42 W. R. 675; 38 Sol. Jo. 694; 7 R. 511, C. A.

Annotations:—*Consd.* *Crompton & Evans' Union Bank v. Burton*, [1895] 2 Ch. 711. *Reid. Re Wright, Kirke v. North* (1895), 13 R. 849; *Pullinger v. Barnato, Barnato-Pullinger Pool* (1896), 12 T. L. R. 280.

7408. ———— Admission showing discharge as to certain amount.]—A statement of defence admitted receipt of £11,674 purchase moneys of real estate & between £7,000 & £8,000 personal estate & showed a discharge of £12,000 & also alleged payment of debts & legacies:—*Held*: this was not a sufficient admission to found an order for payment into ct.—*HETHERINGTON v. LONGRIGG* (1878), as reported in 48 L. J. Ch. 171.

7409. Liability to pay amount admitted—Though action pending by creditor—Provision for payment out to creditor.]—An exor. having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into ct., although he stated that an action at law was depending against him for a debt to a considerable amount due from testator, but with liberty in case pltf. in the action should recover, to apply to the ct. to have a sufficient sum paid out again. Pltf. in the action did recover, & the ct. ordered the amount to be paid out to pltf. in the action, & not to the exor.—*YARE v. HARRISON* (1793), 2 Cox, Eq. Cas. 377; 30 E. R. 173.

7410. ———— Though debts still outstanding.]—Exor. admitting a balance due from him to testator upon an unsettled account, was ordered to pay the amount into ct., notwithstanding there were debts

the ct. refused a motion for payment of that amount into ct. pending the reference.—*COLLINS v. ORME* (1870), 3 Ch. Ch. 70.—CAN.

o. Power of referee to order.]—The referee in chambers has no jurisdiction to make an order for payment into ct. by an exor. or administrator

of amounts admitted by him to be in his hands.—*Re CURRY* (1880), 8 P. 11. 340.—CAN.

of testator still outstanding, testator having died three years before.—*MORTLOCK v. LEATHES* (1817), 2 Mer. 491 ; 35 E. R. 1028, L. C.

Annotation :—*Mentd.* *Toulmin v. Copland* (1837), 3 Y. & C. Ex. 643.

7411. — & invested on improper security—*Promissory note.*—Exor., by schedule to his answer, acknowledging that he had received testator's property, & lent it on a promissory note, was ordered to pay the money into ct.—*VIGRASS v. BINFIELD* (1818), 3 Madd. 62 ; 56 E. R. 432.

7412. — — — — —.]—*BOULTER v. BRODERIP*, No. 7356, *ante*.

7413. — — — — —.]—In an administration suit where wilful default is charged against an exor., & he admits that a sum of money had been allowed by him to remain upon personal security, without any excuse being given, deft. will be ordered to pay the money into ct., & the ct. will only consider the time within which the money should be paid.—*HAWKES v. HOWELL* (1844), 4 L. T. O. S. 171.

Compare No. 7357, *ante* ; No. 7423, *post*.

7414. — — — — —.]—An exor. & trustee, who had lent trust money on unsurrendered copyholds, a deposit of a lease & a bond, was ordered, on motion, to pay the amount into ct.—*WYATT v. SHARRATT* (1840), 3 Beav. 498 ; 49 E. R. 196.

7415. — — — — — *Unspecified securities.*—Administrator was ordered on motion to transfer a sum of Consols into ct., upon an admission in his examination before the master, that he had possessed it, & sold it out after the bill had been filed, & had invested it in other securities, which he did not specify.

I must deal with this case in the same way as if the motion were made upon admissions contained in the answer of deft. He apparently has charged himself with this sum, & therefore he is *prima facie* liable for it (*LORD LANGDALE, M.R.*).—*HINDE v. BLAKE* (1842), 4 Beav. 597 ; 49 E. R. 470.

Annotation :—*Mentd.* *Lodwick v. Day* (1844), 3 L. T. O. S. 4.

7416. — — — — — *Of indebtedness to testator.*—*ROTHWELL v. ROTHWELL*, No. 7319, *ante*.

7417. — — — — —.]—*RICHARDSON v. BANK OF ENGLAND*, No. 7403, *ante*.

7418. — — — — —.]—The only order which I can make is for payment into ct. of such sum as is admitted by the answer of defts. to be part of the general personal estate of testator C. (*LEACH, V.-C.*).—*CRUIKSHANK v. ROBERTS* (1821), 6 Madd. 104 ; 56 E. R. 1031.

7419. — — — — — *Money in partner's control.*—Money admitted by an exor. to be in the hands of his partner is in his own hands for the purpose of being ordered to be paid into ct.—*JOHNSON v. ASTON* (1822), 1 Sim. & St. 73 ; 57 E. R. 29.

Compare No. 7401, *ante*.

7420. — — — — — *After deduction of payments out.*—*ANON.* (1831), No. 7377, *ante*.

7421. — — — — — *Though entitled to part as next-of-kin—Debts not ascertained.*—An extrix. was ordered on motion to pay the whole of a sum admitted by her answer to be in her hands, although she was entitled to one-third of the personal estate as one of the next-of-kin, the reason being, that no account had been taken of the debts.—*ROBOTHAM v. AMPHLETT* (1834), 4 L. J. Ch. 40.

7422. — — — — — *Doubt as to accuracy of schedule*

In which admission made.—Where an exor. refers to certain schedules to his answer as containing the accounts of all the sums received & paid by him on account of testator's estate, & sets out in such schedules the several items in detail, but does not cast up the amounts, or actually show upon his answer what is the balance, the other parties will be permitted to cast up the schedules & show by affidavits that the exor. has in fact admitted a balance, & that sum will be ordered into ct., notwithstanding some ambiguity in the passages of the answer which refer to the schedules.—*BOODLE v. HARPER* (1843), 2 L. T. O. S. 186.

7423. — — — — — *Admission qualified as to charges & expenses—Retention allowed for that purpose.*—An exor. who had proved the will in India, & in his answer admitted that, after payment of all the known debts, a certain balance of the estate remained in his hands, subject to other charges & expenses, the amount of which he had not ascertained, & that he had invested such balance on personal security in India was ordered to pay the balance into ct., allowing a reasonable sum to be retained in respect of the suggested deductions, by a day which would afford time for the remittance of the fund from India.—*ROY v. GIBBON* (1844), 4 Hare, 65 ; 67 E. R. 563.

7424. — — — — — *Executor renouncing probate—Getting in assets notwithstanding.*—(1) Exors. who have no actual knowledge of alleged fraud, or misapplication by their testator of the estate of a testator, under whose will he was appointed exor. & trustee, but renounced probate, will not be obliged to pay money into ct. to answer a demand against his estate, by the residuary legatees of his testator, on account of moneys which came to his hands, notwithstanding his renouncing probate, though they admit that there was a balance remaining after payment of debts, which they disbursed on the trusts of the will, & though a case of constructive notice might possibly be made out against them.

(2) An exor. is imprudent in distributing the assets of his testator, without examination as to his liabilities ; but if he does not examine, & in ignorance, pays away all the estate, though he is accountable for liabilities, he is not so till they are proved against him.—*BARTLETT v. HARTON* (1846), 8 L. T. O. S. 359.

7425. — — — — — *Fund lost by bankruptcy of solicitor.*—The question was, whether deft., an exor. & trustee, had sufficiently admitted assets to answer the demands of pltf., who was entitled to a life interest in £1,300 to render him personally liable. The alleged admission was contained in a correspondence between pltf. & deft., in the course of which deft., in reply to a letter threatening proceedings in this ct., assured pltf. that the principal was as safe as it could be, & spoke of regularly providing for the future interest. The money had in fact been lost by being placed by testator's widow, the first tenant for life, in the hands of an attorney who became bkpt. :—*Held* : there was a clear admission of assets, both upon authority & principle, & the exor. was liable to a personal decree.—*DAVYS v. PRITCHARD* (1848), 11 L. T. O. S. 450.

C. On Liability to Account.

7426. *Account rendered unnecessary.*—In a suit for the recovery of a legacy, an inventory was refused, because extrix. had, in her answers, allowed there were assets sufficient to pay the

Sect. 7.—On admission of assets: Sub-sect. 4, C. Sect. 8. Part VII. Sect. 1: Sub-sects. 1, 2, 3 & 4.]

legacy, & the costs of the suit.—*FLEET v. HOLMES* (1755), 2 Lee, 101.

7427. —.]—Admission of assets prevents the necessity of setting forth the accounts.—*PULLEN v. SMITH* (1799), 5 Ves. 21; 31 E. R. 451.

7428. —.]—Exors. paid some interest on a legacy, & about nine years after testator's death passed their accounts at the Legacy Duty Office, showing a considerable residue:—*Held*: the legatee was entitled to an immediate decree for payment of the legacy, without first taking the accounts of testator's estate.—*WHITTLE v. HENNING* (1840), 2 Beav. 396; 48 E. R. 1235.

7429. — Constructive admission.]—An exor. denied assets, but his answer disclosed a personal liability for payment of pltf.'s legacies. The ct. made an order for immediate payment, without directing the accounts to be taken.—*ROGERS v. SOUTTEN* (1838), Coop. Pr. Cas. 96; 2 Keen, 598; 7 L. J. Ch. 118; 47 E. R. 417.

Annotations:—Folld. Savage v. Lane (1847), 6 Hare, 32. *Refd. Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

7430. —.]—*WOODGATE v. FIELD*, No. 7389, *ante*.

7431. —.]—Order was made for payment of the dividends of a fund in ct. to exors., for distribution amongst the parties interested, before the accounts of the estate were taken, exors. admitting assets of testator for all purposes.—*SHEWELL v. SHEWELL* (1843), 2 Hare, 154; 12 L. J. Ch. 250; 67 E. R. 64.

7432. —.]—*GORDON v. SCOTT* (1844), 3 Hare, 459, n.; 67 E. R. 462.

Annotation:—Consd. Say v. Creed (1844), 3 Hare, 455.

7433. —.]—*SAVAGE v. LANE*, No. 7328, *ante*.

SECT. 8.—PAYMENT OF ESTATE AND OTHER DEATH DUTIES.

See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 27, 47, 72–74, 112, 126, 127, Nos. 148–154, 302, 303, 475–479, 482–492, 498, 845, 934, 937.

Part VII.—Actions by and against Representative.

SECT. 1.—ACTIONS BY REPRESENTATIVE.

SUB-SECT. 1.—RIGHT TO BRING ACTIONS.

Before grant of probate.]—See Part I., Sect. 13, sub-sect. 8, A., ante.

Before grant of administration.]—See Part I., Sect. 14, sub-sect. 2, A., ante.

SUB-SECT. 2.—RIGHT TO CONTINUE ACTIONS.

See R. S. C., Ord. 17, rr. 1–10; PRACTICE.

7434. Ecclesiastical court—Right to be substituted as promoter.]—*Qu.*: whether the personal representative of deceased promoter would have, over a stranger, a prior claim to the office if he desired it.—*ELPHINSTONE v. PURCHAS*, *Ex p. HEBBERT* (1870), L. R. 3 P. C. 245; 7 Moo. P. C. C. N. S. 17; 39 L. J. Eccl. 124; 23 L. T. 285; 34 J. P. 820; 18 W. R. 1073; 17 E. R. 7, P. C.

A. T.

SUB-SECT. 3.—HOW REPRESENTATIVE MAY SUE.

7435. Whether in *formâ pauperis*.]—Pltf. brought her bill, as administratrix of S. H., & obtained an order to sue in *formâ pauperis*. Deft. applied the above day to discharge the order.

PART VII. SECT. 1, SUB-SECT. 3.

p. Option to sue in representative character—Action on bond.]—On a bond

given to exors., they may sue either as exors. or in their own right.—DAVIS v. DAVIS (1837), 5 O. S. 551.—*CAN.*

q. — Contract made with him-

self.]—An exor. has the option to sue in his representative character on contracts made with himself, & where the money when recovered, would be

The indulgence intended poor persons not of ability to sue for their rights in *formâ pauperis* extends only to persons suing in their own rights, & not as exor. or administrator (*LORD HARDWICKE, C.*).—*PARADICE v. SHEPPARD* (1745), 6 Beav. 586, n.; 1 Dick. 136; 49 E. R. 953, L. C.

Annotation:—Consd. Oldfield v. Cobbett (1845), 1 Ph. 613.

7436. — Representative having beneficial interest.]—*THOMPSON v. THOMPSON* (1820), cited in *Beames on Costs*, p. 79.

Annotations:—N.F. Fowler v. Davies (1848), 17 L. J. Ch. 287. *Consd. Martin v. Whitmore, Reeve v. Whitmore* (1869), 17 W. R. 809. *Refd. Oldfield v. Cobbett* (1845), 1 Ph. 613; *Everson v. Matthew* (1855), 3 W. R. 159.

7437. —.]—A. being extrix. of a will, & entitled under it to an equity of redemption, filed a bill to redeem, offering to pay what, if anything, should be found due on the mtge., & praying for relief as testator's representative:—*Held*: she could not sue as a pauper.—*FOWLER v. DAVIES* (1848), 16 Sim. 182; 17 L. J. Ch. 287; 12 Jur. 321; 60 E. R. 842.

7438. —.]—(1) Where a party entitled to property as personal representative of his wife, filed a bill in *formâ pauperis* to have his right declared, & for an injunction to restrain defts. from disposing of the property:—*Held*: on motion for an injunction according to the prayer of the bill, as pltf. had obtained only the common order to sue in *formâ pauperis*, such order was insufficient, & the motion was refused; (2) on a petition presented afterwards for a special order to sue in *formâ pauperis*, pltf. was entitled to

have such order.—**ROGERS v. HOOPER** (1853), 21 L. T. O. S. 278; 1 W. R. 474.

Annotation :—As to (2) **Folld. Parkinson v. Chambers** (1854), 3 Eq. Rep. 234.

7439. —.]—An administratrix was admitted to sue *in forma pauperis* in person, notwithstanding as one of the next of kin she was also beneficially entitled.—**PARKINSON v. CHAMBERS** (1854), 3 Eq. Rep. 234; 24 L. J. Ch. 47; 24 L. T. O. S. 106; 3 W. R. 34.

Compare Nos. 7557, 7558, *post*.

SUB-SECT. 4.—PARTIES.

7440. Whether all representatives must join.]
OFFLEY v. JENNEY & BAKER, No. 7559, *post*.

7441. —.]—Three exors. ordered goods to be sold as the goods of testator. They afterwards sued for the amount, without styling themselves exors., & without joining a fourth exor., who was named in the will :—*Held* : they might recover.—**BRASSINGTON v. AULT** (1824), 2 Bing. 177; 1 C. & P. 302; 1 Moore, C. P. 340; 3 L. J. O. S. O. P. 243; 130 E. R. 274.

7442. Representative must sue.]—A suit against a debtor to testator's estate cannot be maintained by a creditor or legatee, but only by the exor.—**BICKLEY v. DORRINGTON** (1737), West temp. Hard. 169; 2 Eq. Cas. Abr. 253; 25 E. R. 877; *sub nom.* **BECKLEY v. DORRINGTON**, cited in 6 Ves. at p. 749, L. C.

Annotations :—**Consd.** **Alsager v. Rowley** (1802), 6 Ves. 748. **Reid.** **Francklyn v. Fern** (1740), Barn. Ch. 30; **Consett v. Bell** (1842), 11 L. J. Ch. 401. **Mentd.** **Holland v. Prior** (1834), Coop. temp. Brough. 426; **Barker v. Birch** (1847), 1 De G. & Sm. 376.

7443. —.]—Parties interested, not being the legal personal representatives of testator, will not be allowed to sue persons possessed of assets of testator, unless they satisfy the ct. that such assets would probably be lost if such suit had not been instituted.—**STANTON v. CARRON CO.** (1854), 18 Beav. 146; 2 Eq. Rep. 466; 23 L. J. Ch. 299; 22 L. T. O. S. 299; 18 Jur. 137; 2 W. R. 176; 52 E. R. 58.

Annotations :—**Consd.** **Yeatman v. Yeatman** (1877), 7 Ch. D. 210. **Mentd.** **Stanton v. Carron Co.** (No. 3) (1856), 21 Beav. 500.

7444. — Though estate administered by court—Unless misconduct alleged.]—A decree having been made for the administration of personal estate at the suit of residuary legatees, it was found necessary that proceedings should be taken in equity against a person who had had dealings with testatrix. The exor. was willing to conduct them, & no case of misconduct was established against him. An order of **STUART, V.-C.**, giving pl'tfs. liberty to take proceedings in the name of the exor. was discharged on appeal, & the exor. directed to take them.—**HARRISON v. RICHARDS** (1866), 1 Ch. App. 473; 35 L. J. Ch. 677; 15 L. T. 137; 12 Jur. N. S. 871; 14 W. R. 823, L. J.

7445. — — —.]—Where proceedings are necessary against persons who have had deal-

ings with testator whose estate is being administered, the exor. has the right to the conduct of the proceedings in preference to the beneficiaries, unless misconduct on the part of the exor. is clearly proved, or it is made out that the course of justice will be impeded thereby.—**LONGBOURNE v. FISHER** (1879), 40 L. T. 124; 27 W. R. 405; *previous proceedings* (1878), 47 L. J. Ch. 379.

Administration by court, *see* Part VIII., *post*.

7446. —.]—The exors. are the proper persons to sue to recover assets belonging to testator's estate. Accordingly, where residuary legatees filed a bill to recover a certain fund alleged to belong to testator's estate, a demurrer was allowed with costs, & leave to amend was refused.

WALKER v. WALKER (1871), 25 L. T. 481; 20 W. R. 162.

7447. Some of several executors infants—Right to sue by attorney.]—**RUTLAND v. RUTLAND** (1595), as reported in Cro. Eliz. 377; 78 E. R. 624.

Annotations :—**Consd.** **Foxwith v. Tremain** (1670), 1 Mod. Rep. 296. **Mentd.** **Rivers v. Oodskirt** (1597), Cro. Eliz. 568; **Savil v. Roberts** (1698), 1 Salk. 13; **Tharpe v. Stallwood** (1843), 6 Scott, N. R. 715.

7448. — — —.]—Where there are several exors. they may all sue by attorney, though some of them be under age.—**FOXWIST v. TREMAYN** (1670), 2 Keb. 698; 1 Lev. 299; 1 Mod. Rep. 296; T. Raym. 198; 1 Sid. 449; 1 Vent. 102; 2 Wms. Saund. 212; 86 E. R. 896.

Annotations :—**Consd.** **Coan v. Bowles** (1690), Carth. 122. **Overd.** **Keniston v. Friskobaldi** (1727), Fitz-G. 1. **Mentd.** **Curry v. Stephenson** (1694), Carth. 335; **Wilkins v. Brown** (1745), 2 Stra. 1220.

7449. — Other administering durante minore.]—Two exors., one under age, the other proves the will, & hath administration *durante minore*, etc. He may sue solely.—**COLBORNE v. WRIGHT** (1678), 2 Lev. 239; T. Jo. 119; 83 E. R. 537.

Annotation :—**Mentd.** **Rivis v. Watson** (1839), 5 M. & W. 255.

7450. Infant executor—Right to sue by guardian.]—An infant exor. ought to sue by his guardian, for though he be an exor. & so *in autre droit*, yet he is an infant, & by consequence is to have the privilege of his infancy.—**FOWKES v. CHILDE** (1616), as reported in 3 Bulst. 179; 81 E. R. 152.

Annotations :—**Reid.** **Foxwist v. Tremain** (1670), 2 Wms. Saund. 212. **Mentd.** **R. v. Willis** (1728), 1 Barn. K. B. 108; **Rogers v. Smith** (1834), 1 Ad. & El. 772.

7451. — — —.]—Where an infant is exor. alone, he cannot sue *per attornatum*.—**COAN v. BOWLES** (1691), Carth. 122, 179; Holt, K. B. 358; 1 Show. 165; 90 E. R. 675, 709; *sub nom.* **CONE v. BOWLS**, Comb. 100; 4 Mod. Rep. 7; 12 Mod. Rep. 1; 1 Salk. 205.

Annotations :—**Consd.** **Keniston v. Friskobaldi** (1727), Fitz-G. 1. **Mentd.** **Dibben v. Cooke** (1735), 2 Stra. 1005; **R. v. Glastonby** (1737), Lee temp. Hard. 355; **Golding v. Dias** (1808), 10 East, 2; **Murray v. Nichols** (1830), 6 Bing. 530; **R. v. York JJ.** (1834), 1 Ad. & El. 828; **Met. Ry. v. Wilson** (1871), L. R. 6 O. P. 376.

Compare Nos. 7573, 7575, *post*, & *see* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 165 (2).

7452. Married woman executrix—Whether joined with husband.]—**YARD v. ELLARD** (1698), Carth.

assets.—**AYER v. KELLY** (1913), 12 E. L. R. 564.—**CAN.**

PART VII. SECT. 1, SUB-SECT. 4.

r. *Whether all representatives must*

join—In appeal from judgment against estate.]—Where an exor. without reference to his co-exor., appealed, without describing in the writ the capacity in which he appealed :—*Held* : the omission to describe the exor.'s capacity was

fatal, & where there are two exors. they must concur in proceedings taken on behalf of the estate, otherwise the authority of the ct. should be obtained.—**MARSKILL v. HOVE'S ESTATE** (1907), 28 N. L. R. 607.—**S. AF.**

Sect. 1.—Actions by representative: Sub-sects. 4, 5 & 6, A.]

462; 1 Ld. Raym. 368; 12 Mod. Rep. 207; 1 Salk. 117; 90 E. R. 867.

Annotations:—*Mentd. Wills v. Nurse* (1834), 1 Ad. & El. 65; *Morton v. Burn* (1837), 7 Ad. & El. 19.

7453. ———.]—A feme extrix. must join with her husband.—*THOMPSON v. PINCHELL* (1708), 11 Mod. Rep. 177; 88 E. R. 973.

See, now, Married Woman's Property Act, 1882 (c. 75), sects. 1 (2), & 24.

7454. Some executors not proving—Right of proving executor to sue.]—Action by two exors., & probate by one:—*Held: well.—BROOKS v. STROUD* (1702), 7 Mod. Rep. 39; 1 Salk. 3; 87 E. R. 1080.

Annotations:—*Reid. Rendall v. Rendall* (1841), 1 Hare, 152; *Pemberton v. Chapman* (1857), 7 E. & B. 210.

7455. ———.]—Where one exor. has alone proved, he may sue without making the other exors. parties, although they have not renounced.—*DAVIES v. WILLIAMS* (1826), 1 Sim. 5; 4 L. J. O. S. Ch. 210; 57 E. R. 480.

Annotation:—*Reid. Vickers v. Bell, Bell v. Vickers* (1863), 11 L. T. 600.

7456. ——— Right to join as plaintiffs.]—In actions by exors., all who are named in the will may join, though some only of them have proved, & it makes no difference that issue is raised on a plea of *ne unques exor.*—*SCOTT v. BRIANT* (1836), 1 Har. & W. 54; 6 Nev. & M. K. B. 381.

7457. ———.]—(1) An exor. who has not come in & proved with two others, who had been appointed his co-exors., must nevertheless be joined with them in an action against debt., for a debt due to the estate of deceased.

(2) *Semble:* where three exors. join in an action to recover a debt due to deceased, & debt. pleads that one of pltf's. never was exor., for that he had never taken the administration of the estate upon himself, & that he had renounced his exorship., & never revoked his renunciation; the plea is not sufficiently pleaded as a renunciation by deed, disqualifying the renouncing exor. from joining in the action.—*CRESWICK v. WOODHEAD* (1842), 4 Man. & G. 811; 5 Scott, N. R. 778; 12 L. J. C. P. 111; 6 Jur. 973; 134 E. R. 334.

7458. Executor renouncing—Whether necessary party.]—One devises that his exors. should sell his land, & leaves two exors., one whereof dies, & the other renounces, & administration is granted to A. who brings a bill against the heir to compel a sale. *Qu.*: whether the renouncing exor., in whom this power of sale collateral to the exorship. was vested, ought not to be made a party.—*YATES v. COMPTON* (1725), 2 P. Wms. 308; *Cas temp. King*, 54; 2 Eq. Cas. Abr. 457; 24 E. R. 743.

Annotations:—*Mentd. Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31; *Bayley v. Bishop* (1803), 9 Ves. 6; *Palmer v. Crawford* (1819), 3 Swan. 482; *Dawson v. Hearn* (1831), 1 Russ. & M. 606; *Re Mabbett, Pitman v. Holborrow*, [1891] 1 Ch. 707; *Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648.

74541. Some executors not proving—Right of proving executor to sue.]—Such exors. as have proved may sue without making the others parties, though the latter have not renounced.—*FORSYTH v. DRAKE* (1850), 1 Gr. 223.—CAN.

s. Whether beneficiaries need be parties—Agreement for distribution of estate—Where will declared void.]—C. died abroad, leaving a will, which the

cts. there declared void. Administration of his effects in Ontario was granted to his widow, & she & the next of kin made an agreement for a distribution of the assets, whereupon she filed a bill to have such agreement established & the intended will declared invalid. The ct. in the circumstances, & in view of the fact that the intended legatees were not parties & that no controversy was shown to

7459. One executor absconding — Whether necessary party.]—One of two exors. lent money belonging to testator's estate on the security of a charge on real estate, & subsequently became bkpt. & absconded out of the jurisdiction, & it was not known where he was. His co-exor. brought a foreclosure action against the borrower, alleging that he had borrowed the money knowing that it belonged to the estate, & that with that knowledge he had given the charge to the solrs. to the estate, one of whom was the absconding exor., & both of whom had left the country together. The absconding exor. was not made a party:—*Held:* the action was not bad for non-joinder of the absconding exor.—*DRAKE v. HARTOPP* (1885), 28 Ch. D. 414; 54 L. J. Ch. 434; 51 L. T. 902; 33 W. R. 410.

Annotation:—*Expld. Re Continental Oxygen Co., Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511.

7460. Whether beneficiaries need be parties—In action against co-executor.]—Where one of two exors. was indebted to testator at the time of testator's decease, & was sued by his co-exor. for the recovery of the debt, & the realisation of a security which had been given for it:—*Held:* the *cestuis que trustent* under the will were not necessary parties to the suit.—*PEAKE v. LEDGER* (1850), 4 De G. & Sm. 137; 8 Hare, 313; 64 E. R. 769.

7461. ———.]—A trustee of a fund belonging to a deceased person refused to pay it over to his legal personal representative, on the ground that there was a question, under the will of deceased, whether it was not specifically bequeathed, & requiring the assent of the alleged specific legatees. He was ordered to pay it to the legal personal representative, together with the costs of suit, to which it was held that such specific legatees were not necessary parties.—*SMITH v. BOLDEN* (1863), 33 Beav. 262; 55 E. R. 368.

7462. Whether creditors need be parties.]—*BAKER v. ANTHONY* (1850), 15 L. T. O. S. 295.

7463. ———.]—An annuity charged on the lands of K. was bought by his solr. After K.'s death his representatives filed a bill against the solr., seeking a declaration that the purchase had been made for the benefit of K., & with his moneys. To this bill the solr. was the only debt., & he put in a plea for want of parties, on the ground that the judgment-creditors of K. were not before the ct.:—*Held:* the plea must be disallowed with costs.—*FORD v. TENNANT* (1861), 3 De G. F. & J. 697; 29 Beav. 452; 30 L. J. Ch. 631; 4 L. T. 457; 7 Jur. N. S. 615; 9 W. R. 674; 45 E. R. 1048, L. JJ.

7464. Surviving executor — Administrator of deceased trustee—Action to set aside mortgage made by deceased trustee.]—The survivor of two exors. who had taken out administration to the other, filed a bill to set aside a mtge. of part of the assets made by deceased exor. as having been a breach of trust:—*Held:* his having taken out the administration did not disqualify him from maintaining the suit.—*MILES v. DURNFORD*,

exist, refused to make any declaration, & dismissed the bill.—*CLARKE v. COOK* (1876), 23 Gr. 110.—CAN.

t. Contract of sale — Specific performance—Joinder of infant heir.]—Where, in a suit by personal representatives of a vendor for the specific performance of the contract of sale, an infant heir was joined as co-pltf., the ct. refused to make a decree, although

DURNFORD v. WOOD (1852), 2 De G. M. & G. 641; 21 L. J. Ch. 667; 19 L. T. O. S. 369; 42 E. R. 1022, L. JJ.

Annotation:—*Consd.* Carter v. Sanders (1854), 2 Drew. 248.

Parties in administration actions.]—See Part VIII., Sect. 2, *post*.

SUB-SECT. 5.—JOINDER OF CAUSES OF ACTION.

See, now, R. S. C., Ord. 18, r. 5.

7465. Joinder of claim by representative as such—With claim in own right.]—Action by administrator. *Indebitatus assumpsit* to intestate, & *insimul computasset* for money due to administrator, not joinable.—ROGERS v. COOK (1692), 1 Salk. 10; 1 Show. 366; Carth. 235; 91 E. R. 9.

Annotations:—*Consd.* Hooker v. Quilter (1747), 1 Wils. 171. *Distd.* Cowell v. Watts (1805), 6 East, 405. *Refd.* Hosier v. Arundell (1802), 3 Bos. & P. 7.

7466. ———.]—Extrix. sues for a debt due as extrix. & *in proprio jure*, the writs shall abate.—HOOKER v. QUILTER (1747), 1 Wils. 171; 2 Stra. 1271; 95 E. R. 556.

Annotations:—*Consd.* Cowell v. Watts (1805), 6 East, 405. *Refd.* Gallant v. Bonteflower (1781), 3 Doug. K. B. 34; Aspinall v. Wake (1833), 2 L. J. C. P. 227.

7467. ———.]—A count for money had & received by deft. to the use of the exor., as such, may be joined to a count for money had & received to the use of testator; but a count for a debt due to the exor. in his own right cannot.—PETRIE v. HANNAY (1790), 3 Term Rep. 659; 100 E. R. 789.

Annotations:—*Mentd.* Dunbar v. Hitchcock (1815), 3 M. & S. 591; Richardson v. Mellish (1825), 3 Bing. 346; Jackson v. Galloway (1845), 1 C. B. 280.

7468. ——— Where personal claim not in reference to estate.]—A tenant for life of a house granted a lease of it at a rent of £9 a year, & the lease became vested in deft. A year's rent became due during the lifetime of the tenant for life. The tenant for life died, & pltf., who was his sole exor., became entitled to the reversion expectant on the determination of the lease. Subsequently a half-year's rent became due. Pltf. brought an action to recover possession of the house, & as exor. & also in his personal capacity to recover £13 10s., being the amount of the year's rent which accrued due in the lifetime of the tenant for life & the half-year's rent which accrued due subsequently:—*Held*: as the claims by pltf. personally did not arise with reference to the estate of which he was exor., they could not be joined in the same action, & the order would be that pltf. should elect which claim he would proceed with, & failing such election the proceedings in the action should be stayed.—TREDEGAR (LORD) v. ROBERTS, [1914] 1 K. B. 283; 83 L. J. K. B. 159; 109 L. T. 731; 58 Sol. Jo. 118, C. A.

7469. ——— With claim of deceased—For money had & received.]—PETRIE v. HANNAY, No. 7467, *ante*.

7470. ——— For money payable on a bond.]—

the bill had been taken *pro confesso* against deft. purchaser, & ordered pltf. to amend their bill, by making the infant a party deft., in order that the contract might be established against him.—HAMILTON v. WALKER (1865), 12 Gr. 172.—CAN.

PART VII. SECT. 1, SUB-SECT. 5.

7465 i. Joinder of claim by representative as such—With claim in own

right.]—Where the assignee of a mtge. debt sued the mtgor. on foot of it, & the legal estate in the mtge. was vested in the assignee as personal representative of the last survivor of the original mtgees.:—*Held*: it was unnecessary to amend the title by adding thereto pltf. as co-pltf. in his capacity of exor.—LANGTRY & IRWIN v. O'ROURKE (1904), 39 I. L. T. 80.—IR.

7465 ii. ——— 1.—Where a person

An exor. cannot join a count upon a bond given to testator & a count upon a bond given to himself as exor. in the same action.—HOSIER v. ARUNDELL (LORD) (1802), 3 Bos. & P. 7; 127 E. R. 5.

Annotations:—*Distd.* Partridge v. Court (1818), 5 Price, 412. *Refd.* Charlton v. Durham (1869), 4 Ch. App. 433.

7471. ——— When both amounts recovered would be assets.]—A count upon a promise to pltf. as administratrix for goods sold & delivered by her after the death of the intestate may be joined with a count upon an account stated with her as administratrix, for the damages & costs when recovered would be assets.—COWELL v. WATTS (1805), 6 East, 405; 2 Smith, K. B. 410; 102 E. R. 1342.

Annotations:—*Folld.* Powley v. Newton (1816), 2 Marsh. 147. *Consd.* Partridge v. Court (1818), 5 Price, 412. *Refd.* Catherwood v. Chabaud (1823), 1 B. & C. 150; Marshall v. Broadhurst (1831), 1 Cr. & J. 403; Aspinall v. Wake (1833), 10 Bing. 51; Heath v. Chilton (1844), 12 M. & W. 632; Watts v. Rees (1854), 2 C. L. R. 1278.

7472. ———.]—A count on an *insimul computasset* with pltf. as exor., may be joined with a count for goods sold by testator. The criterion whether the counts are misjoined, is, whether the money, if recovered, will be assets in the hands of exor. If it will, exor., declaring as such, is not liable to the costs of those counts on which assets will be recovered.—THOMPSON v. STENT (1808), 1 Taunt. 322; 127 E. R. 857.

Annotation:—*Folld.* Powley v. Newton (1816), 6 Taunt. 453.

7473. ———.]—An exor. may join a count on promises to himself, as exor., with counts on promises to testator, when the sum recovered would be assets in his hands.—POWLEY v. NEWTON (1816), 6 Taunt. 453; 2 Marsh. 147; 128 E. R. 1111.

7474. ———.]—Counts on promises made to an intestate may be joined with counts on promissory notes, given to the administrator, as administrator since the death of intestate, because, where when recovered, the amount would be assets.—COURT v. PARTRIDGE (1819), 7 Price, 591; 146 E. R. 1071, Ex. Ch.; *affg.* S. C. *sub nom.* PARTRIDGE v. COURT (1818), 5 Price, 412.

7475. ———.]—A count for work done by pltf. as administrator may be joined with counts for goods sold & work done by the intestate, on promises to him.—EDWARDS v. GRACE (1836), 2 M. & W. 190; 5 Dowl. 302; 2 Gale, 241; 6 L. J. Ex. 68; 150 E. R. 723.

Annotations:—*Refd.* Bolingbroke v. Kerr (1866), 14 L. T. 365; Abbott v. Parfitt (1871), L. R. 6 Q. B. 346.

SUB-SECT. 6.—PLEADING.

A. Claims.

7476. What must be pleaded—Appointment of executors.]—SWALLOW v. EMBERSON (1665), 1 Sid. 242; 1 Keb. 865; 1 Lev. 161; 82 E. R. 1082.

Annotations:—*Refd.* Alexander v. Mawman (1737), Willes, 40; Rawlinson v. Shaw (1790), 3 Term Rep. 557; Ryalls v. Bramall (1848), 1 Exch. 734.

sues for specific performance in respect of one contract as exor., & in respect of another on his own behalf, & objection is not made, & defts. are not prejudicially affected, such joinder is no obstacle to a decree of specific performance.—BECK v. ERICKSON (1908), 28 N. Z. L. R. 43.—N.Z.

PART VII. SECT. 1, SUB-SECT. 6.—A.

a. What must be pleaded—Where one executor dead—That plaintiff

Sect. 1.—Actions by representative: Sub-sect. 6, A. & B. (a) & (b); sub-sect. 7.]

7477. — Where previous administration durante minore ætate—That money not paid to such administrator.]—In an *assumpsit* by an exor., during whose minority another person had the exorship., pltf. must aver that the money was not paid to the exor. *durante minore ætate*.—*ELSTOB v. THOROWGOOD* (1697), 1 Ld. Raym. 283; 1 Salk. 393; 91 E. R. 1086; *sub nom.* *ELSTOB v. THOROWGOOD*, Comb. 428.

Annotation:—*Mentd.* *Kinsey v. Heyward* (1697), 1 Ld. Raym. 432.

B. Defences.

(a) In General.

7478. Payment to co-executor.]—ANON. (1293), Y. B. (Rolls Series), 21 & 22 Edw. 1, 259.

7479. Previous action unsuccessfully brought—By one executor as administrator.]—To an action of debt on bond brought by several, as exors. of J. R., it is no plea that before the writ purchased one of pltf.s., as administrator of J. R. brought an action of debt on the same bond against deft., who pleaded that J. R. made exors. who administered, & upon which plea judgment was given for deft. —*ROBINSON'S CASE* (1603), 5 Co. Rep. 32 b; 77 E. R. 103; *sub nom.* *ROBINSON v. ROBINSON*, Cro. Jac. 14.

Annotations:—*Consd.* *Kitchen v. Campbell* (1772), 3 Wils. 304. *Refd.* *Slingsby v. Lambert* (1616), Cro. Jac. 394; *Hustler v. Raines* (1695), 2 Lut. 1414; *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151. *Mentd.* *Ferrer's Case* (1598), 6 Co. Rep. 7a; *Overton v. Harvey* (1850), 9 C. B. 324.

7480. Action on bond for penalty—Payment after forfeiture to infant executor.]—Payment, after forfeiture of the principal, interest & costs, due upon a bond to an infant of eighteen years of age, who was one of three exors. of obligee, cannot be pleaded in satisfaction to an action of debt, by all exors. for the penalty.—*KNIVETON v. LATHAM* (1637), Cro. Car. 490; 79 E. R. 1023.

Annotations:—*Refd.* *Bank of England v. Morrice* (1736), Lee temp. Hard. 219; *Pennington v. Healey* (1833), 1 Cr. & M. 402.

7481. Release of all actions by executors.]—*KNIGHT v. COLE* (1690), 3 Lev. 273; Carth. 118; 1 Show. 150; 83 E. R. 686; *sub nom.* *COLE v. KNIGHT*, Holt, K. B. 620; 3 Mod. Rep. 277.

Annotations:—*Mentd.* *Thorpe v. Thorpe* (1696), 1 Ld. Raym. 235; *Jenner v. Jenner* (1866), L. R. 1 Eq. 361.

7482. —.]—A release by an exor. of all actions, will extend to all actions he is entitled to either in his own right or as exor.—*THORPE v. THORPE* (1697), 1 Ld. Raym. 235; Holt, K. B. 28; 1 Lut.

*made to deceased executor.]—Where one of three exors. is dead, & the survivors sue in right of the testator, the declaration must state that payment had not been made to the deceased exor.—**NICHALL v. WILLIAMS* (1823), Tay. 21.—CAN.

b. — Mortgage action—Grant of probate.]—A bill to foreclose filed by the exors. of the mtgee. did not allege that probate had issued to them:—*Held: defective, on demurrer.—**LAWRENCE v. HUMPHRIES* (1865), 11 Gr. 209.—CAN.

PART VII. SECT. 1, SUB-SECT. 6.—
B. (a).

c. Invalidity of grant.]—Where to an action on a note brought by an exor., deft. pleaded that at the time of testator's death, deft. resided in the

London district, & that therefore the letters testamentary granted by the surrogate ct. of the home district were void, & pltf. demurred, the ct. gave judgment against the demurrer.—*KING v. CLARIS* (1839), 2 Ont. Dig. 2717.—CAN.

d. Invalidity of will.]—In trover against deft. for conversion of personal property bequeathed by testatrix to pltf., in trust for her children, deft. claimed the property by gift *inter vivos* from testatrix, & on such gift being disproved, he urged that the will was invalid on the ground of the absence of the husband's consent. Testatrix, who was living apart from her husband, died in possession of the property; the husband had never interposed, nor did deft. defend under the husband's right:—*Held: it was*

245; 12 Mod. Rep. 455; 1 Salk. 171; 91 E. R. 1054.

Annotations:—*Refd.* *Acherley v. Vernon* (1739), Wilses, 153. *Mentd.* *Lock v. Wright* (1722), 8 Mod. Rep. 40; *Russen v. Coleby* (1733), 7 Mod. Rep. 236; *Johnston v. Wilson* (1741), 7 Mod. Rep. 345; *Torry v. Duntze* (1795), 2 Hy. Bl. 389; *Campbell v. Jones* (1796), 6 Term Rep. 570; *Morton v. Lamb* (1797), 7 Term Rep. 125; *Simons v. Farren* (1834), 1 Bing. N. C. 272; *Smith v. Keating* (1848), 6 C. B. 136; *Manby v. Cremonini* (1851), 6 Exch. 808; *Foakes v. Beer* (1884), 9 App. Cas. 605.

7483. Plaintiff jointly liable with defendant.]—A party cannot be both pltf. & deft. in an action at law. Therefore where pltf. sued as exor., & defts. pleaded that the promises in the declaration were made jointly with pltf.:—*Held: this is a good plea in bar of the action.—**MOFFAT v. VAN MILLINGEN* (1787), 2 Bos. & P. 124, n.; 2 Chit. 539; 126 E. R. 1193.

Annotations:—*Apld.* *Mainwaring v. Newman* (1800), 2 Bos. & P. 120. *Foll.* *Fitzgerald v. Boehm* (1821), 6 Moore, C. P. 332. *Refd.* *Hammond v. Teague* (1829), 3 Moo. & P. 474; *Beecham v. Smith* (1858), 27 L. J. Q. B. 257.

7484. Payment to next of kin of intestate—Dying without administering.]—A. died intestate. B. the next of kin, having died without administering to the effects of A. C., exor. of B., takes out administration to A., the grant being of the goods, etc., "left unadministered" by B.:—*Held: a payment to B. is no bar to an action by C.—**MITCHELL v. MOORMAN* (1826), 1 Y. & J. 21; 148 E. R. 570.

Annotation:—*Apld.* *Mitchell v. Holmes* (1873), 25 L. T. 72.

7485. —.]—A. by his will granted an annuity of £20 *per annum*, payable half-yearly, on May 13, & Nov. 23, to H., & charged the same upon certain lands which he devised to C., the will containing a direction that after the death of H. a proportionate part of the annuity to be computed from the last preceding day of payment to her death should be paid to her exors. or administrators. After the death of A. the annuity was paid to H. until her death on Apr. 24, 1866, when £10, being the full amount which would have been due had she lived to May 13 next, was paid to her surviving husband, who, however, never took out letters of administration to her. Upon his death, in Mar. 1869, he left by his will, his son, deft., his exor., who thereupon took out letters of administration to his mother, H., & distrained upon the lands upon which the annuity was charged for the proportion of the annuity due at his mother's death:—*Held: (1) as the only legal personal representative of H., he was entitled to do so, & the payment of the £10 to her husband could not be taken into account; (2) no equitable plea could be framed so as to make the payment of the £10 an answer to deft.'s claim.—**MITCHELL v. HOLMES*

not open to the deft. to raise the objection.—*ADAMS v. CORCORAN* (1875), 25 C. P. 524.—CAN.

e. Action for recovery of money deposited in bank—Pleas of payment to indorsee.]—Action by pltf. as administratrix of L., to recover a sum deposited by L. in his lifetime with defts. Pleas (1) that the moneys were paid to the person presenting the deposit receipt with L.'s indorsement thereon; (2) that L., in his lifetime, indorsed & delivered the receipt to B., his wife & afterwards his widow, to whom defts., without any notice or knowledge of L.'s death, duly paid the same, were held to be bad.—*LEE v. BANK OF BRITISH NORTH AMERICA* (1879), 30 C. P. 255.—CAN.

f. Failure to prove testator's death.]—In an action by pltf.s. as trus-

(1873), L. R. 8 Exch. 119; 42 L. J. Ex. 98; 28 L. T. 72; 21 W. R. 412.

7486. That one executor has renounced.]—CRESWICK v. WOODHEAD, No. 7457, *ante*.

(b) *Lapse of Time.*

See, generally, LIMITATION OF ACTIONS.

7487. Time within which action must be brought.]—Stat. Limitations pleaded to an action brought by an administrator. He shall have six years next after the granting the administration.—CURRY v. STEPHENSON (1894), Carth. 335; Comb. 311; Holt, K. B. 98; Skin. 555; 4 Mod. Rep. 376; 90 E. R. 796; *sub nom.* CARY v. STEPHENSON, 2 Salk. 421.

*Annotations:—*Reid. Chandler v. Roberts (1779), 1 Doug. K. B. 58; Murray v. East India Co. (1821), 5 B. & Ald. 204; Rhodes v. Smethurst (1838), 4 M. & W. 42.

7488. — Action begun by deceased.]—KINSEY v. HAYWARD (1701), 1 Lut. 256; 1 Ld. Raym. 432; 125 E. R. 134; *sub nom.* HAYWARD v. KINSEY, 12 Mod. Rep. 568.

*Annotations:—*Distd. Hickman v. Walker (1737), Willes, 27. *Apld.* Curlew v. Mornington (1858), 27 L. J. Q. B. 439. *Consd.* Swindell v. Bulkeley (1886), 18 Q. B. D. 250. *Reid.* Brown v. Babbington (1703), 2 Ld. Raym. 880; Wilcox v. Huggins (1730), 1 Barn. K. B. 335, 382; Carver v. James (1740), 7 Mod. Rep. 348; Karver v. James (1741), Willes, 255; Adam v. Bristol (1836), 2 Ad. & El. 389; Davies v. Lowndes (1843), 6 Man. & G. 471. *Mentd.* R. v. Leighton (1708), Fortes. Rep. 173; Emery v. Bartlett (1729), 2 Stra. 827.

7489. — — —.]—LETHBRIDGE v. CHAPMAN (1729), cited in Fitz-G. 171; cited in 1 Barn. K. B. 382; 94 E. R. 760.

*Annotations:—*Reid. Willcox v. Huggins (1730), Fitz-G. 289; Karver v. James (1741), Willes, 255; Adam v. Bristol (1834), 2 Ad. & El. 389.

7490. — — —.]—WILCOX v. HUGGINS (1731), 2 Barn. K. B. 5; 2 Stra. 907; 94 E. R. 319; *sub nom.* WILLCOX v. HUGGINS, Fitz-G. 289.

*Annotations:—*Consd. Adam v. Bristol (1834), 2 Ad. & El. 389. *Reid.* Hickman v. Walker (1737), Willes, 27; Rhodes v. Smethurst (1840), 6 M. & W. 351; Curlew v. Mornington (1857), 7 E. & B. 283.

7491. — — —.]—A suit for an account of the rents & profits of real estate having become abated by pltf.'s death, after answer, but before decree, pltf.'s personal representative more than six years afterwards, filed a bill of revivor, to which the personal representative of original deft., who had also died, pleaded Stat. Limitations, but did not state in his plea that six years had elapsed since representation had been taken out to original pltf. The plea was overruled.—PERRY v. JENKINS (1836), 1 My. & Cr. 118; 5 L. J. Ch. 82; 40 E. R. 321.

*Annotation:—*Reid. Rhodes v. Smethurst (1840), 6 M. & W. 351.

7492. — No action brought by deceased.]—It is not competent to an exor. to maintain an action for debt which accrued to his testator, & for which he might have sued, more than six years before the issuing of the writ.

A. had a right of action against B. for a debt in respect of which the Stat. Limitations began to run in Sept. 1856. A. died on May 31, 1862. His exor. proved the will on July 12, & commenced an action against B. on Nov. 5:—*Held*: Stat. Limitations was a bar to the claim, notwithstanding a jury, or an arbitrator, might think that the exor. had commenced the proceeding within a reasonable time.—PENNY v. BRICE (1865), 18 C. B. N. S. 393; 11 L. T. 632; 13 W. R. 342; 144 E. R. 497.

7493. Action by infant executor—Suit commenced by administrator durante minoritate.]—ELSTOB v. THOROWGOOD, No. 7477, *ante*.

7494. Representative bound by laches of deceased.]—No rule is better settled than that a legal personal representative is bound by the laches, or neglect, which affects the person through whom he claims.—HODGSON v. BIBBY (1863), 32 Beav. 221; 8 L. T. 266; 11 W. R. 529; 55 E. R. 87.

Statute of Limitations as defence in actions against representative.]—*See* Part VIII., Sect. 6, *post*.

SUB-SECT. 7.—EVIDENCE.

7495. What must be proved—Action by administrator—Grant of administration.]—PETTO v. RUDDOCK (1664), 1 Sid. 228; 82 E. R. 1074.

*Annotations:—*Reid. Gidley v. Williams (1700), 1 Ld. Raym. 634; Holyday v. Fletcher (1727), 1 Barn. K. B. 29.

7496. — — —.]—In an action by a man as administrator the neglect of showing that administration was granted to him will be fatal upon demurrer. But no advantage can be taken of it after deft. has pleaded.—GIDLEY v. WILLIAMS (1701), 1 Ld. Raym. 634; 12 Mod. Rep. 443; 1 Salk. 37; 91 E. R. 1324.

7497. — Action by temporary administrator—Continuation of administration.]—A temporary administrator must in actions brought by him show that his administration continues.—BEAL v. SIMPSON (1698), 1 Ld. Raym. 408; Lut. 627; 91 E. R. 1171.

*Annotation:—*Mentd. Lucas v. Nockells (1833), 10 Bing. 157.

7498. — Action by administrator de bonis non—Original grant of administration.]—Where a bill of exchange was endorsed generally, but delivered to S. as administratrix of J. for a debt due to intestate, & S. died intestate after the bill became due, & before it was paid:—*Held*: the administrators *de bonis non* of J. might sue upon the bill, & their title was sufficiently proved by the letters of administration *de bonis non*, without producing those granted to S., the administratrix.—CATHERWOOD v. CHABAUD (1823), 1 B. & C. 150; 2 Dow.

tees of D. to recover land purchased by D. at sheriff's sale, objection was taken that at the trial pltf. failed to give evidence of the death of D.:—*Held*: the objection was one which must be specifically taken.—DOUIL v. KEEFE (1901), 34 N. S. R. 15.—CAN.

PART VII. SECT. 1, SUB-SECT. 7.

g. Admissibility—Account book kept by testator.]—In an action by exors. for a debt due to testator, a

book of account kept by him, & containing an account between him & deft. with debit & credit entries, is admissible as to the whole contents of the account.—WILLIAMSON'S EXECUTORS v. LANGLEY (1877), 3 V. L. R. 52.—AUS.

h. — Action on promissory note—Uncorroborated evidence of maker—Statements of deceased.]—TONE v. BROLLY (1891), 17 V. L. R. 467.—AUS.

k. Corroborative evidence—Nature of.]—The "material evidence" in corroboration, required by Evidence Act, R. S. O. 1887, c. 61, may be direct or may consist of inferences or probabilities arising from other facts & circumstances tending to support the truth of witness's statement.—GREEN v. MCLEOD (1896), 23 A. R. 676.—CAN.

l. — Necessity for.]—In an action by exors. to recover money due from

Sect. 1.—Actions by representative: Sub-sects. 7 & 8.]

& Ry. K. B. 271; 1 L. J. O. S. K. B. 66; 107 E. R. 50.

Annotation:—Distd. *Clay v. Willis* (1823), 2 Dow. & Ry. K. B. 539.

7499. — Action by executor with right to sue in own name—Probate.]—A man who sues as exor., where he might sue in his own right, need not make a profert of the letters testamentary.—*WALLIS v. LEWIS* (1705), 2 Ld. Raym. 1215; 92 E. R. 302.

7500. Admissibility — Exemplification of lost probate.]—If the probate be lost, the exor. may declare on an exemplification of it.—*SHEPHERD v. SHORTHORSE* (1721), 1 Stra. 412; 93 E. R. 603.

Annotation:—Refd. *Daly v. Mahon* (1838), 5 Scott, 606.

— Admissions by co-executor.]—See EVIDENCE, Vol. XXII., p. 91.

7501. Sufficiency of evidence—Of acknowledgment of debt—To support action on promise to intestate.]—Promise to pay an exor. cannot be given in evidence upon the issue of *assumpsit infra sex annos* to the exor.'s testator.—*GREEN v. CRANE* (1705), 2 Ld. Raym. 1101; 11 Mod. Rep. 37; 92 E. R. 229; *sub nom.* *DEAN v. CRANE*, 11 Mod. Rep. 309; 1 Salk. 28.

Annotations:—Folld. *Williams v. Gun* (1711), Fortes. Rep. 177; *Hickman v. Walker* (1737), Willes, 27; *Sarell v. Wine* (1803), 3 East, 409. **Refd.** *Stafford v. Forcer* (1714), 10 Mod. Rep. 311; *Skinner v. Rebow* (1731), 2 Stra. 919; *Pittam v. Foster* (1823), 1 B. & C. 248; *Scales v. Jacob* (1826), 3 Bing. 638; *Tanner v. Smart* (1827), 6 B. & C. 603.

7502. — — —.]—*WILLIAMS v. GUN* (1711), Fortes. Rep. 177; 92 E. R. 808.

7503. — — —.]—Evidence of an acknowledgment of debt. within six years of an old existing debt of above six years' standing due to pltf.'s intestate but which acknowledgment was made after intestate's death, will not support a count by the administrator laying the promise to be made to intestate.—*SARELL v. WINE* (1803), 3 East, 409; 102 E. R. 654.

Annotations:—Refd. *Scales v. Jacob* (1826), 3 Bing. 638; *Tanner v. Smart* (1827), 6 B. & C. 603; *Napper v. Napper* (1847), 9 L. T. O. S. 80.

7504. — — — To support action by executor—When executor has claims in his own right.]—Where the action is by an exor., who has also claims due to himself in his own right, it will be for the jury whether the payments were upon account of the debt due to testator, or to the exor. in his own right.—*COLLINSON v. MARGESSON* (1858), 27 L. J. Ex. 305.

See, generally, LIMITATION OF ACTIONS.

7505. — Of agreement to accept as tenant—By one of executors.]—To an action for use & occupation for a quarter's rent from Lady-day to Midsummer, 1841, deft. pleaded that by an agreement made between pltf's., exors. of T., &

deft., deft. agreed to take of pltf's. exors. as aforesaid, the premises in question, that it was afterwards agreed between them & W. that W. should become tenant to pltf's. from Lady-day, 1841, & that deft. should be discharged from all liability to subsequent rent, that deft. accordingly gave up possession to W., & pltf's. accepted him as tenant:—**Held:** this plea was not proved by evidence that one of pltf's. had so agreed to accept W. as tenant in lieu of deft.—*TURNER v. HARDEY* (1842), 9 M. & W. 770; 1 Dowl. N. S. 954; 11 L. J. Ex. 277; 152 E. R. 326.

7506. — Of agreement not to enforce debt.]—(1) W., the uncle of pltf.'s wife, was applied to by a friend of pltf. to advance £1,000 to defray some expenses connected with pltf.'s election as Member of Parliament. W. declined to make the advance, but said he would give pltf. £500 & deduct it from the legacy he intended to leave to his wife. Shortly afterwards W. sent pltf. a cheque for £500. Pltf. wrote to thank W., saying that he would gladly repay it at an early opportunity, & hoped shortly to be able to do so. A few weeks afterwards, as pltf. deposed, a conversation took place between him & W., & it was agreed at pltf.'s instance that pltf. should pay banker's interest on the sum during W.'s life; & pltf., for the purpose, as he deposed, of effectuating this agreement, signed & gave to W., a promissory note for £500, with interest at 1 per cent., on the understanding that payment of the principal was not to be enforced, but only payment of interest during W.'s life. After W.'s death his exors. sued pltf. on the note for the £500:—**Held:** although, if there had been a complete gift of the £500, it could not afterwards have formed a consideration for a promissory note, the exors. were entitled to recover, for that, as pltf. had not, before the giving of the promissory note, agreed to accept the £500 as a gift, it remained open whether it should be a gift or loan, & the giving the promissory note was conclusive evidence that the parties agreed upon its being a loan, & the ct. could not allow the documentary evidence to be rebutted by the parol evidence given by pltf. on his own behalf.

(2) Evidence of pltf. on his own behalf as to a bargain with a man since dead ought, in the absence of corroboration, to be disregarded (*JAMES, L.J.*).—*HILL v. WILSON* (1873), 8 Ch. App. 888; 42 L. J. Ch. 817; 29 L. T. 238; 21 W. R. 757, L. JJ.

Annotations:—As to (1) *Refd.* *Henry v. Smith* (1895), 39 Sol. Jo. 559. **As to (2)** *Refd.* *Re Richardson, Shillito v. Hobson* (1885), 30 Ch. D. 396.

SUB-SECT. 8.—SET-OFF AND COUNTERCLAIM AGAINST REPRESENTATIVE.

See, generally, R. S. C., Ord. 19, r. 3; SET-OFF; PRACTICE.

7507. General rule—Claim sought to be set off—

C. to testator, it was proved that the latter when ill in a hospital had sold a farm to C. & \$1,000 of the purchase money was deposited in a bank to testator's credit; that C. withdrew this money on an order from testator who died some weeks after, when none was found on his person nor any record of its having been received by him. C. admitted having drawn out the money, but swore that he had paid it over to testator, but no other evidence of any kind was given of such payment:—**Held:** a *prima facie* case having been

made out against C. & his evidence not having been corroborated, the exors. were entitled to judgment.—*THOMPSON v. COULTER* (1903), 34 S. C. R. 261.—CAN.

m. — — — Employee of interested party.]—The provision of Alberta Evidence Act, s. 12, that in an action by or against the administrators of a deceased person an opposite or interested party shall not obtain judgment on his own evidence, in respect of any matter occurring before

the death of deceased, without corroboration, does not apply to the evidence of an employee of the interested party, even though the interested party is a corp'n.—*IMPERIAL BANK v. TRUSTS & GUARANTEE CO., LTD.*, [1921] 1 W. W. R. 801.—CAN.

PART VII. SECT. 1, SUB-SECT. 8.

7507 i. General rule—Claim sought to be set off—Must be against representative as such.]—In an action by extric. against a sheriff for money received

Must be against representative as such.]—We are of opinion that the debts pleaded cannot be set off in the present case, this being a bail-bond, & pltf. not suing in his own right but in the nature of a trustee. It might be as well said that when a man sues as exor., deft. may set off a debt from pltf. to deft. in his own right, as that deft. can set off in the present case. That is contrary not only to common sense but also to the plain words of the statute (WILLES, J.).—HUTCHINSON v. STURGES (1741), Willes, 261; 125 E. R. 1163.

Annotations:—*Reid*. Schofield v. Corbett (1836), 11 Q. B. 779. *Mentd.* Gillingham v. Waskett (1824), M'Cle. 198.

7508. ———.]—JONES v. MOSSOP, No. 7522, *post*.

7509. ———.]—FORD v. HEALE (1852), 19 L. T. O. S. 109.

7510. ———.]—(1) To an action by an administrator *de bonis non*, who sues in his representative character, for a debt due after the death of intestate & in the lifetime of the first administrator, deft. cannot set off a debt due to him from the first administrator.

(2) Therefore in such an action a plea that the moneys in the declaration mentioned were received by deft. as agent of H., first administratrix, for her, & deft. applied them, as directed by H. & as her agent, in the administration of the estate of intestate, & that the moneys were not due from deft. to H. as administratrix, is bad.

(3) The present case is entirely out of 2 Geo. 2, c. 22, s. 13. There is no privity between the administrator *de bonis non* & the original administrator of an intestate. Present pltf. do not represent the original administratrix in respect of the debt due to deft., & therefore could not be sued by deft., consequently there is no mutuality between the debts (LUSH, J.).—ALLISON v. SMITH (1869), 10 B. & S. 747.

See, now, Jud. Act, 1873, s. 24 (3).

7511. ———.]—PHILLIPS v. HOWELL, No. 7523, *post*.

7512. Debt due from deceased as tradesman.]—HAWKINS v. FREEMAN (1723), 2 Eq. Cas. Abr. 10; 22 E. R. 8, L. C.

7513. Debt due from deceased before death—Whether set off against debt due to estate—Accrued after death.]—An exor. may sue in his own name for moneys received subsequent to testator's death, & deft. cannot set off a debt due to him from testator.—SHIPMAN v. THOMSON (1738), 7 Mod. Rep. 246; Willes, 103; Cooke, Pr. Cas. 151; 87 E. R. 1219.

Annotations:—*Consd.* Mardall v. Thellusson (1852), 18 Q. B. 857. *Apld.* Lambarde v. Older (1853), 17 Beav. 542; Rees v. Watts (1855), 11 Exch. 410. *Reid.* Schofield v. Corbett (1836), 11 Nev. & M. K. B. 527. *Mentd.* *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546.

to her use as extrix. on a *fl. fa.* against D.:—*Held*: a set-off by deft. against pltf. in her own right was inadmissible, pltf. claiming in her representative character.—DEVLIN v. JARVIS (1840), 3 Ont. Dig. 6354.—CAN.

7507 ii. ———.]—Exors. of private & partnership estates, although the same individuals, must be in law considered as distinct *persons*, & it is incompetent to plead against the exor. of the private estate a reconventional claim against the partnership estate.—ROBERTSON & OSMOND (EXECUTORS OF NAUDE) v. ZIERVOGEL'S EXECUTRIX (1833), 3 Men. 354.—S. AF.

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7514. ———.]—TEGETMEYER v. LUMLEY (1785), Willes, 264, n.; 125 E. R. 1164.

Annotations:—*Consd.* Rogerson v. Ladbroke (1822), 7 Moore, C. P. 412. *Reid.* Schofield v. Corbett (1836), 11 Q. B. 779; Mardall v. Thellusson (1852), 18 Q. B. 857; Watts v. Rees (1854), 23 L. J. Ex. 238.

7515. ———.]—To *assumpsit* for money received to the use of pltf. as administrator, & on an account stated with him as administrator, with promises to him as administrator, deft. cannot plead a set-off for money due from the intestate in his lifetime.—SCHOFIELD v. CORBETT (1836), 11 Q. B. 779; 6 Nev. & M. K. B. 527; 116 E. R. 666.

Annotation:—*Reid.* Rees v. Watts (1855), 11 Exch. 410.

7516. ———.]—A creditor of intestate purchased part of intestate's goods from his administrator:—*Held*: he could not set off the amount against a debt due to him from intestate at his decease.—LAMBARDE v. OLDER (1851), 17 Beav. 542; 23 L. J. Ch. 18; 22 L. T. O. S. 94; 17 Jur. 1110; 2 W. R. 32; 51 E. R. 1144.

Annotations:—*Distd.* Watkin v. Newcomen (1883), Cab. & El. 113. *Reid.* Wrouth v. Dawes (1858), 25 Beav. 369; *Re* Gregson, Christison v. Bolam (1887), 36 Ch. D. 223.

7517. ———.]—To an action by an administrator, who sues in his representative character for a debt due after the death of intestate deft. cannot set off a debt due to him from intestate in his lifetime.—REES v. WATTS (1855), 11 Exch. 410; 3 C. L. R. 1435; 25 L. J. Ex. 30; 1 Jur. N. S. 1023; 3 W. R. 575; 156 E. R. 891, Ex. Ch.; *affg.* S. C. *sub nom.* WATTS v. REES, 9 Exch. 696.

Annotations:—*Apld.* Newell v. National Provincial Bank of England (1876), 1 C. P. D. 496. *Reid.* Mardall v. Thellusson (1856), 6 E. & B. 976; Hallett v. Hallett (1879) 13 Ch. D. 232; *Re* Gregson, Christian v. Bolam (1887), 36 Ch. D. 223; Watkins v. Lindsay (1898), 67 L. J. Q. B. 362. *Mentd.* Bennett v. White, [1910] 2 K. B. 1; *Re* Peruvian Ry. Construction Co., [1915] 2 Ch. 144.

7518. ———.]—A., being about to be married, effected a policy on his own life in the names of defts., & by his marriage settlement, of which defts. were trustees, he settled the policy in terms which excepted the bonuses. By the negligence of the trustees, a portion of certain other property comprised in the settlement was misappropriated & lost by A. After A.'s death the sum assured by the policy & also a sum representing bonuses thereon were paid by the assurances co. to the trustees, & his extrix. brought an action against them to recover the last-mentioned sum:—*Held*: the trustees could not retain such sum to answer their claim against A. in respect of his misappropriation of the trust funds, the bonuses not being subject to the settlement, & therefore, not being taken by extrix. under the settlement, & there being no set off or mutual debt since the debt from A. to the trustees was payable in his lifetime, while the debt from the trustees to A. in respect of the

7513 i. Debt due from deceased before death—Whether set off against debt due to estate—Accrued after death.]—In *assumpsit*, upon promise to an intestate, a note of hand made by him, & after his death endorsed to deft., cannot be pleaded as a set-off to an action by the administrator.—CURRY & ORR v. HIBBARD (1836), 2 N. B. R. (Ber.) 300.—CAN.

7513 ii. ———.]—Pltf. consigned goods to defts. to be sold & the proceeds handed over to S. S. being indebted to defts. gave them a promissory note for the amount & died leaving his estate insolvent. In an

action by exors. of S. in the name of pltf. to recover the amount arising from the sale of the goods:—*Held*: defts. were entitled to offset the amount of the note given by S.—CHISHOLM v. CHISHOLM (1872), 9 N. S. R. 85.—CAN.

7513 iii. ———.]—In an action of trespass by administrator for entering the warehouse of deceased after his death & taking & converting goods therein, deft. set off a debt due by deceased to him. An administration order had been made, of which deft. had notice before defence:—*Held*: the set-off was bad.—MONTEITH v. WALSH (1884), 10 P. R. 162.—CAN.

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bonuses was not so payable.—**HALLETT v. HALLETT** (1879), 13 Ch. D. 232; 49 L. J. Ch. 61; 41 L. T. 723; 28 W. R. 321.

*Annotations:—*Reid. *Re Gregson, Christison v. Bolam* (1887), 36 Ch. D. 223; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164.

7519. ———.—*Re GREGSON, CHRISTISON v. BOLAM*, No. 7526, *post*.

7520. Debt due from deceased after death—Not set off against debt due to deceased—Accrued before death.—**ALLISON v. SMITH**, No. 7510, *ante*.

7521. ———.—(1) To an action by an administrator for the balance of intestate's banking account at the time of his death, defts. in their statement of defence sought to avail themselves, either by way of set off or of counter-claim, of a debt due to them from intestate as one of several makers of a promissory note for £1,000, which did not become due until after intestate's death. Reply, that, before action an order was made in an administration suit in the Ch. Div., to take an account of the debts & liabilities affecting the personal estate of deceased, of which defts. before action had notice; & that, under Law of Property Amendment Act, 1860 (c. 38), s. 14, equity would restrain any proceedings on the note until the account had been taken. On demurrer to this reply:—*Held*: upon the authority of *Rees v. Watts*, No. 7517, *ante*, the claim in respect of the promissory note could not be relied on as a set-off; & in accordance with the practice in equity, defts. must under the circumstances be restrained from setting it up by way of counter-claim, & be left to prove for it in the administration suit.

(2) As the claim in respect of the £1,000 promissory note did not mature in the lifetime of the maker, intestate, it cannot be set off against a debt due to deceased in his lifetime (**ARCHIBALD, J.**).—**NEWELL v. NATIONAL PROVINCIAL BANK OF ENGLAND** (1876), 1 C. P. D. 496; 45 L. J. Q. B. 285; 34 L. T. 533; 40 J. P. 376; 24 W. R. 458; 3 Char. Pr. Cas. 47.

*Annotations:—*As to (1) *Reid. Macdonald v. Carington* (1878), 48 L. J. Q. B. 179; *Re Gregson, Christison v. Bolam* (1887), 36 Ch. D. 223. As to (2) *Distd. Watkins v. Lindsay* (1898), 67 L. J. Q. B. 362. *Reid. Hallett v. Hallett* (1879), 13 Ch. D. 232.

7522. Representative beneficially entitled—To subject-matter of action—Effect on right to set off.—The debt upon the bond was due to J. R. The debts which pltf. paid were the debts of R. R. [the insolvent]. The sums therefore were due in different rights; & no rule is better understood than that you cannot set off demands due in different rights—the principle being that one man's money shall not be applied to pay another man's debt. But in this case it was said that inasmuch as R. R. was sole next of kin & administrator of J. R., & as it appeared by the answer of deft. [assignee & administrator of R. R.]. That R. R. was entitled beneficially to this very sum of £500, the difficulty I have adverted to did not arise. If the effect of the answer be that before the date of the vesting order, R. R., as administrator & next of kin of J. R., had become beneficial

owner of the bond, there is no technical reason, founded in the origin of his claim, why the ct. should not treat the bond as his, & give pltf. [surety for R. R.] the equity he claims. The admission in the answer is most distinct, that the bond itself is part of the beneficial estate of R. R. & that deft. obtained letters of administration empowering him to recover it, not as part of the estate of J. R. but as part of the estate of the insolvent. That admission relieves the case of all difficulty with regard to the fact of the debts being due in different rights. The case is the same in principle as where an assent has been given to a legacy whereby the property has passed to the legatee, being himself an exor., in which case the legacy is separated from the estate of testator & becomes the property of the legatee (**WIGRAM, V.-C.**).—**JONES v. MOSSOP** (1844), 3 Hare, 568; 13 L. J. Ch. 470; 8 Jur. 1064; 67 E. R. 506.

*Annotations:—*Distd. *Re Willis, Percival, Ex p. Morier* (1879), 12 Ch. D. 491. *Reid. Freeman v. Lomas* (1851), 9 Hare, 109; *Wilson v. Leslie* (1857), 5 W. R. 815; *Cochrane v. Green* (1860), 9 C. B. N. S. 448; *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29.

7523. ———.—(1) Pltf. as purchaser of leasehold property, obtained judgment for specific performance against deft. as administratrix of an intestate with costs to be paid by her personally. Deft. had a beneficial interest, to the extent of one-fourth in intestate's estate, & it was alleged that except a mtge. there were no unpaid debts of intestate, & that the purchase-money payable by pltf. represented the whole of intestate's estate. The judgment not having been passed & entered, pltf. moved for the addition of a direction enabling him to deduct the costs due to him from deft. from so much of the purchase-money as represented her beneficial interest in the intestate's estate:—*Held*: without some form of administration order, which the ct. had no power to make in this action, it was impossible to ascertain what the amount representing the beneficial interest of deft. was, so as to bind other persons interested in intestate's estate, & though a set-off of costs against purchase-money might be allowed in a case where the debt due to & the debt due from the vendor were so, due in the same capacity, pltf. here could not be allowed to bring into account all or any part of an unascertained sum to which deft. might be beneficially entitled in the administration of intestate's estate, as against the purchase-money which was due to her in her representative capacity.

(2) It is conceded that pltf. could not ask to retain his costs out of the purchase-money generally, that being payable to deft. in her capacity of administratrix, & the costs being due from her personally (**BYRNE, J.**).—**PHILLIPS v. HOWELL**, [1901] 2 Ch. 773; 71 L. J. Ch. 13; 85 L. T. 777; 50 W. R. 73; 46 Sol. Jo. 12.

7524. Claim against mortgagee—For surplus after security realised—Whether unsecured debts set off.—After the death of mtgor. insolvent, mtgees. of a policy on the life of the mtgor., taken in their names, received the policy moneys. After satisfaction of their mtge. debt, they had a balance in their hands. This they claimed to retain against exor. of mtgor., to satisfy an unsecured simple contract debt due from mtgor. to them:—

7522 1. Representative beneficially entitled—To subject-matter of action—Effect on right to set off.—Where an exor. is the sole person beneficially

interested in the estate of testator, & all claims against the estate have been satisfied, a debt due by him personally may be set off in an action brought by

him as exor. to recover a debt due to the estate.—**WILLIAMS v. MACDONALD**, [1915] V. L. R. 229.—**AUS.**

Held: they were entitled to do so.—*Re HAZEL-FOOT'S ESTATE, CHAUNTLER'S CLAIM* (1872), L. R. 13 Eq. 327; 26 L. T. 146; *sub nom. Re HAZEL-FOOT'S ESTATE, CHAUNTLER'S CLAIM*, 41 L. J. Ch. 286.

Annotations:—*N.F. Talbot v. Frere* (1878), 9 Ch. D. 568. **Consd.** *Re Gregson, Christison v. Bolam* (1887), 36 Ch. D. 223. **Refd.** *Pile v. Pile* (1875), 23 W. R. 440. **Mentd.** *Re General Provident Assce., Ex p. National Bank* (1872), L. R. 14 Eq. 507.

7525. ——— **Deceased mortgagor insolvent.**—Where mtgor. dies insolvent & mtgee. then realises his security &, after paying himself the mtge. debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from mtgor. & so give himself a preference over other creditors, but must hand it over to the mtgor.'s legal personal representatives as part of his estate, mtgee. being in the position of a trustee of the surplus for the estate.—*TALBOT v. FRERE* (1878), 9 Ch. D. 568; 27 W. R. 148.

Annotations:—**Apld.** *Re Gregson, Christison v. Bolam* (1887), 36 Ch. D. 223. **Refd.** *Roxburghe v. Cox* (1881), 17 Ch. D. 520; *Re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541; *Re Gedney, Smith v. Grummitt*, [1908] 1 Ch. 804; *Re Sutherland, Michell v. Bubna*, [1914] 2 Ch. 720; *Re Thorne*, [1914] 2 Ch. 438.

7526. ——— **G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mtgees. After the death of G. mtgees. received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy:**—**Held:** they had no right to set off the balance against exor. in respect of arrears of the annuity.—*Re GREGSON, CHRISTISON v. BOLAM* (1887), 36 Ch. D. 223; 57 L. J. Ch. 221; 57 L. T. 250; 35 W. R. 803.

Annotations:—**Consd.** *Re Gedney, Smith v. Grummitt*, [1908] 1 Ch. 804. **Refd.** *Re Thorne*, [1914] 2 Ch. 438. **Mentd.** *Watkins v. Lindsey* (1898), 67 L. J. Q. B. 362.

7527. ——— **Assignee of mortgagee.**—Testator by his will, dated in 1890, devised & bequeathed all his real & personal estate to his widow & appointed her his sole extrix. He died in 1891, insolvent. The widow did not prove the will. In 1907 a judgment was given for the administration of his real & personal estate. Between the date of testator's death & the date of the judgment, H. purchased & had assigned to him certain bond & simple contract debts due from testator & also took transfers of certain mtges. on testator's real estate. In exercise of the powers of sale contained in the mtges. H. sold the mortgaged properties & after paying himself principal & interest out of the proceeds, there remained in his hands a balance which he claimed to set off in satisfaction *pro tanto* of the debts due to him from testator's estate: **Held:** the purchase by H. after testator's death of the debts, & the transfers to him of mtges. followed by a sale under the powers of sale were not mutual dealings between him & the testator's estate within Bkpcy. Act, 1883 (c. 52), s. 38, & he was not therefore entitled to the right of set-off he claimed.—*Re GEDNEY, SMITH v. GRUMMITT*, [1908] 1 Ch. 804; 77 L. J. Ch. 428; 98 L. T. 797; 15 Mans. 97.

Annotation:—**Refd.** *Re Thorne*, [1914] 2 Ch. 438.

7528. Set-Off of judgment debt—Against judgment for representative in another court.]—*BARKER v. BRAHAM* (1773), 3 Wils. 396; 2 Wm. Bl. 869; 95 E. R. 1120.

Annotations:—**Apld.** *Bridges v. Smyth* (1831), 8 Bing. 29. **Mentd.** *Morland v. Lashley, Same v. Lashley* (1794), 2 Hy. Bl. 441, n.

7529. ——— **Held:** a judgment for pltf. in this ct. might be set off against a judgment for debt. in K. B., although pltf. was dead, & the judgment was assets in the hands of her administrator.—*BRIDGES v. SMYTH* (1831), 8 Bing. 29; 1 Dowl. 242; 1 Moo. & S. 93; 1 L. J. C. P. 33; 131 E. R. 311.

Annotations:—**Mentd.** *Green v. Cobden* (1837), 4 Scott, 486; *Miles v. Bough* (1846), 6 L. T. O. S. 325; *Scott v. De Richebourg* (1851), 11 C. B. 447.

7530. Set-Off of interest under will—Against value of estate assets detained.]—Bill stated pltf. to be entitled to certain benefits, under the will of which debt. was exor.; that a bill was filed for an account of the personal estate, etc., & decree having been made pltf. was charged before the master with several articles of the personal estate possessed by him, that the account between them was afterwards referred to an arbitrator, who found a small sum in favour of pltf., but never made an award; that after this debt., as exor., brought an action against pltf. for the effects so possessed by him. The bill prayed an injunction, & that the value of the articles possessed by pltf. might be deducted out of the interest taken by him under the will. To this bill there was a demurrer for want of equity, which was overruled.—*MILNER v. GOOLDEN* (1785), 1 Cox, Eq. Cas. 195; 29 E. R. 1125, L. C.

7531. Counterclaim against representative—In respect of personal & estate liabilities—Action by representative in own right.]—Deft. must not set up by way of counterclaim against the claim of pltf., suing only in a distinct personal character, claims against him personally & also as an exor.—*MACDONALD v. CARINGTON* (1878), 4 C. P. D. 28; 48 L. J. Q. B. 179; 39 L. T. 426; 27 W. R. 153.

Annotations:—**Refd.** *Re Gilson, Gilson v. Gilson*, [1894] 2 Ch. 92. **Mentd.** *Gray v. Webb* (1882), 21 Ch. D. 802.

7532. ——— **For payment of funeral expenses—Debt due before death—Cause of action arising after death.]**—In an action by exor. for the detention of goods of testator taken possession of, after testator's death, debt. may counterclaim for funeral expenses of testator paid by him, & also for a debt due to him from testator before his death.—*WATKIN v. NEWCOMEN* (1883), 1 Cab. & El. 113.

———.]—*See* R. S. C., Ord. 18, r. 5.

SUB-SECT. 9.—COSTS.

A. Personal Liability of Representative.

NOTE.—Cases prior to the Civil Procedure Act, 1833 (c. 42), dealing with the liability of the representative to costs in unsuccessful actions have been omitted as obsolete.

7533. Liability on failure of action—In absence of order to contrary.]—*ASHTON v. POYNTER* (1835), 1 Cr. M. & R. 738; 3 Dowl. 465; 1 Gale, 57; 5 Tyr. 322; 4 L. J. Ex. 71; 149 E. R. 1278.

PART VII. SECT. 1, SUB-SECT. 9.—A.
n. *Liability on failure of action.*
—Exors. will be ordered personally to repay costs paid to them or their solr. under a decree which is afterwards

reversed.—*DAVIDSON v. THIRKELL* (1850), 1 Gr. 284.—**CAN.**

o. ———.]—When a decree of a probate ct. is reversed as against an exor. he will not in ordinary cases be

subjected personally to costs.—*Re McDONALD'S ESTATE* (1855), 2 N. S. R. (James) 342.—**CAN.**

p. ———.]—Where an administrator brought an unfounded action

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7534. — Though action brought *bonâ fide*.]—The circumstance, that an exor. has commenced & conducted an action properly, is not sufficient to exempt him from costs, if he fails.—*SOUTHGATE v. CROWLEY* (1835), 1 Bing. N. C. 518; 1 Hodg. 1; 1 Scott, 374; 4 L. J. C. P. 102; 131 E. R. 1217; *sub nom.* *BROWN v. CROLEY*, 3 Dowl. 386.

*Annotations:—*Refd. *Engler v. Twisden* (1835), 2 Bing. N. C. 263; *Lakin v. Massie* (1835), 1 Gale, 270; *Maddock v. Phillips* (1835), 3 Ad. & El. 198; *Farley v. Briant* (1836), 3 Ad. & El. 839; *Birkhead v. North* (1847), 4 Dow. & L. 732.

7535. — Unless caused by misconduct of defendant.]—The ct. will not relieve an exor. or administrator pltf. from costs, unless there has been some misconduct on the part of deft., which led pltf. to proceed with the action, or unless some other very peculiar ground is laid for the interference of the ct. It is not enough that the action was brought *bonâ fide*, that pltf. had apparently reasonable grounds for suing, & that he was taken by surprise by the defence.—*GODSON v. FREEMAN* (1835), 2 Cr. M. & R. 585; 1 Gale, 329; Tyr. & Gr. 35; 5 L. J. Ex. 41; 150 E. R. 249.

*Annotation:—*Refd. *Redmayne v. Moon* (1856), 25 L. J. Q. B. 311.

7536. — ———.]—(1) As a general rule, since Civil Procedure Act, 1833 (c. 42), s. 3, exors., pltf.s., are liable to costs where they do not succeed, & it is incumbent on them to show some facts which may satisfy the ct. that they should be exempt in the particular case.

The fact that they were advised by counsel, that a point of law which was ultimately decided against them was in their favour or, at all events, that there was sufficient doubt, as that pltf.s. ought to take the opinion of a ct. of law upon it, is not sufficient.

(2) The conduct of defts. after action brought, as that there was greater prolixity of pleading than necessary, etc., will not be considered by the ct. in exercising their discretion as to relieving exors. from costs.—*FARLEY v. BRIANT* (1836), 3 Ad. & El. 839; 1 Har. & W. 775; 5 L. J. K. B. 132; 6 L. J. K. B. 87; 111 E. R. 632.

*Annotations:—*Generally, *Mentd.* *Morse v. Tucker* (1846), 5 Hare, 79; *Re St. George Steam-Packet Co., Ex p. Hamer's Devises* (1852), 21 L. J. Ch. 832.

7537. — ———.]—Exors. are *primâ facie* liable to the payment of costs if they fail in an action, & it is not enough, to exempt them, to show that they brought the action *bonâ fide*.—*LEWIS v. MARFELT* (1837), Murp. & H. 5.

7538. — Unless caused by misconduct of defendant.]—Exors. who are pltf.s. will not be exempted from paying the costs of issues on which they have failed unless deft. has been guilty of deception or misrepresentation. It is not enough that conduct of deft. has been such as to induce the exors. to go on.—*BIRKHEAD v. NORTH* (1847), 4 Dow. & L. 732; 2 Saund. & C. 9; 16 L. J. Q. B. 284; 9 L. T. O. S. 106; 11 Jur. 436.

7539. — ———.]—In order to exempt pltf., administrator, who has failed in an action from payment of costs under Civil Procedure Act,

1833 (c. 42), s. 31, it is not enough that deft., being in possession of evidence which he knows will defeat pltf.'s case at the trial, or may prevent him from bringing the action, does not volunteer a disclosure of it. But if pltf., administrator, applied to deft. for information, the result of which may decide the case, deft. is guilty of misconduct if by suppression or concealment or miscolouring he leads him astray, & induces him to continue his action. In this latter case, such pltf. if he fail in the action, will be exempt from payment of costs.—*REDMAYNE v. MOON* (1856), 25 L. J. Q. B. 311; 27 L. T. O. S. 191; 2 Jur. N. S. 691.

7540. — Revival of dismissed suit.]—An exor., after a bill filed by testator had been dismissed with costs, revived the suit, alleging that he intended to appeal. Exor. was ordered to pay the costs of the suit.—*HORLOCK v. PRIESTLEY* (1837), 8 Sim. 621; 59 E. R. 246.

*Annotations:—*Fold. *Boynton v. Boynton* (1878), 9 Ch. D. 250 (see (1879), 4 App. Cas. 733). Refd. *Cook v. Hathway* (1869), L. R. 8 Eq. 612.

7541. — Proceedings begun by testator.]—An order under the modern practice, allowing exor. to continue the proceedings in an action instituted by testator, which order has been obtained by him after a judgment in favour of testator, & after notice of an appeal against that judgment, is equivalent to the old order for revivor, & subjects him to the same liabilities. He becomes in effect a substantive party to the suit, & is personally liable to costs.—*BOYNTON v. BOYNTON* (1879), 4 App. Cas. 733; 41 L. T. 450; 27 W. R. 825, H. L.

*Annotations:—*Appld. *Re London Drapery Stores*, [1898] 2 Ch. 684; *Re Wenborn*, [1905] 1 Ch. 413.

7542. Liability on nonsuit.]—An exor. having been nonsuited in an action to recover the amount of a policy of insurance effected on the life of testator, the ct. ordered judgment to be entered up for deft. without costs, under Civil Procedure Act, 1833 (c. 42), it appearing to be pltf.'s duty to attempt the recovery of the money.—*LYSONS v. BARROW* (1834) 10 Bing. 563; 4 Moo. & S. 463; 2 Dowl. 807; 3 L. J. C. P. 192; 131 E. R. 1013.

*Annotations:—*N.F. *Ashton v. Poynter* (1835), 3 Dowl. 465. Dbtd. *Engler v. Twisden* (1835), 2 Bing. N. C. 263. Refd. *Godson v. Freeman* (1835), 5 L. J. Ex. 41; *Lewis v. Marfelt* (1837), Murp. & H. 5.

7543. — ———.]—Where an exor. or administrator sues in his representative character, & deft. obtains judgment as in case of a nonsuit, the exor. is not liable to the costs of the cause, but only to such costs as have been occasioned by his own wilful negligence in not proceeding to trial.—*PICKUP v. WHARTON* (1834), 2 Cr. & M. 401; 2 Dowl. 388; 4 Tyr. 224; 3 L. J. Ex. 97; 149 E. R. 816.

*Annotation:—*Refd. *Moon v. Durden* (1848), 2 Exch. 22.

7544. — ———.]—An exor. suing on a count upon promises to himself as exor., stating a consideration, partly of money due to testator in his lifetime, & partly of an account stated with himself as exor., is liable to costs if nonsuited, & cannot be relieved by the ct. or a judge under Civil Procedure Act, 1833 (c. 42), s. 31.—*SPENCE v. ALBERT* (1835), 2 Ad. & El. 785; 1 Har. & W. 7; 4 Nev. & M. K. B.

against testator's widow, which she was put to costs in defending:—*Held*: her only remedy for such costs was against the administrator personally, not against the estate.—*RODGERS v. RODGERS* (1867), 13 Gr. 457.—*CAN.*

q. — Effect on attorney's rights.]

an exor. that he costs of a suit ——— not in itself deprive the attorney employed by such exor. of his right to recover his costs from the *PILKINGTON* (1894),

7542i. Liability on nonsuit.]—Where an exor. declared, upon promises to himself, & was nonsuited, the ct. allowed deft. her costs.—*GROSVENOR'S EXECUTORS v. AGNEW* (1835), Ber. 58.—*CAN.*

385; 4 L. J. Ex. 72, n.; 4 L. J. K. B. 97; 111 E. R. 303.

Annotation:—*Reid*. Ashton v. Poynter (1835), 1 Cr. M. & R. 733.

B. Security for Costs.

7545. Whether security ordered—Representative resident outside jurisdiction.—Pltfs., who live out of the jurisdiction of the ct., may be compelled to give security for costs, though such pltfs. sue as exors.—*CHEVALIER v. FINNIS* (1819), 1 Brod. & Bing. 277; 3 Moore, C. P. 602; 129 E. R. 729.

Annotations:—*Folld*. Chamberlain v. Chamberlain (1832), 1 Dowl. 366. *Reid*. Sykes v. Sykes (1869), L. R. 4 C. P. 645.

7546. ———.]—The ct. will compel a pltf., extrix., who is out of the jurisdiction to give security for costs; but such security will be confined to those costs only for which she would be liable.—*CHAMBERLAIN v. CHAMBERLAIN* (1832), 1 Dowl. 366.

Annotation:—*Reid*. Sykes v. Sykes (1869), L. R. 4 C. P. 645.

7547. ——— **Action under Lord Campbell's Act, 1845 (c. 93).**—In an action brought by an administrator under above Act, for the benefit of deceased's widow & children, the ct. refused to order security for costs to be given merely on the ground that pltf. was suing wholly for the benefit of others.

The rule is not to order security for costs unless it is shown that pltf., besides being merely nominal pltf., is also in insolvent circumstances (*BRAMWELL, B.*).

The ct. ought not to order security for costs in an action brought under the Act by an administrator unless there has been something like practice in the case (*MARTIN, B.*).—*LARSEN v. MONMOUTHSHIRE RAILWAY & CANAL CO.* (1867), 16 L. T. 289.

7548. ——— **Representative insolvent.**—An exor. is not a nominal pltf. within the rule that where a mere nominal pltf. is insolvent security for costs will be ordered.—*SYKES v. SYKES* (1869), L. R. 4 C. P. 645; 38 L. J. C. P. 281; 20 L. T. 663; 17 W. R. 799.

Annotations:—*Appld*. Denston v. Ashton (1869), L. R. 4 Q. B. 590. *Consd*. Pooley's Trustee in Bankruptcy v. Whetham (1884), 28 Ch. D. 38; *Cowell v. Taylor* (1885), 31 Ch. D. 34; *Greener v. Kahn*, [1906] 2 K. B. 374. *Apprvd*. Reader v. Kahn (1906), 75 L. J. K. B. 660. *Consd*. White v. Butt, [1909] 1 K. B. 50. *Reid*. United Ports Insce. v. Hill (1870), L. R. 5 Q. B. 395; *Blackett v. Blackett & Frail* (1902), 71 L. J. P. 69.

7549. ———.]—Pltf., who is an administrator, even although the letters of administration are only

granted to him as the attorney of a person who is abroad & until that person obtains letters of administration, & although he is shown to be insolvent, will not be ordered to give security for deft.'s costs of the action.—*RAINBOW v. KITTOE*, [1916] 1 Ch. 313; 85 L. J. Ch. 468; 114 L. T. 606; 60 Sol. Jo. 338.

SUB-SECT. 10.—EXECUTION.

See, generally, EXECUTION, Vol. XXI., pp. 407 et seq.

7550. Effect of revocation of letters of administration—After judgment obtained.—The letters of administration being revoked, pltf.'s power is determined, for he prosecutes the suit in another's right, for he is but as the ordinary's servant; then the ground of the suit being overthrown, viz. his commission, he has no authority to proceed further, & so the execution awarded without warrant.

The same law on a judgment had by an administrator, the second administrator shall not have execution upon it, for he has not privity to the record (*per CUR.*).—*BARNEHURST v. YELVERTON* (1605), Yelv. 83; Brownl. 91; Noy, 15; 80 E. R. 57.

——.]—*See, generally*, Part II., Sect. 9, sub-sect. 2, ante.

7551. Effect of death of representative—Execution not abated.—If an exor. brings trespass for goods taken out of his own possession, which were testator's, & recovers & makes his exor., & dies, although the record is general, so that *non constat* whether the goods, for which the trespass was brought, were testator's or not, yet if exor. sues execution, he shall have them to the use of first testator. For so were they adjudged in testator to be assets, viz. the damages for the taking of the goods. But if an administrator brings such general action for goods which *re vera* were intestate's & recovers & dies, his administrator shall have execution of the judgment, *qui non constat* by the record to whom the goods belonged. But when he recovers, then the administrator of first intestate shall compel him in a ct. of equity to pay him as much money to the use of first intestate, as he had recovered before (*POPHAM, J.*).—*YATES v. GOUGH* (1603), Yelv. 33; 80 E. R. 24; *sub nom.* YATE v. GOTH, Moore, K. B. 680.

Annotation:—*Mentd*. Wynne v. Wynne (1743), 1 Wils. 42.

7552. ———.]—(1) Pltf.'s death did not abate the execution, & the sheriff, notwithstanding that, might proceed in it, because the sheriff has nothing

PART VII. SECT. 1, SUB-SECT. 9.—B.

7545 i. Whether security ordered—Representative resident outside jurisdiction.—An extrix. resident abroad, applying for payment out of ct. of moneys to the credit of testator, was ordered to give security for costs of an alleged assignee of the fund, who opposed the application.—*Re PARKER, PARKER v. PARKER* (1895), 16 P. R. 392.—CAN.

7545 ii. ———.]—*O'BRIEN v.* (1842), 4 I. L. R. 419; 2 Leg. Rep. 294.—IR.

7545 iii. ———.]—*WHEELAN v. IRWIN*, [1909] 1 I. R. 294.—IR.

r. ——— **Personal action for same purpose discontinued—Costs unpaid.**—As administrator of his late wife, brought this action to recover compensation for her death, alleged to have been caused by reason of the negligence of the defts. Previous to his obtaining

letters of administration to his wife's estate he had brought an action in his own name against defts. for the same purpose, but discontinued it. The costs of the first action being unpaid, the defts. applied for security for costs:—*Held*: the cause of action in the two cases was not the same, & an order staying proceedings till pltf. should give security for costs was set aside.—*LUCAS v. CRICKSHANK* (1889), 13 P. R. 31.—CAN.

s. ——— **In contested claims in Probate Court.**—The rule of the Supreme Ct. in relation to security for costs is not applicable to contested claims in the Probate Ct.—*Re PRIEST'S ESTATE* (1908), 43 N. S. R. 230; 6 E. L. R. 342.—CAN.

t. ——— **Insolvent suing in representative capacity.**—While as a general rule security for costs will be ordered in case proceedings are taken by an

insolvent person for the benefit of other persons, this rule does not apply in the case of an exor.—*KRUZ v. CROW'S NEST PASS COAL CO., LTD.* (1909), 14 B. C. R. 385.—CAN.

a. ———.]—When pltf. brings an action as exor., he will not be required, even though he be insolvent, to give security for deft.'s costs if the estate of which he is exor. is solvent.—*HENRY v. BIGGER* (1910), 44 I. L. T. 47.—IR.

PART VII. SECT. 1, SUB-SECT. 10.

b. Judgment against administratrix in own right—Sale by sheriff of property held by her as administratrix.—Administratrix was nonsuited, & judgment was marked against her in her own right; the sheriff seized & sold two houses which she held as administratrix:—*Held*: the sale was void, as judgment marked against the

Sect. 1.—Actions by representative: Sub-sect. 10.
Sect. 2: Sub-sects. 1, 2 & 3.]

more to do with pltf., for the writ commands him to levy & bring the money into ct., which pltf.'s death does no way hinder. Besides, an execution is an entire thing, & cannot be superseded after it is begun (*per CUR.*).

(2) Since, by 17 Car. 2, c. 8, an administrator *de bonis non* may commence an execution on a judgment obtained by an exor. or administrator, it is but reasonable, & within the equity of that Act, that an administrator *de bonis non* should be permitted to perfect an execution thus begun; for the right now comes to him (*per CUR.*).—CLERK *v. WITHERS* (1704), 1 Salk, 322; Holt, K. B. 303, 646; 3 Ld. Raym. 1072; 11 Mod. Rep. 34; 6 Mod. Rep. 290; 91 E. R. 286.

Annotations:—As to (1) *Consd.* White *v. Hayward* (1752), 2 Ves. Sen. 461. *Refd.* Wharam *v. Broughton* (1748), 1 Ves. Sen. 180; Cooper *v. Chitty & Blackiston* (1756), 1 Burr. 20; Giles *v. Grover* (1832), 9 Bing. 128; Stimson *v. Farnham* (1871), L. R. 7 Q. B. 175. *Generally, Mentd.* Wilcox & Litchey *v. Pokinhorn* (1728), 1 Barn. K. B. 81; Meriton *v. Stevens* (1741), Willes, 271; Clutterbuck *v. Jones* (1812), 15 East, 78; Doe d. Stevens *v. Donston* (1818), 1 B. & Ald. 230; R. *v. Giles* (1820), 8 Price, 293; Morland *v. Pellatt* (1828), 8 B. & C. 722; Drewe *v. Lainsan* (1840), 11 Ad. & El. 529; Holmes *v. Newlands* (1843), 5 Q. B. 367; Levy *v. Hale* (1859), 29 L. J. C. P. 127; *Re Davies, Ex p. Williams* (1872), 7 Ch. App. 314.

7553. — After judgment obtained—Administrator *de bonis non* may perfect execution.]—CLERK *v. WITHERS*, No. 7552, *ante*.

7554. Garnishee proceedings—Necessity for representative to become party to suit.]—An exor. of a judgment creditor is not entitled, under C. L. P. Act, 1854 (c. 125), s. 61, to attach a debt due to judgment debtor before he has made himself a party to the judgment.—BAYNARD *v. SIMMONS* (1855), 5 E. & B. 59; 3 C. L. R. 1350, n.; 24 L. J. Q. B. 253; 25 L. T. O. S. 115; 1 Jur. N. S. 657; 3 W. R. 422; 119 E. R. 404.

—.]—See EXECUTION, Vol. XXI., pp. 617 *et seq.*

7555. Equitable execution—Representative not entitled to.]—The appointment of a receiver of the property or interest of a judgment debtor is not "execution" within Ord. 42, rr. 8, 23. Exors. of a deceased judgment creditor are not entitled to obtain an ord. for a receiver of the judgment debtor's property or an injunction against his dealing with it.—NORBURN *v. NORBURN*, [1894] 1 Q. B. 448; 63 L. J. Q. B. 341; 70 L. T. 411; 42 W. R. 127; 38 Sol. Jo. 11; 10 R. 10, D. C.

Annotations:—*Mentd.* *Re Clements, Ex p. Clements*, [1901] 1 K. B. 260; Thompson *v. Gill*, [1903] 1 K. B. 760.

—.]—See EXECUTION, Vol. XXI., pp. 664 *et seq.*

Right to issue bankruptcy notice.]—See BANKRUPTCY, Vol. IV., pp. 87, 88, Nos. 791, 792, 798.

SECT. 2.—ACTIONS AGAINST REPRESENTATIVE.

SUB-SECT. 1.—CONTINUANCE OF ACTION AGAINST REPRESENTATIVE.

Abatement of actions generally.]—See PRACTICE; R. S. C., Ord. 17.

administratrix in her own right could not affect property which she held as administratrix.—WILLIAMS *v. HEPENSTALL* (1874), 22 W. R. 412.—IR.

c. For costs of unsuccessful action—Not ordered to be paid by representative personally.]—Although *prima facie* a trustee or other person suing in a representative capacity should be held

personally liable for the costs of an unsuccessful action, yet if the judgment gives costs against him without ordering that they be paid *de bonis propriis*, a writ of execution should be against him in his representative capacity.—STANDARD BANK *v. JACOBSON'S TRUSTEE* (1899), 16 S. C. 352; 9 C. T. R. 365.—S. AF.

7556. Death of respondent pending appeal—From decision of Income Tax Commissioners—Addition of personal representative.]—Resp. successfully appealed to the General Comrs. against his assessment to income tax, whereupon applt., the surveyor, expressed his dissatisfaction, & by notice in writing under Taxes Management Act, 1880 (c. 19), s. 59, required the Comrs. to state & sign a case for the opinion of the High Ct. Subsequently & before the case was signed & filed, resp. died. A copy of the case when signed was served on resp.'s exor. On motion by applt. that the proceedings in the appeal be continued between him & the exor. & that the latter be added as resp.:—*Held*: (1) the proceedings in appeal were begun in the lifetime of resp., inasmuch as the notice in writing given by applt. to the Comrs. requiring them to state & sign a case was the commencement of the proceedings; (2) the proceedings did not abate on the death of resp., & the ct. was entitled, in the absence of apt procedure being provided by statute on the subject, to mould a convenient form of procedure so that the appeal could be heard, & it would do this by ordering that resp.'s exor. be added as resp.—SMITH *v. WILLIAMS*, [1922] 1 K. B. 158; 91 L. J. K. B. 156; 126 L. T. 410; 38 T. L. R. 116; 8 Tax Cas. 321.

See, also, COUNTY COURTS, Vol. XIII., p. 539, Nos. 925–927.

Liability of representative for contracts of deceased.]—See Part VI., Sect. 2, *ante*.

Liability of representative for torts of deceased.]—See Part VI., Sect. 3, *ante*.

Statute of Limitations as defence to action against representative.]—See Sect. 2, sub-sect. 5, B. (g), ii.

SUB-SECT. 2.—HOW REPRESENTATIVE MAY DEFEND.

7557. Whether in form *pauperis*.]—An application by a party sued as exor., for leave to defend the suit, *in form pauperis*, refused, though, in addition to the usual affidavit, he swore that he had been prevented by an injunction from receiving any assets. *Semble*: the result would have been the same if he had sworn that there were no assets.—OLDFIELD *v. COBBETT* (1845), 1 Ph. 613; 15 L. J. Ch. 116; 10 Jur. 2; 41 E. R. 765, L. C.

7558. —.]—An exor., having been made a deft. in a suit, was in contempt for want of putting in his answer & an attachment having issued against him, he was committed. Being brought up on *habeas*, he stated his inability to put in his answer by reason of poverty; whereupon the usual order was made to inquire as to the truth of the allegation, & to assign a solr. & counsel to prepare his answer, which was accordingly prepared & put in. It became known however, to the solr. of the Suitors' Fund that he was a deft. in his character of exor.; & on a motion being made to discharge him out of custody, & that the costs be paid out of the Suitors' Fund, the solr. of the fund opposed

PART VII. SECT. 2, SUB-SECT. 1.

d. Executor *de son tort*.]—An action commenced against intestate may be revived & continued against his exors. *de son tort*.—KEENA *v. O'HARA* (1860), 16 C. P. 435.—CAN.

e. —.]—ANON. (1840), 1 Leg. Rep. 112.—IR.

the application:—*Held*: the motion ought to be granted. Exception to the rule preventing an exor. from suing in *forma pauperis*.—*BAYLY v. BAYLY* (1848), 11 Beav. 256; 11 L. T. O. S. 409; 50 E. R. 814.

Compare Nos. 7435–7439, *ante*.

SUB-SECT. 3.—PARTIES.

7559. General rule—All representatives must be joined.]—All exors. must sue & be sued.—*OFFLEY v. JENNEY & BAKER* (1847), 3 Rep. Ch. 92; Nels. 44; 21 E. R. 738.

7560. Whether action maintainable against one executor only—One not appearing.]—Detinue is brought against two exors. for goods left in the possession of testator; one of them appears upon the distress, the other makes default. He who appeared shall answer without the other, by the equity of 9 Edw. 3, c. 3, which makes this provision in debt against exors. *Ubi eadem ratio est, ibi eadem lex*. Exors. by representation are the same person with testator.—*ANON.* (1412), Jenk. 78; 145 E. R. 55.

7561. ———.]—Executor shall not answer without his co-partners. If a subpoena be brought against three exors., & one of them appear, he shall not be compelled to answer, till they be driven to appear also, for they are but one.—*ANON.* (1468), Cary, 15; 21 E. R. 8, L. C.

7562. ———.]—If a *capias ad respondendum* is sued against several as exors., & the sheriff returns *non est inventus* to all but one, & as to him *cepi*, pltf. may proceed against him alone, & if he is entitled to a judgment, he may enter it against them all.—*ROUS v. ETHERINGTON* (1703), 2 Ld. Raym. 870; 1 Salk. 312; Holt, K. B. 313; 92 E. R. 81.

Annotation:—*Reid. Vaughan v. Guy* (1729), 1 Barn. K. B. 271.

7563. ——— Claim for accounts personally.]—Two exors., & a bill by a residuary legatee against one only, to have an account of his own receipts & payments; yet at the hearing the objection for want of the other disallowed, unless in the process of the cause it should appear necessary. So where two factors are, a bill has been allowed against one, the other being beyond sea.—*COWSLAD v. CELY* (1698), Prec. Ch. 83; 1 Eq. Cas. Abr. 73; 24 E. R. 40, L. C.

7564. ——— One out of jurisdiction.]—Where there are two exors., & one is beyond sea & the other in England, & a bill is brought against him that is in England, he having assets in his hands to answer the demand, the other exor. need not be made a party in such a case of necessity (*per CUR.*).—*JEFFREY v. NAPPER* (1708), 2 Eq. Cas. Abr. 464; 22 E. R. 395.

PART VII. SECT. 2, SUB-SECT. 3.

7559 1. General rule—All representatives must be joined.]—Co-exors. must be joined in any action against the estate they represent.—*ERASMUS v. MULLER* (1909), E. D. C. 293.—S. AF.

1. Whether representative must be party—In foreclosure suit.]—Where A., the devisee, after testator's death, the real estate to B., a creditor, claimed payment, praying in

default a foreclosure or sale:—*Held*: the personal representative was a necessary party.—*KELLY v. ARDELL* (1865), 11 Gr. 579.—CAN.

the administrator of a deceased mtgor. should not be made a party to a foreclosure suit. Where an administrator is improperly made a party to such a suit he should disclaim in order to entitle him to have the bill dismissed

7565. ——— One not administering.]—Deft. sued as exor., cannot plead in abatement that a co-exor. ought to have been sued with him, without showing that the co-exor. administered, etc. Where deft., in pleading such a plea, said that "he & the other exor. did administer divers goods, etc., where A.'s, testator's," the ct. rejected "where" as surplusage, & held the plea good.—*ALEXANDER v. MAWMAN* (1737), Willes, 40; 125 E. R. 1045.

Annotations:—*Reid. Ryalls v. Bramall* (1848), 1 Exch. 734. *Mentd. Wilkes v. Williams* (1800), 8 Term Rep. 631.

7566. Whether representative must be party—After release.]—Although an exor. does actually release yet he must be made a party to the suit.—*SMITHBY v. HINTON* (1681), 1 Vern. 31; 23 E. R. 286.

7567. ——— Action against husband of deceased administratrix.]—A man marries an administratrix. Pltf. obtains a decree against him & his wife for £1,500. She dies. Whether pltf. can proceed against the husband, without reviving against the administrator of the wife.—*JACKSON v. RAWLINS* (1690), 2 Vern. 194; 23 E. R. 727.

7568. ——— Deceased insolvent & without assets.]—An allegation in a bill that a person who would have been a necessary party, was dead, insolvent, & without leaving any assets for payment of his debts, is sufficient to dispense with his representative being made a party.—*SEDDON v. CONNELL, SEDDON v. MOULT, SEDDON v. EVANS* (1840), 10 Sim. 58; 9 L. J. Ch. 341; 10 L. J. Ch. 68; 59 E. R. 534.

Annotation:—*Mentd. Harrison v. Brown* (1852), 5 De G. & Sm. 723.

7569. ——— Action against administrator de son tort.]—To a suit by a creditor of an intestate, against an administrator *de son tort*, for an account & payment, it is necessary that a legal personal representative duly constituted should be a party.—*CREASOR v. ROBINSON* (1851), 14 Beav. 589; 21 L. J. Ch. 64; 18 L. T. O. S. 82; 15 Jur. 1049; 51 E. R. 411.

7570. Creditors & legatees not necessary parties.]—Parties: not necessary to make any other than the exor. parties relative to the personal estate; since he sustains the person of testator to defend the estate for himself, creditors & legatees.—*PEACOCK v. MONK* (1748), 1 Ves. Sen. 127; 27 E. R. 934, L. C.

Annotations:—*Mentd. Hulme v. Tenant* (1779), 2 Dick. 560; *Gale v. Williamson* (1841), 8 M. & W. 405; *Clifford v. Turrell* (1845), 14 L. J. Ch. 390; *Kelson v. Kelson* (1853), 1 W. R. 143; *Atchison v. Le Mann* (1854), 23 L. T. O. S. 302; *Leischild's Case* (1865), L. R. 1 Eq. 231; *Re Bowen, James v. James* (1892), 8 T. L. R. 524.

7571. Where representative an infant—Executor durante minoritate.]—Debt lies against an exor. *durante minore etate*.—*PEMBERTON v. CONY* (1589), Cro. Eliz. 164; 78 E. R. 422.

7572. ——— Administrator durante minoritate.]—Exor. ought to be named though administration is

with costs.—*BARNABY v. MUNROE* (1895), 1 N. B. Eq. Rep. 94.—CAN.

h. ——— Money paid for fee simple to executors of tenant for life—Action by remainderman for money had & received.]—Where a ry. co. paid to the exors. of a tenant for life a sum payable for the fee simple of lands taken by the co., & the remainderman filed a bill against the co. & the representatives of the tenant for life, seeking

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committed during minority.—**SMITH v. SMITH** (1609), Yelv. 130; 1 Brownl. 101; 80 E. R. 88.

Annotations:—**Consd.** Foxwith v. Tremaine (1670), 1 Mod. Rep. 296. **Refd.** Wilkins v. Brown (1745), 2 Stra. 1220.

7573. — **Appearance by guardian.**—An infant exor. must appear by guardian, & not by attorney.—**COTTON v. WESTCOT** (1617), Cro. Jac. 441; 79 E. R. 377.

Annotation:—**Refd.** Foxwist v. Tremaine (1670), 2 Saund. 212.

7574. — **When an infant is made an exor., & an action is brought against him in that right, how far he must appear by guardian.**—**FRESCOBALDI v. KINASTON** (1727), 1 Barn. K. B. 4, 23; 2 Stra. 783; 94 E. R. 3, 16; *sub nom.* **KENISTON v. FRISKDALDI**, Fitz-G. 1; *sub nom.* **KINERSTON v. FRESCOBALDY**, 11 Mod. Rep. 411.

7575. — **If deft. be sued as administratrix during her minority, & appear by attorney, such appearance is irregular, as she should have appeared by guardian.**—**HINDMARSH v. CHANDLER** (1817), 7 Taunt. 488; 1 Moore, C. P. 250; 129 E. R. 196.

Compare Nos. 7450, 7451, *ante*, & see Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 165 (2).

7576. Representative sued with partner of deceased—Whether collusion need be proved.—Residuary legatees may sustain a bill for an account against the exor. & the surviving partner of testator, though collusion between the exor. & the surviving partner is neither charged nor proved.—**BOWSHER v. WATKINS** (1830), 1 Russ. & M. 277; 39 E. R. 107.

Annotations:—**Expld.** Cropper v. Knapman (1836), 2 Y. & C. Ex. 338. **Expld. & Distd.** Davies v. Davies (1837), 2 Keen, 534. **Consd.** Yeatman v. Yeatman (1877), 7 Ch. D. 210. **Refd.** Holland v. Prior (1834), Coop. temp. Brough. 426; Bolton v. Powell, Howard v. Earle (1851), 16 Jur. 24; Brett v. Beckwith (1856), 26 L. J. Ch. 130; Ambler v. Lindsay (1876), 35 L. T. 93; *Re* Lovett, Ambler v. Lindsay (1876), 3 Ch. D. 198.

7577. — **The case of Bowscher v. Watkins, No. 7576, ante, does not establish the general proposition that in every case a bill may be filed against any exor. & the surviving partner of testator, without charging & proving fraud or collusion between them.**—**DAVIES v. DAVIES** (1837), 2 Keen, 534; 1 Jur. 446; 48 E. R. 733.

Annotation:—**Refd.** Yeatman v. Yeatman (1877), 7 Ch. D. 210.

7578. — **Legatees can sustain a bill against the exors. & the surviving partners of their testator, although collusion between the exors. & surviving partners is not alleged or proved.**—**TRAVIS v. MILNE, MILNE v. MILNE** (1851), 9 Hare, 141; 20 L. J. Ch. 665; 68 E. R. 449.

Annotations:—**Consd.** Stainton v. Carron Co. (1853), 18 Beav. 146; Yeatman v. Yeatman (1877), 7 Ch. D. 210. **Refd.** Meldrum v. Scorer (1887), 56 L. T. 471. **Refd.** Brett v. Beckwith (1856), 26 L. J. Ch. 130; Benningfield v. Baxter (1886), 12 App. Cas. 167; Alcoy & Gandia Ry. & Harbour Co. v. Greenhill (1897), 76 L. T. 542. **Mentd.** Flockton v. Bunning (1868), 8 Ch. App. 323, n.

7579. Whether debtor to estate may be joined.—

to obtain payment from the co. of the proportion of purchase money payable to himself:—*Held*: the exors. were properly made parties with a view to the co. being compelled to make good the money in the first instance.—**v. GRAND TRUNK RY. CO.**

(1881), 28 Gr. 431.—**CAN.**

k. — **After distribution of assets.**—Even after an exor. has filed his account & distributed the assets of the estate, he should still be a party in a suit which relates to & affects the estate.—**FITZGERALD v. GREEN**

Though generally a bill by those interested in the personal estate as creditors or next of kin will not lie against a debtor to the estate it will under circumstances as in this case upon collusion with the representative. Deft. was also liable in the character of trustee & agent.—**DORAN v. SIMPSON** (1799), 4 Ves. 651; 31 E. R. 336, L. C.

Annotation:—**Refd.** Pearse v. Hewitt (1835), 7 Sim. 471.

7580. — **It is a general rule that a person having a claim on the assets of a testator cannot in suing the exor. make a debtor to the estate a party to the suit, but the rule admits of exceptions.**—**LANCASTER v. EVORS** (1841), 4 Beav. 158; 5 Jur. 525; 49 E. R. 299.

Annotations:—**Expld.** Yeatman v. Yeatman (1877), 7 Ch. D. 210. **Refd.** Stainton v. Carron Co. (1853), 18 Beav. 146.

7581. — **Mere refusal by a legal personal representative to sue for the recovery of outstanding assets will not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the legal personal representative & the alleged debtor to the estate.**—**YEATMAN v. YEATMAN** (1877), 7 Ch. D. 210; 47 L. J. Ch. 6; 37 L. T. 374.

Annotations:—**Consd.** Meldrum v. Scorer (1887), 56 L. T. 471. **Mentd.** Craven v. Craven (1908), 52 Sol. Jo. 498.

7582. Non-proving executor—Acting as executor.—A person named as an exor., but who has neither proved nor renounced probate, may properly be made a party to an administration suit, where he has acted as an exor., or has given himself out as an exor., & it is not necessary to prove that he has actually received money. Three persons were named exors., & two of them proved the will. The third, on being applied to for information who were the exors., replied in a letter naming the two others & himself. He was made deft., & put in a separate answer; denying the exorship, but taking upon himself, or joining in, the substantial defence of the suit made by the other defts., & alleging matters in opposition to pltf.'s claim:—*Held*: he was an exor. & properly a party. The usual administration decree was made against him, as against the others who had taken probate, & the substantial defence failing, the costs were ordered to be paid by all of defts., including the exor. who had so acted.—**VICKERS v. BELL** (1864), 4 De G. J. & Sm. 274; 3 New Rep. 624; 10 L. T. 77; 10 Jur. N. S. 376; 12 W. R. 589; 46 E. R. 924, L. JJ.

Annotations:—**Folld.** *Re* Lovett, Ambler v. Lindsay (1876), 3 Ch. D. 198. **Refd.** Rayner v. Kochler (1872), L. R. 14 Eq. 262; Coote v. Whittington (1873), L. R. 16 Eq. 534.

7583. Executor proving after judgment—Added as defendant.—Where one of four exors., after a decree has been made in a suit instituted by one of his co-exors. against the two others, returned from abroad & proved the will:—*Held*: he could be made a party to the suit by the common supplemental order.—**HALDANE v. ECKFORD** (1866), 14 L. T. 14; 14 W. R. 306, 328.

Annotation:—**Folld.** Guthrie v. Walrond (1874), 30 L. T. 377.

7584. Right of creditor to defend action in name of representative.—A creditor's action had been

(1910), E. D. C. 299.—**S. AF.**

1. Executor named in earlier will—Joinder with executors.—In suit to have wills condemned.—Where pltf., in an action to have a last will condemned, in which the exors. of the last will were defts., learned from

instituted for the administration of A.'s estate, A.'s widow, his extrix., being sole deft. There being reason to believe that the extrix. would not defend A.'s estate for the benefit of his creditors against the claim of A.'s son, pltf. in the creditor's action obtained an order from the chief clerk of the Vice-Chancellor, giving him leave to apply for liberty to intervene in the action to contest the forfeiture, & the chief clerk of the Master of the Rolls, on production of such order, made an order giving him leave. The first order was held to be totally irregular. The duty of the extrix. conflicting with her interest, pltf. in the creditor's action should have appeared in the name of the extrix. under an order obtained in the creditor's action. The only way in which such order could have been regular would have been by proceeding to add the intervening party as deft. to the action.—*SAMUEL v. SAMUEL* (1879), 12 Ch. D. 152; 47 L. J. Ch. 716; 41 L. T. 402; 26 W. R. 750.

Annotations:—*Mentd. Hurst v. Hurst* (1882), 21 Ch. D. 278; *Metcalfe v. Metcalfe* (1889), 43 Ch. D. 633; *Re Loftus-Otway, Otway v. Otway*, [1895] 2 Ch. 235; *Re Evans, Public Trustee v. Evans*, [1920] 2 Ch. 301.

Creditors' actions.—See Part VIII., Sect. 6, *post*.

SUB-SECT. 4. —JOINDER OF CLAIMS.

See, now, R. S. C., Ord. 18, r. 5.

7585. Claim against representative—With claim against representative personally.—H. brought an *assumpsit* against P., administratrix of her husband, & declared that her husband had bought of him gold & silver & pearl, & was indebted unto him for them £200, & she, after his death, had likewise bought of him pearl, for £27, & that upon account she was found indebted both those sums unto him, & promised payment. Judgment for pltf., & assigned for error, that deft. was to be charged by two several actions, because she was charged in two manners, one in her own right, & the other as administratrix, & therefore the judgment was reversed.—*HERRENDEN v. PALMER* (1615), Hob. 89; 80 E. R. 238.

Annotations:—*Reid. Nutton v. Crow* (1713), 10 Mod. Rep. 170; *Corner v. Shew* (1838), 4 M. & W. 163.

7586. ———.]—A count which states that deft., as exor. was indebted to pltf. for interest, for the forbearance at interest by pltf. to deft., as such exor. as aforesaid, at his request of moneys owing from deft. as such exor. as aforesaid, to pltf., states a liability arising on a personal contract by the exor., & not one in his representative character; & such a count, therefore cannot be joined with counts which seek to render the deft. liable in his representative character.—*BIGNELL v. HARPUR* (1850), 4 Exch. 773; 19 L. J. Ex. 168; 154 E. R. 1428.

7587. ———.]—A count for money had & received to the use of pltf. by deft. as exor. after the death of testator, charges deft. personally & cannot therefore be joined with counts charging him as exor. only.—*BROWN v. MACLEAN* (1849),

12 L. T. O. S. 423; *subsequent proceedings*, 14 L. T. O. S. 199.

7588. ——— When alleged to arise with reference to estate.]—Pltf. issued a writ in an action, against deft. for goods sold & delivered, but having ascertained that some of the goods had been supplied to her deceased husband they had obtained leave to amend their writ, so that it might appear by it that deft. was sued as extrix. for part of the debt, & personally for a sum as representing the balance due to them for such goods. This leave to amend the writ was given on the understanding that it should be done in accordance with the terms of Ord. 18, r. 5, but the order did not specifically require, that pltf. should allege that their claim made against deft. personally had arisen with reference to the estate in respect of which she was sued by them as extrix.:—*Held*: the order was right & the right to join claims against an exor. as such with claims against him personally was given, provided that such mentioned claims were "alleged," either in the writ, or in the statement of claim, or in an affidavit in the case, to have arisen with reference to the estate in respect of which he was sued.—*DAVIS & CO. v. SAINTSBURY* (1885), 1 T. L. R. 538, D. C.

7589. ——— With claim against third party.]—That an exor. cannot be jointly sued with another, because he is to be charged *de bonis testatoris*, & the other *de bonis propriis*.—*KEMP v. ANDREWS* (1691), Carth. 170; 90 E. R. 704.

7590. Claim on promise by representative—With claim on promise by deceased.—A count on a promise made by deft., as administrator, to pay money received by him, as such, to pltf.'s use, cannot be joined with other counts on promises made by the intestate.—*JENNINGS v. NEWMAN* (1791), 4 Term Rep. 347; 100 E. R. 1056.

7591. ——— For rent.]—A count in against husband & wife, who was administratrix with the will annexed, upon promises by testator to pay rent, cannot be joined with counts upon promises by the husband & wife, as administratrix, for use & occupation by them after the death of testator.—*WIGLEY v. ASHTON* (1819), 3 B. & Ald. 101; 106 E. R. 600.

7592. Claim on account stated with representative—With claim on promise by deceased.—A count upon a promise by deft. as exor. to pay money in which he was found in arrear upon an account stated between him & pltf. of money due from testator, may be joined with counts upon promises by testator in his lifetime.—*ELLIS v. BOWEN* (1801), For. 98; 145 E. R. 1125.

Annotation:—*Apld. Powell v. Graham* (1817), 1 Moore, C. P. 305.

7593. ———.]—(1) A promise made upon good consideration by testator, that his exor. shall pay, is a sufficient consideration for an action in *assumpsit* against the exor.; & in such action it is neither necessary to aver assets, nor a promise by the exor.

(2) On a count averring an account stated by deft. of moneys due from him as exor., the judgment

defts.' affidavit that three earlier wills of deceased existed, the ct. gave pltf. liberty to amend the writ & statement of claim by adding as a deft. an exor. of two of the earlier wills, who lived in Ireland, & also by seeking to have the earlier wills condemned.—*KIERNAN v. KIERNAN* (1908), 42 L. T. 49.—IR.

PART VII. SECT. 2, SUB-SECT. 4.

75851. Claim against representative—With claim against representative personally.—The prohibition against joining in one action a demand against deft. as exor. with a demand against

him on his own private liability, does not apply where the two demands are included in one cause of action, & the cause of action would be incomplete if brought against deft. in one capacity only.—*CHALMERS v. CLARKE*, 2 J. R. N. S. 246.—N.Z.

Sect. 2.—Actions against representative: Sub-sects. 4 & 5, A. & B. (a), (b) & (c) i.]

shall be *de bonis testatoris*. It may be therefore joined with counts on promises of testator.—**POWELL v. GRAHAM** (1817), 7 Taunt. 580; 1 Moore, C. P. 305; 129 E. R. 232.

Annotations:—As to (1) Reqd. *Dowse v. Cox* (1825), 3 Bing. 20. **As to (2) Consd.** *Ashby v. Ashby* (1827), 7 B. & C. 444. **Reqd.** *Farhall v. Farhall* (1871), 7 Ch. App. 123.

7594. — With claim for money had & received by representative—To the use of plaintiff.]—A count in *assumpsit* for money had & received by deft., as exor., to the use of pltf., cannot be joined with a count for money due to pltf. from deft., as exor., upon an account stated with him of money due from him as exor. *Semble*: a count for money paid by pltf. to the use of deft., as exor., may be joined with such a count on an account stated.—ASHBY v. ASHBY** (1827), 7 B. & C. 444; 1 Man. & Ry. K. B. 180; 6 L. J. O. S. K. B. 41; 108 E. R. 789.**

Annotations:—Folld. *Corner v. Showe* (1838), 6 Dowl. 584; *Brown v. Maclean* (1849), 12 L. T. O. S. 423. **Consd.** *Batard v. Hawes* (1853), 2 E. & B. 287. **Reqd.** *Waite v. Gale* (1845), 2 Dow. & L. 925; *Bignell v. Harpur* (1850), 4 Exch. 773; *Haynes v. Forshaw* (1853), 11 Hare, 93; *Rees v. Watts* (1855), 11 Exch. 410; *Mardall v. Thelluason* (1856), 6 E. & B. 976; *Farhall v. Farhall* (1871), 7 Ch. App. 123. **Mentd.** *Breckon v. Smith* (1834), 1 Ad. & El. 488; *Padwick v. Scott, Re Scott's Estate*, *Scott v. Padwick* (1876), 2 Ch. D. 736.

7595. — — To use of representative.]—ASHBY v. ASHBY, No. 7591, ante.

7596. — With claim for work done—For representative.]—Counts for goods sold to & work & labour done for deft., as exor., cannot be joined with a count for money found to be due on an account stated with deft., as exor.—CORNER v. SHEW** (1838), 3 M. & W. 350; 6 Dowl. 584; 1 Horn & H. 65; 7 L. J. Ex. 105; 150 E. R. 1179; *subsequent proceedings*, 4 M. & W. 163.**

Annotations:—Folld. *Kitchenman v. Skeel* (1848), 3 Exch. 49. **Reqd.** *Brown v. Maclean* (1849), 12 L. T. O. S. 423; *Farhall v. Farhall* (1871), 7 Ch. App. 123.

7597. — — For testator.]—Where a count for work done & money paid for a testator, was joined with a count for work done for, & money due on an account stated with, defts., as exors., & the jury found for pltf., with general damages, the ct. arrested the judgment. Such objection might have been cured by a verdict for the deft. on, or a *nolle prosequi* entered as to, the second count.—KITCHENMAN v. SKEEL** (1848), 3 Exch. 49; 18 L. J. Ex. 23; 12 L. T. O. S. 152; 154 E. R. 751.**

7598. Claim for breach of covenant by testator—With claim for breach by assignee—Since testator's death.]—To a count in covenant, charging defts. as exors. for breaches of covenant by their testator as lessee, who had covenanted for himself, his exors. & assigns, may be joined another count, charging them that after testator's death, & their proving the will, & during the term, the demised premises came by assignment to one D. against whom breaches were alleged; & concluding that so neither testator, nor defts. after his death, nor D. since the assignment to him, had kept the covenant, but had broken same.

Plene administraverunt may be pleaded to both counts.—**WILSON v. WIGG** (1808), 10 East, 318; 103 E. R. 794.

Annotation:—Reqd. *Collins v. Crouch* (1849), 18 L. J. Q. B. 209.

SUB-SECT. 5.—PLEADING.

A. Claims.

7599. What need be pleaded—That assets in hands of executor.]—An *assumpsit* against an exor. need not aver that he has assets.—COTTINGTON v. HULETT** (1587), Cro. Eliz. 59; 78 E. R. 320.**

Annotation:—Folld. *Pinchon's Case* (1611), 9 Co. Rep. 86 b.

7600. — —.]—In *assumpsit* against exors. or the payment of a debt, it is not necessary to aver that they had assets for the payment of legacies: nor is it necessary to aver that they had assets for payment of debts.—PINCHON'S CASE** (1611), 9 Co. Rep. 86 b; 77 E. R. 859; *sub nom.* **PUNCHEON v. LEGATE**, 2 Brownl. 137; *sub nom.* **LEGATE v. PINCHION**, Cro. Jac. 294; *sub nom.* **ANON.**, Jenk. 144, 290.**

Annotations:—Mentd. *Marshalsea Case* (1612), 10 Co. Rep. 68 b; *Papworth v. Johnson* (1613), 2 Bulst. 91; *Beresford v. Gooderidge* (1616), 3 Bulst. 236; *Manby v. Scot* (1662), 1 Keb. 361; *London City v. Wood* (1701), 12 Mod. Rep. 669; *Mood v. London (Mayor)* (1701), 2 Salk. 683; *Farr v. Newman* (1792), 4 Term Rep. 621; *Raymond v. Fitch* (1835), 2 Cr. M. & R. 588; *Phillips v. Homfray* (1883), 24 Ch. D. 439; *Batthyany v. Walford* (1887), 56 L. J. Ch. 881; *Finlay v. Chirney* (1888), 20 Q. B. D. 494.

7601. — —.]—Qu.: whether it be necessary in an *assumpsit* against an administrator, upon his own promise, to allege that he has assets.—EVANS v. WARREN** (1620), Cro. Jac. 604; 79 E. R. 516.**

7602. — —.]—An exor. may be sued on a promise in consideration of forbearance, without averring assets, & although he have none.—PORTER v. BILLE** (1673), Freem. K. B. 125; 89 E. R. 91.**

7603. — —.]—POWELL v. GRAHAM**, No. 7593, ante.**

7604. — Grant of letters of administration to defendant.]—PETTO v. RUDDOCK** (1664), 1 Sid. 228; 82 E. R. 1074.**

Annotations:—Reqd. *Gidley v. Williams* (1700), 1 Ld. Raym. 634; *Holyday v. Fletcher* (1727), 1 Barn. K. B. 29.

7605. — —.]—If an action be brought against an administrator pltf. need not aver in his declaration that administration was committed to deft. (HOLT, C.J.**).—**SPARKS v. CROFTS** (1698), as reported in Comb. 465; 90 E. R. 593.**

7606. — How many executors.]—SWALLOW v. EMBERSON** (1665), 1 Sid. 242; 1 Keb. 865; 1 Lev. 161; 82 E. R. 1082.**

Annotations:—Folld. *Alexander v. Mawman* (1737), Willes, 40; *Rawlison v. Shaw* (1790), 3 Term Rep. 557. **Mentd.** *Ryalls v. Bramall* (1848), 1 Exch. 734.

7607. — Action for debt due from particular fund—That fund in existence.]—In an action against an exor. for a debt due from testator out of a particular fund, it must be averred that the fund was solvent, etc.—ANON.** (1673), 1 Mod. Rep. 163; 86 E. R. 802.**

PART VII. SECT. 2, SUB-SECT. 5.—A.

7599 1. What need be pleaded—That assets in hands of executor.]—Declaration stated that A. bequeathed to pltf. one-fourth of £200, which would be

due from B. after A.'s death; that A. by his will directed that B. should pay £50 per annum for four years to A.'s exor.; that he appointed deft. his exor., & that more than four years

had elapsed since the death of A.:—**Held**: bad for not averring that deft. had received the money from B.—**BROWN v. HARDING** (1855), 3 All. 249.—**CAN.**

B. Defences.**(a) In General.**

See R. S. C., Ord. 19, rr. 13, 15; Ord. 21, r. 5.

7608. Different defences may be pleaded—By executors sued jointly.]—Where an action is brought against several exors., although no one of them can be compelled to act in unison with the rest, & each may plead separate pleas, yet the ct. will take that plea which is best for testator's estate.—*STOTT v. LORD* (1862), 31 L. J. Ch. 391; 5 L. T. 817; 8 Jur. N. S. 249; 10 W. R. 284.

7609. Whether defence must be taken—In favour of general body of creditors.]—There might possibly be a question whether an exor. could properly be made a deft. under Bills of Exchange Act; & although I would give no opinion whether the exor. in the present case might have objected to that proceeding, still, as between themselves & the general creditors of testator, I am of opinion that they were not obliged to take that line of defence (*Knight-Bruce, L.J.*).—*Re SKIGGS, MARRIAGE v. SKIGGS* (1859), 4 De G. & J. 4; 28 L. J. Ch. 433; 33 L. T. O. S. 21; 5 Jur. N. S. 325; 7 W. R. 320; 45 E. R. 2, L. JJ.

Annotation:—Reid. Hewat v. Davenport (1872), 21 W. R. 77.

(b) Ne unques Executor.

7610. What must be traversed—That defendant was executor.]—In *assumpsit* against a person as exor., a plea in abatement, that testator made another person exor., who proved the will, & took upon him the execution thereof, must traverse that deft. was exor.—*SINGLETON v. BAWTREE* (1677), 2 Mod. Rep. 168; 86 E. R. 1004.

7611. Whether available to one executor—As to co-defendant.]—Pltf. declared against A. & B. as exors., alleging that they as exors. were indebted to him for the use & occupation of certain messuages held of him by them as exors. under a demise to testator, & that, in consideration of the premises, they as exors. promised to pay. Plea, by A., that B. never was exor., nor ever administered,

etc.:—*Held*: the declaration was good in substance; & that the plea was bad, as setting up a personal discharge, of which B. only could avail himself.—*ATKINS v. HUMPHREY* (1846), 2 O. B. 654; 3 Dow. & L. 612; 15 L. J. C. P. 120; 6 L. T. O. S. 347; 135 E. R. 1103.

Annotation:—Mentd. Lowe v. Ross (1850), 5 Exch. 553.

(c) Plene administravit.**i. In General.**

7612. Effect of plea—Admission of executorship.]—*WATSON'S CASE* (1594), Moore, K. B. 396; 72 E. R. 651.

7613. ———.]—If an exor. pleads *plene administravit* & thereupon issue is joined, deft., has admitted himself exor. & therefore cannot show that he only acted as agent for the exor., for then he should have pleaded *ne unques exor.* But if he give in evidence a retainer pltf. cannot object that as exor. *de son tort* he cannot retain without showing the will & who are rightful exors.—*ARNOLD v. ARNOLD* (1733), Bull. N. P. 143 a.

7614. ——— Admission of debt not of amount.]—In an action against an exor. upon *plene administravit* pleaded, pltf. must prove his debt, otherwise he shall recover but *ld.* damages, though there be assets, for the plea only admits a debt but not the quantity.—*SHELLY'S CASE* (1693), 1 Salk. 296; 91 E. R. 262.

Annotations:—Reid. Young v. Cawdrey (1819), 8 Taunt. 731. *Mentd. Hancock v. Podmore* (1830), 1 B. & Ad. 260; *Edwards v. Edwards* (1834), 2 Cr. & M. 612.

7615. Of what goods plene administravit should be pleaded—All goods belonging to deceased at time of death.]—*Plene administravit* of the goods which were the intestate's at the time of his death, is good.—*BUCKLAND v. BROOK* (1594), Cro. Eliz. 315; 78 E. R. 565.

Annotation:—Reid. Bank of England v. Morrice (1736), *Leo temp. Hard.* 219.

7616. ——— Action against executor of executor.]—It is not enough for the exor. of an exor., sued for breach of covenant made by the original testator, to plead *plene administravit* of all

PART VII. SECT. 2, SUB-SECT. 5.—**B. (a).**

m. Submission to arbitration by defts.,

n. Action for debt.—Outstanding debt not p same debt extrix. can-

o. ——— No notice of specially debt.]—S. administered the estate of insolvent, at the request of a simple contract creditor, & was served by the latter with a summons for his debt. He took no steps to ascertain whether there were any other debts, but allowed judgment by default, & all the chattel property of intestate was sold under the execution:—*Held*: the administrator could not set up the defence of no notice of the specialty debt.—*HUTCHINSON v. EDMISON* (1865), 11 Gr. 477.—CAN.

p. ——— Bequest by debtor to creditor—Whether defence.]—A bequest by a debtor to his creditor of a legacy to the amount of the debt, payable out of the proceeds of certain property

which remains unsold, is no defence to an action by the creditor for his debt.—*BISHOP v. ROBINSON* (1867), 12 N. B. R. (1 Han.) 68.—CAN.

PART VII. SECT. 2, SUB-SECT. 5.—**B. (b).**

q. Plea by two executors—Verdict against one only.]—On a plea of *ne unques exors.* by two, pltf. may have a verdict against one only.—*ELGIN (EARL) v. SLAWSON* (1853), 10 U. C. R. 289.—CAN.

r. Effect of plea—Personal liability of executor.]—In an action on two promissory notes against the exors. of the maker they pleaded that they never were exors. Pltf. obtained a verdict, & judgment was entered for the debt & costs to be levied of the goods of testator in the hands of defts., his exors., if they had so much thereof, & if not, then to be levied of the goods of defts. A motion to amend the judgment by relieving defts. from personal liability was refused.—*HUYCK v. PROCTOR* (1863), 10 P. R. 25.

PART VII. SECT. 2, SUB-SECT. 5.—**B. (c) i.**

s. Whether replication necessary.]—*Seem*: for the purpose of enabling the creditor of intestate to get execu-

tion against intestate's lands on a judgment against the administrator, it is not indispensable to reply to a plea of *plene administravit*, that intestate died seised of lands.—*MEIN v. SHORT* (1859), 9 C. P. 244; 11 C. P. 430.—CAN.

t. Replication "Lands"—Admission of truth of plea.]—*Held*: the replication of "lands" was a full admission of the truth of the plea of *plene administravit*.—*HOGAN v. MORISSY* (1864), 14 C. P. 441.—CAN.

u. When plea not available Declaration on scire facias—To revive judgment against executor.]—An exor. is estopped from pleading *plene administravit* to a declaration on a *sci. fa.* to revive a judgment against himself.—*WOOD v. LEEMING* (1832), 2 O. S. 508.—CAN.

v. ——— Submission to arbitration.]—An exor. or administrator may by a submission to arbn. preclude himself from pleading *plene administravit*, & thus render himself personally liable.—*REID v. REID* (1866), 16 C. P. 247.—CAN.

w. ——— Real estate unadministered.]—In an action brought by pltf. to recover a balance due on a mtge. & bond given by B., deft. pleaded that he had "fully administered all B.'s personal estate which had ever come

Sect. 2.—Actions against representative: Sub-sect. 5, B. (c) i. & ii., (d) & (e).]

the goods & chattels of the original testator at the time of his death come to the hands of deft., etc., without also pleading *plene administravit* by the first exor.; or at least that he, the second exor., had no assets of the first; so as to show that he had no fund out of which any *deceat* by the first exor. could be made good.—*WELLS v. FYDELL* (1808), 10 East, 315; 103 E. R. 795.

Annotations:—Reid. Meyrick v. Anderson (1850), 14 Q. B. 719; *Wilson v. Hodson* (1872), L. R. 7 Exch. 84.

7617. Whether plea need be specifically pleaded.]

—Deft., as extrix., pleaded no assets, without any averment of *plene administravit*; pltf. replied, assets in hand:—*Held*: upon this issue deft. might show assets exhausted by payment; & the jury having found such to be the fact, the ct. refused to grant a new trial, or to enter judgment *non obstante veredicto*.—*REEVES v. WARD* (1835), 2 Bing. N. C. 235; 1 Hodg. 300; 2 Scott, 390; 5 L. J. C. P. 67; 132 E. R. 93.

ii. When Available as Defence.

7618. To action for payment of rent—Rent incurred since testator's death.]—*Semble*: in an action of covenant for payment of rent, against deft. as exor., *plene administravit* is a good plea, although the rent incurred in his own time, & the declaration states an entry & holding by deft. since testator's death.—*BOULTON v. CANON* (1675), *Freem. K. B.* 336; 3 Keb. 446; 89 E. R. 250.

7619. ———.]—To debt in the *debet & detinet* against an administrator, for rent incurred in his own time, the plea of *plene administravit* is bad.—*SACKILL v. EVANS* (1674), *Freem. K. B.* 171; 89 E. R. 123.

7620. ———.]—Whether *plene administravit* be a good plea in covenant against exors. where the breach is for non-payment of rent incurred in their own time.

There is no doubt but defts. might have been charged as assignees of the term, if no other judgment can be given but only against defts. as exors., then this will be a good plea (*LEE, C.J.*).—*LYDDALL v. DUNLAPP* (1743), 1 Wils. 4; 95 E. R. 400.

Annotation:—Apld. Wilson v. Wigg (1808), 10 East, 313.

7621. ———.]—(1) An exor. cannot plead *plene administravit* to an action for rent or non-repair, on the covenant of testator.

(2) Where deft. is charged as exor. judgment shall be *de bonis testatoris*, though he might have been charged as assignee.—*BUCKLEY v. PIRK* (1710), 10 Mod. Rep. 12; 1 Salk. 316; 88 E. R. 602.

Annotations:—As to (2) Consd. Rubery v. Stevens (1832), 4 B. & Ad. 241; *Wollaston v. Hakewill* (1841), 3 Man. & G. 297. *Reid. Lyddall v. Dunlapp* (1743), 1 Wils. 4; *Re Bowes, Strathmore v. Vane, Norcliffe's Claim* (1887), 57 L. J. Ch. 455.

7622. ———.]—Where a tenant dies, & his

to his hands as administrator *de bonis non*. Besides personal property there was real estate which the administrator might have made available as assets, but which had not been administered, nor had the value of it been realised for the benefit of the estate:—*Held*: the administrator was chargeable.—*NORTHROP v. CUNNINGHAM* (1892), 24 N. S. R. (12 R. & G.) 188.—CAN.

d. Effect of failure to plead.]—If

an administrator deft. has not pleaded *plene administravit* he must be taken as admitting assets to satisfy the judgment.—*LANGSTAFF v. LANGSTAFF*, [1920] 2 W. W. R. 418; 13 Sask. L. R. 265; 55 D. L. R. 420.—CAN.

PART VII. SECT. 2, SUB-SECT. 5.—
B. (c) ii.

e. Grant of new trial—To enable

exor. enters on the premises, & is sued for rent, the latter, in order to escape liability, total or partial, must plead specially that he has entered solely as exor., that there are no assets, & that the value of the land is not equal to the rent paid for it.—*PATTEN v. REID* (1862), 6 L. T. 281; 26 J. P. 421.

7623. To action on arbitration award referred by representative.]—Where deft. bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate & another, & the arbitrators awarded that he as administrator should pay, etc., he cannot plead *plene administravit* to debt on the bond.—*BARRY v. RUSH* (1787), 1 Term Rep. 691; 99 E. R. 1324.

7624. To action on breach of covenant by testator—Joined with claim for breach since death.]—*WILSON v. WIGG*, No. 7598, *ante*.

7625. ——— Residue paid over within six months.]—*Plene administravit* is no bar to an action against an exor. upon a covenant by testator, where the exor. has paid over the residue within six months after probate.—*DAVIS v. BLACKWELL* (1832), 9 Bing. 5; 2 Moo. & S. 7; 1 L. J. C. P. 140; 131 E. R. 516.

7626. To action by legatee—Legacy left in executor's hands by agreement.]—Where an exor. agrees with a legatee to allow him interest on his legacy if he will permit it to remain in his hands, it becomes a loan to the exor., for which he is personally liable at law, & cannot plead *plene administravit* in bar to an action by the legatee.—*WASNEY v. EARNSHAW* (1834), 4 Tyr. 806.

7627. To action for dilapidations—When assets exhausted in payment of simple contract debts.]—The exor. of a deceased incumbent is bound to satisfy simple contract debts before paying for dilapidations by testator. Therefore, in a suit on the custom of England for dilapidations, by the successor of a deceased incumbent against the exor., it is a good plea that, since the commencement of the suit, deft. has paid simple contract debts, leaving no assets to be administered.—*BRYAN v. CLAY* (1852), 1 E. & B. 38; 22 L. J. Q. B. 23; 20 L. T. O. S. 64; 17 J. P. 38; 17 Jur. 276; 1 W. R. 20; 118 E. R. 351.

Reid. Re Monk, Wayman v. Monk (1887), 35 Ch. D. 583.

(d) Plene administravit prater.

7628. To what time plea should refer.]—*administravit* ill pleading, if it want the words, *et quod ipse non habet*, etc. If the exor. who has no effects belonging to testator will not take advantage of that defence at the proper time, he shall not do it afterwards.—*HEWLET v. FRAMINGHAM* (1681), 3 Lev. 28; 83 E. R. 560.

Annotation:—Reid. Reeves v. Ward (1835), 2 Scott, 390.

7629. ———.]—In covenant against an exor. sued as an assignee for breaches of covenants to pay rent & to repair, incurred in his time, it was pleaded, that deft. was exor. of the lessee; that the

executor to plead.]—In a very hard case a new trial was granted to enable an exor. to plead *plene administravit*.—*McMARTIN v. TRAVELLER* (1836), 5 O. S. 155.—CAN.

*f. Failure to file claim with executor—Before administration.]—**KOTZE v. MOSTERT* (1869), 2 Buch. 199.—S. AF.

premises vested in him as such exor. only, & not otherwise; that the profits of the demised premises at the time he became exor., & since that hitherto, were less than the rent reserved; & that deft. had paid to the pltf. before commencing the suit £225, being all that remained in his hands of the profits by him at any time received therefrom, & that he had never since received any such profit. In two other pleas, deft. added to the above statement, that the sum of £225 so paid before the commencement of the suit was all the money which remained in his hands, not only on account of the profits of the premises received by him, but of all the goods & chattels which were of deceased which had come to his hands to be administered; & that he had not at the time of the commencement of the suit, or at any time since, any profits or goods & chattels of deceased in his hands to be administered:—*Held*: to be insufficient, for not stating that during the interval between the payment of the £255 & the commencement of the suit, deft. had no assets.—*REID v. TENTERDEN* (LORD) (1833), 4 Tyr. 111.

Annotations:—*Consd.* *Hornidge v. Wilson* (1839), 3 Per. & Dav. 641. *Reid.* *Sleap v. Newman* (1862), 12 C. B. N. S. 116.

7630. Plea of plene administravit by co-defendant executor—Plea by first defendant bad.—If one of two exors. plead *plene administravit præter* 40s. & conclude in bar; & the other plead *plene administravit* generally; the first plea is bad.—*BALDWIN v. CHURCH* (1716), 10 Mod. Rep. 323; 88 E. R. 747.

Annotation:—*Mentd.* *Elwell v. Quash* (1716), 1 Stra. 20.

7631. Plea already pleaded in former action—May be pleaded in subsequent action.—If an exor. or administrator plead *plene administravit præter* a certain sum, & afterwards to another action brought in the same term plead also *plene administravit præter* the same sum, & as to that sum that he had confessed it in the other action, such plea is a good bar.—*WATERS v. OGDEN* (1780), 2 Doug. K. B. 452; 99 E. R. 288.

Annotations:—*Reid.* *Prince v. Nicholson* (1814), 5 Taunt. 474. *Mentd.* *Ayrey v. Davenport* (1807), 2 Bos. & P. N. R. 474.

7632. Effect of plea—Admission of assets to amount pleaded.—In *assumpsit* by A. against B., C., & D., as extrix. & exors. of E., for a debt due from E., C. & D. severally pleaded *plene administravit*. B. pleaded *plene administravit*, except as to £383 6s. 7d., & also except as to certain goods of the value of £481 13s. 6d. A. signed judgment for £1,280 13s., to be levied, as to £865 0s. 1d., of the assets confessed, & as to the residue, of assets *in futuro*. Under a *fi. fa.* the goods produced £400 9s. 5d. B. gave a cheque on the bankers, with whom the £383 6s. 7d. had been deposited; which was dishonoured, not being signed by C. & D.:—*Held*: B. was bound by her admission that the money was in her hands, & consequently was guilty of a *devastavit* to the amount of the £383 6s. 7d. *Semble*: B. was liable for no more than £400 9s. 5d. in respect of the goods.—*COOPER v. TAYLOR* (1844), 6 Man. & G. 989; 7 Scott, N. R. 950; 13 L. J. C. P. 92; 2 L. T. O. S. 348; 8 Jur. 450; 134 E. R. 1193.

Annotation:—*Reid.* *Jewsbury v. Mummery* (1872), L. R. 8 C. P. 56.

(e) *No Assets ultra.*

7633. Form of plea—Must be specific.—In debt against an administratrix, she pleaded a debt due to the King, by recognisance, & several other recognisances, & that she had fully administered, & that she had, etc., no goods & chattels of the intestate in her hands to be administered, except to the value of the debt to the King, & of the recognisances, & averred that all the recognisances were yet in force, & that she had no goods & chattels of the intestate in her hands to be administered, except goods & chattels which were not sufficient to satisfy the recognisances. Pltfs. replied, as to one of the recognisances, that it was made for security of a less sum, & that such sum had been paid & received in full satisfaction, & as to another, that it was made to secure the performance of certain covenants, & that none of them were broken, & as to the others that they had been paid by the intestate, & that they were kept in force by covin, & with intent to defraud pltfs. of their debt, & that deft. had in her hands goods & chattels, etc. Upon demurrer, judgment was given for pltfs., & resolved: (1) Deft.'s plea is repugnant in itself in first averring that she had goods & chattels, etc., to the value of the recognisances, & afterwards that she had goods & chattels, etc., which were not sufficient to satisfy them; (2) an exor. or administrator ought to plead that he has not goods & chattels, except to the value of the debts, or if he has not assets to satisfy the debts of record, then, that he has not goods & chattels, etc., except to the value of a sum certain, etc., but not except goods & chattels not exceeding or which are not sufficient to satisfy the debts; (3) if the plea in bar be insufficient in matter, & the writ & declaration good, & the replication superfluous, without any matter which impugns or destroys the action, pltf. shall have judgment.—*TRESHAM'S CASE* (1612), 9 Co. Rep. 108 a; 77 E. R. 891; *sub nom.* *BROOKESBY & VAUX v. TRESHAM*, 1 Brownl. 51.

Annotations:—*As to* (1) *Reid.* *Samms v. Mercer* (1621), Cro. Jac. 626; *Gilbert v. Dee* (1681), Freem. K. B. 537. *Generally, Mentd.* *Ballo & Griffith v. Briard* (1624), Lat. 225; *Anon.* (1706), 1 Com. 150; *Prescott v. Levi* (1835), 1 Scott, 726.

7634. — Whether judgment for just debt.—*Qu.*: if a plea of no assets to satisfy the judgments pleaded be good, or if it need be averred they were for a just debt.—*SAMMS v. MERCER* (1621), Cro. Jac. 626; 79 E. R. 539.

7635. — All judgments must be pleaded.—Exor. must plead all the judgments in force against him.—*ATFIELD v. PARKER* (1701), 12 Mod. Rep. 496; Holt, K. B. 310; 88 E. R. 1472; *sub nom.* *PARKER v. ATFIELD*, 1 Ld. Raym. 678; 12 Mod. Rep. 527; 1 Salk. 311.

Annotations:—*Consd.* *Pease v. Naylor* (1792), 5 Term Rep. 80. *Reid.* *Bank of England v. Morice* (1736), 2 Stra. 1028.

7636. What judgments may be pleaded—Judgment recovered against executor as administrator—Confessed while suit pending.—An exor. cannot avail himself of a judgment which he has confessed in an action against him as administrator, pending the suit to which he pleads it.—*ANON.* (1585), Cro. Eliz. 41; 78 E. R. 306

7637. — — — — ——An exor. or administrator

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may plead judgment recovered against them as administrator or exor.—**SMALPEACE v. SMALPEACE** (1598), Cro. Eliz. 647; 78 E. R. 886.

Annotation:—Reid. **Parker v. Masters** (1669), 1 Sid. 404.

7638. — Judgment against one of several representatives.]—A recovery against one administrator shall bind all; & may be pleaded with no assets *ultra* to an action for another debt of the intestate's.—**FURTHER v. FURTHER** (1596), Cro. Eliz. 471; 78 E. R. 708.

Annotation:—Reid. **Parker v. Masters** (1669), 1 Sid. 404.

7639. — —.]—**PARKER v. MASTERS** (1669), 1 Sid. 404; 82 E. R. 1182.

7640. — Judgment not bona fide.]—In debt upon bond against administrators, they pleaded several former judgments obtained against them in the ct. of Chichester, amounting in the whole to £514 0s. 8d. & that they had not goods or chattels of the intestate in their hands to be administered except to a less value. Pltf. replied that defts. had compounded for a less sum, & that the judgments are kept on foot by covin to defraud him, etc. Upon demurrer to this replication judgment was given for pltf.—**TURNOR'S CASE** (1610), 8 Co. Rep. 132 a; 77 E. R. 673.

Annotations:—Consd. **Fresham's Case** (1612), 9 Co. Rep. 108 a. **Reid.** **Read v. Dawson** (1676), Freem. K. B. 215; **FitzPatrick v. Strong** (1727), Gilb. Ch. 251. **Mentd.** **Norton v. Sinmes** (1614), Hob. 12; **Ley v. Luttrell** (1619), Palm. 70; **Marshall v. Freake** (1622), Palm. 287; **Brockham's Case** (1628), Litt. 128; **Horn v. Barbar** (1635), Cro. Car. 421; **Philips v. Bury** (1694), Skin. 447; **Arnote v. Bream** (1704), 4 Mod. Rep. 244; **London (Bp.) v. Mercer's Co.** (1731), 2 Barn. K. B. 108.

7641. — Void judgment.]—When an exor. pleads a judgment, not merely erroneous, but void, as a recovery in an impossible term, the plea is bad.—**DRAKE v. RANDALL** (1678), Freem. K. B. 255; 89 E. R. 183; *sub nom.* **RANDAL'S CASE**, 2 Mod. Rep. 308.

7642. — Judgment recovered since general issue pleaded.]—An exor. may plead, *puis darrein continuance*, unreversed judgments in debt on simple contracts of testator, recovered against the exor. in suits commenced since he pleaded the general issue in bar in the principal case.—**PRINCE v. NICHOLSON** (1814), 5 Taunt. 665; 1 Marsh. 280; 128 E. R. 852; *subsequent proceedings* (1815), 6 Taunt. 45.

Annotation:—Apld. **Lyttleton v. Cross** (1824), 3 B. & C. 317.

7643. In what cases available—Action on judgment debt—Goods taken on statute.]—An exor. or administrator ought to pay a debt due by judgment, before a debt upon a statute or recognisance of an older date; but if the goods are taken on a statute, he may plead that he had not *aliqua alia bona præter*.—**BEREBLOCK v. READ** (1603), Cro. Eliz. 734; 78 E. R. 967; *sub nom.* **BEARBLOCK v. READ**, Cro. Eliz. 822; *sub nom.* **REDE v. BERELocke**, Yelv. 29; *subsequent proceedings*, *sub nom.* **BEARBLOCK v. READ** (1611), 2 Brownl. 39, 81.

Annotations:—Reid. **Prinn v. Edwards** (1695), 1 Ld. Raym. 47. **Mentd.** **Anon.** (1692), 12 Mod. Rep. 48; **Lancashire v. Killingworth** (1701), 12 Mod. Rep. 529.

7644. — Action on bond—Debt on existing statute merchant.]—To an action of debt on bond against an exor., if deft. plead, that testator was

indebted to pltf. upon a statute merchant yet in force, & no assets *ultra*, pltf. may reply, that the statute was destroyed by fire.—**BUCKLY v. HOWARD** (1674), 1 Mod. Rep. 186; 86 E. R. 818; *sub nom.* **BULKLY v. HOARE**, Freem. K. B. 44.

7645. Effect of plea.]—A plea by an exor. that six judgments are recovered against him, each for £20, & that he has only £10 assets, is a confession of assets beyond the sums recovered by five of them.—**ASHTON v. SHERMAN** (1697), 1 Ld. Raym. 263; Carth. 429; Comb. 444; Holt, K. B. 308; 12 Mod. Rep. 153; 1 Salk. 298; 91 E. R. 1072.

Annotation:—Mentd. **Corner v. Shew** (1838), 3 M. & W. 350.

7646. What are assets—Not goods distrained & impounded.]—Goods impounded are not assets. Debt against an exor., who pleaded he had *riens in ses maines*, but certain goods, distrained & impounded: it was adjudged to be no assets to charge him.—**ANON.** (1583), Cro. Eliz. 23; 78 E. R. 289.

(f) Release and Satisfaction

7647. Availability of general release—In action for breach of covenant.]—Whether a release of all demands on testator's estate will bar an action against exor. for a breach of covenant by testator.—**MORRIS v. WILFORD** (1678), Freem. K. B. 474; 2 Lev. 214; 2 Show. 46; T. Jo. 104; 3 Keb. 814, 840; 89 E. R. 355; *sub nom.* **MORRIS v. PHILPOT**, 2 Mod. Rep. 108.

Annotations:—Reid. **Topham v. Toller** (1702), 2 Ld. Raym. 786. **Mentd.** **Solly v. Forbes** (1820), 2 Brod. & Bing. 38; **Squire v. Ford** (1851), 9 Hare, 47.

7648. Availability of release—Of all right to personal estate.]—A release of all right to the personal estate of an intestate will not discharge a debt due from him. Particularly if the release imports to be made for settling disputes which had arisen between pltf. & deft. concerning the right of administration.—**TOPHAM v. TOLLIER** (1702), 2 Ld. Raym. 786; 2 Salk. 575; Holt, K. B. 621; 92 E. R. 25.

7649. How release pleaded—Consideration must be stated.]—In a plea of a release, the consideration for which the release was given must be stated.—**BROOKS v. SUTTON** (1808), L. R. 5 Eq. 361; 37 L. J. Ch. 311; 18 L. T. 224; 16 W. R. 570.

7650. Whether plea of satisfaction available—In action of debt on a bond—Personal bond of administration substituted.]—To debt upon bond against an administrator, deft. may plead, that he gave another bond in his own name in discharge of the first bond.—**PECK v. HILL** (1676), 2 Mod. Rep. 136; 86 E. R. 986; *sub nom.* **BLYTHE v. HILL**, 1 Mod. Rep. 221, 225.

Annotation:—Reid. **Weston v. Foster** (1836), 3 Scott, 164.

7651. — By payments made to testator in his life.]—Exor., charged by his answer, not permitted to discharge himself by his affidavit of payments to testator in his life. Admission of the receipt of sums, which sums he had paid, etc., a good discharge.—**RIDGEWAY v. DARWIN** (1802), 7 Ves. 404; 32 E. R. 164, L. C.

Satisfaction generally.]—See EQUITY, Vol. XX., pp. 449 *et seq.*

(g) Lapse of Time.

i. In General.

7652. How far laches available—In action for legacy.]—In 1783 testator bequeathed the residue

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7652 1. How far laches available—In action for legacy.]—**CAREY v. CUTHBERT** (1875), 9 I. R. Eq. 330.—IR.

of his estate upon trust for his five children equally at twenty-one, of whom pltf. was one. In 1799 pltf. attained twenty-one; in 1800 she married. Disputes arose as to the amount of her share. In 1807 one of the trustees, D., wrote to the husband to state that the share of the wife amounted to £1,139, "which sum I have placed out so as to pay you 5 per cent. interest; the principal you can have at any time by giving notice. I shall be glad to hear from you in respect to this." The husband never answered the letter. In 1829-1830 pltf. attempted to enter into correspondence with D., then the surviving trustee, but D. refused to answer her inquiries, stating that he would answer the husband only, whom he considered the proper person. In May, 1844, D. died, leaving deft. his sole exor. In Oct. 1844, the husband, ignorant of D.'s decease, addressed him on the subject. Deft. opened the letter, & as soon as he understood the claim, utterly rejected it. In 1850 deft. finished distributing his testator's estate. In 1855 pltf.'s husband died, & thereupon she filed a bill against deft., as the exor. of the last surviving trustee, claiming the £1,139, & interest since 1807, as her chose in action, coming to her by survivorship. There was not the slightest evidence that either principal or interest had ever been received:—*Held*: such a suit, if a suit for a legacy, was barred by laches, by analogy to the statute; if a bill for enforcing a trust, it ought to be a bill by the husband's representative, as for his fund reduced into possession in 1807, & in such case ought also to be barred by laches.—*FREEMAN v. DOWDING* (1856), 2 Jur. N. S. 1014.

ii. Statutes of Limitations.

See, generally, LIMITATION OF ACTIONS.

7653. Action not brought within six years of accrual of cause of action.]—It is no answer to a plea of Stat. Limitations, that, after the cause of action accrued, & after the statute had begun to run, debtor, within six years, died, & that, by reason of litigation as to the right to probate, an exor. of his will was not appointed, until after the expiration of the six years, & that pltf. sued such exor. within a reasonable time after probate granted.—*RHODES v. SMETHURST* (1840), 6 M. & W. 351; 9 L. J. Ex. 330; 4 Jur. 702; 151 E. R. 447, Ex. Ch.

Annotations:—*Distd.* *Curlewis v. Mornington* (1858), 27 L. J. Q. B. 439. *Apld.* *Penny v. Brice* (1865), 18 C. B. N. S. 393. *Refd.* *Freake v. Cransfeldt* (1838), 3 My. & Cr. 499; *Honfray v. Scroope* (1849), 13 Q. B. 509; *Freeman v. Tranch* (1852), 16 Jur. 1141; *Towns v. Mead* (1855), 16 C. B. 123; *Coombs v. Coombs* (1866), L. R. 1 P. & D. 288; *Segram v. Knight* (1867), 2 Ch. App. 628; *Re Benzon, Bower v. Chetwynd*, [1914] 2 Ch. 68.

7654. Action brought in lifetime of deceased—Continued against representative within reasonable time.]—Where an action by a creditor against his debtor, commenced within six years, abates by reason of the death of deft. intestate, the reasonable time allowed for commencing a fresh action against the personal representatives, in order to prevent the operation of Stat. Limitations dates from the granting of the letters of administration; & the right of pltf. in this respect is not affected by delay on the part of the next of kin in obtaining administration.—*CURLEWIS v. MORNINGTON (EARL)* (1858), 27 L. J. Q. B. 439; 32

L. T. O. S. 29; 4 Jur. N. S. 1102; 0 W. R. 682, Ex. Ch.

Annotations:—*Consd.* *Sturgis v. Darell* (1859), 4 H. & N. 622. *Distd.* *Penny v. Brice* (1865), 18 C. B. N. S. 393. *Folld.* *Swindell v. Bulkeley* (1886), 18 Q. B. D. 250.

7655. ———.]—Where an action on a money bond abates by the death of deft. & no personal representative is appointed for twenty years, but after that time letters of administration are granted, a fresh action may notwithstanding the lapse of time be maintained on the bond against the administrator, if commenced within a year after his appointment, as according to the equitable construction put upon Civil Procedure Act, 1833 (c. 42), s. 3, adopted by analogy from Stat. Limitations, the right of action is not in such case barred.—*STURGIS v. DARELL* (1860), 6 H. & N. 120; 29 L. J. Ex. 472; 2 L. T. 808; 6 Jur. N. S. 1351; 8 W. R. 653; 158 E. R. 50, Ex. Ch.

Annotation:—*Folld.* *Swindell v. Bulkeley* (1886), 18 Q. B. D. 250.

7656. ———.]—Pltf. issued a writ against his debtor within six years from the accrual of the cause of action. Debtor died before service of the writ. An action in respect of the same cause of action was commenced against debtor's exors, after the six years had expired, but within twelve months from the grant of probate of debtor's will:—*Held*: the action was not barred by Stat. Limitations, & the law in this respect has not been altered by the Jud. Acts & rules.—*SWINDELL v. BULKELEY* (1886), 18 Q. B. D. 250; 56 L. J. Q. B. 613; 56 L. T. 38; 35 W. R. 189; 3 T. L. R. 183, C. A.

7657. What will take out of statute—Payment by one executor.]—*Semble*: an acknowledgment in writing, or payment by one of several exors., of a debt due from testator is not sufficient to take the case out of the Stat. Limitations as against his co-exors., even though made by him in his executive capacity.—*SCHOLEY v. WALTON* (1844), 12 M. & W. 510; 13 L. J. Ex. 122; 2 L. T. O. S. 331; 8 Jur. 319; 152 E. R. 1299.

Annotations:—*Consd.* *Spollan v. Magan* (1851), 18 L. T. O. S. 200; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181. *Mentd.* *Callander v. Howard* (1850), 10 C. B. 290; *Nash v. Hodgson* (1855), 6 De G. M. & G. 474.

7658. ——— Creditors suit for administration—Where no claim made in suit.]—*Semble*: the existence of a creditor's suit for the administration of the estate of a deceased debtor does not prevent the operation of Stat. Limitations against a debt, in respect of which no claim is made under the decree.—*TATAM v. WILLIAMS* (1844), 3 Hare, 347; 67 E. R. 415.

Annotation:—*Refd.* *Knox v. Gye* (1872), L. R. 5 H. L. 656.

7659. ——— Payment to separate account in bank.]—Testator died in 1818. A., his administrator, received assets & placed them in a bank, to an account: "A.'s trustee," & where they still remained. A. died in 1853, & to a suit, instituted by the administrator *de bonis non* of the original testator against the representatives of A. & the bankers, to recover the fund, the representatives of A. set up Stat. Limitations, but the bankers were willing to pay the amount:—*Held*: the statute was inapplicable, & a decree was made for pltf.—*SMITH v. ACTON* (1858), 26 Beav. 210; 7 W. R. 159; 53 E. R. 877.

Sect. 2.—Actions against representative: Sub-sect. 6, A. & B.; sub-sect. 7.]

SUB-SECT. 6.—EVIDENCE.

A. In General.

Admissibility — Admissions by co-executor.]—See EVIDENCE, Vol. XXII., p. 91.

7660. Onus of proof on representative—Where legacy admitted as personal debt—To show date of receipt of money.]—FENTON v. MYERS (1843), 1 L. T. O. S. 312.

7661. Ne exeat regno—Affidavit must state assets of deceased in hands of representative.]—The affidavit to ground a writ of *ne exeat regno* must not only state that deft. is equitably indebted in a specific sum, but must mention the facts on which it arises, etc.

An affidavit to found such a writ upon must not only say that deft. is indebted such a sum, but must also mention the facts, on which it arises, & on which it is grounded. In this case the bill being against an administrator, the affidavit ought to swear, or to the best of his knowledge or belief, that assets had come to his hands; because the demand arises in *auter droit*: otherwise it would be holding one, who would not be held to bail at law; & would detain a person here, whom they had no right to detain, the demand arising in *auter droit* (LORD HARDWICKE, C.).—ANON. (1752), 2 Ves. Sen. 489; 28 E. R. 313, L. C.

7662. Necessity for strict proof—That assets purchased by representative purchased with assets of deceased.]—Where the inability of an administrator to purchase an estate with his own money is relied upon as a ground for following that estate as part of the intestate's assets, such inability must be shown by evidence of facts from which the strongest conclusion can be drawn, & not merely or principally by evidence of the opinions of witnesses, though such witnesses may have been well acquainted with the affairs of the party, & their testimony may be corroborated by circumstances of suspicion.—WILKINS v. STEVENS (1842), 1 Y. & C. Ch. Cas. 431; 6 Jur. 253; 62 E. R. 957.

Necessity for corroboration of claims against estate.]—See EVIDENCE, Vol. XXII., pp. 492–495, Nos. 5214–5234.

PART VII. SECT. 2, SUB-SECT. 6.—A.

k. Onus of proof on representative—That money paid by wife was gift to husband.]—Where the widow of deceased claimed from the exor. repayment of moneys paid by her at her husband's request out of her separate property, on premiums payable on policies on his life:—*Held*: the onus was on the exor. to prove that the moneys were a gift to deceased.—ELLIOTT v. BUSSELL (1890), 19 O. R. 413.—CAN.

l. — Of existence of mutual contract—For work done.]—Where a person claimed a sum from the exor. of deceased as wages for work done & services rendered as servant & general manager of deceased:—*Held*: there must be evidence of the existence of a mutual contract between pltf. & deceased that pltf. had undertaken an obligation to render definite services, & had rendered them, & there must also be evidence that deft. had undertaken the obligation to pay for the services to be rendered.—CLEARY v. SIBLEY (1909), 46 I. L. T. 25.—IR.

m. Necessity for strict proof—Of appointment of representative.]—KELLY

v. ARDELL (1865), 11 Gr. 579.—CAN.

n. — — —.]—Where the fact of deft. being administrator is not disputed, & pltf. has filed an affidavit that he is administrator, it is not necessary to give further evidence of the fact, or to produce the letters of administration, or a copy thereof.—*Re* BELL, DELL v. BELL (1871), 3 Ch. Ch. 397.—CAN.

o. Further evidence — Where action continued against representative.]—Where a cause is against the representatives of a deceased trustee, who had been deft., the ct. in its discretion will exercise a greater degree of indulgence in the reception of new evidence than if the original deft. himself, who should have known all the circumstances, was alive.—SMALL v. ECCLES (1867), 2 Ch. Ch. 91.—CAN.

p. Sufficiency of evidence — Proceedings in Probate Court.]—It is sufficient to show the substance of the proceedings against an administrator in the Probate Ct., without setting out the proceedings themselves.—*Re* HUNTER (1867), 12 N. B. R. (1 Han.) 233.—CAN.

q. Judgment as evidence of debt

B. On Plea of plene administravit.

7663. Onus of proof on plaintiff—To show assets received by representative.]—Upon the plea of *plene administravit* it is necessary to prove that effects came into the hands of deft. This is the universal practice (LORD ELLENBOROUGH, C.J.).—GILES v. DYSON (1815), 1 Stark. 32, N. P.

Annotation:—*Re*ld. Stearn v. Mills (1833), 4 B. & Ad. 657.

7664. — — —.]—In an action against an exor., on *plene administravit* pleaded, pltf. is bound to show affirmatively, that deft. had goods of testator in his hands unadministered; & though pltf. is entitled to his verdict, & therefore to costs, if he can prove any property unadministered, yet the measure of pltf.'s damages is not the amount of his debt, but so much as he can show to remain in the hands of the exor.—JACKSON v. BOWLEY, Car. & M. 97, N. P.

7665. Onus of proof on representative—To show that ostensible assets not deceased's—Crops growing on lands of deceased.]—(1) On a plea of *plene administravit*, it was proved, on the part of pltf., that, at the time of the death of the intestate, there were crops on his farm, but that there had been an auction on the premises about a month before, at which these crops were put up for sale:—*Held*: as the crops remained on the premises at the time of the death of the intestate, it lay on deft., as administrator, to show that these crops had not come to his hands.

(2) On a plea of *plene administravit*, it appeared that the intestate, six months before his death, had assigned all his effects to trustees for the benefit of such of his creditors as should execute the deed of assignment. The deed was executed by himself & the trustees, but not by any other creditor:—*Held*: the administrator might give in evidence advertisements published soon after the execution of the deed, stating where the deed lay for execution by the creditors, & calling a meeting of creditors as to the sale of the effects, & also a resolution of that meeting, that the effects should be sold, as this evidence went to show that that deed was acted upon, & was a *bona fide* & not a fraudulent deed.—STROUD v. DANDRIDGE (1844), 1 Car. & Kin. 445, N. P.

7666. Admissibility of evidence—Of payment of debts—Before action brought.]—Under *plene*

duc.]—A judgment against an exor. upon a debt of deceased is conclusive evidence of the indebtedness to pltf. as against all other creditors of deceased.—*Re* HAGUE, TRADERS' BANK v. MURRAY (1887), 13 O. R. 727.—CAN.

r. — — —.]—A colonial judgment having been obtained against the personal representatives of an intestate, who died in a British colony leaving assets in the colony & in Ireland:—*Held*: assuming the exors. dative to have been duly appointed, & the judgment to have been regularly obtained according to the law of the colony, no privy existed between the exors. dative & the administrator in Ireland of the personal estate of intestate, & consequently the colonial judgment was not against the Irish administrator evidence of the debt claimed by the judgment creditor, on foot of which the judgment had been recovered.—TIGHE v. TIGHE (1877), 11 I. R. Eq. 203.—IR.

PART VII. SECT. 2, SUB-SECT. 6.—B.

7666 l. Admissibility of evidence—Of payment of debts—Before action brought.]

administravit the exor. showing debts paid, must show them paid before the commencement of the action; but judgment against him shall be *de bonis testatoris tantum*.—ANON. (1537), 1 Dyer, 32 a; 73 E. R. 70.

7667. — — — — —.]—On a special *plene administravit*, if assets are proved in deft.'s hands, he may give evidence of the payment of other debts with those assets, previous to the action brought.—SMEDLEY v. HILL (1776), 2 Wm. Bl. 1105; 96 E. R. 652.

7668. — — — — — After action brought.]—Under the general plea of *plene administravit*, deft. cannot show payments since action commenced, & before notice.—NIGHTINGALE v. LEE (1673), Freem. K. B. 110; 89 E. R. 81; *sub nom.* NITINGALE v. LEIGH, 3 Keb. 171.

7669. — — — — — Out of money of representative.]—SHELLEY v. SACKVILE (1552), 1 And. 24; 123 E. R. 333.

7670. — — — — — By third party.]—If that administrator, who in truth is but a stranger, pay any debts with the goods of testator without commandment of the exor., same is not an administration, & the exor. cannot give such matter in evidence, to prove his plea of fully administered (PERIAM, J.).—HAWKINS v. LAWSE (1590), 1 Leon. 154; 74 E. R. 143.

7671. — — — — — Durante minore ætate—& payment over of residue.]—On *plene administravit* deft. may give in evidence that he was administrator *durante minore ætate*, & hath paid such debts, delivered over the residue.—BROOKING v. JENNINGS (1674), Freem. K. B. 150; 1 Mod. Rep. 174; 80 E. R. 109.

Annotation :—*Mentd.* Davis v. Blackwell (1832), 9 Blug. 5.

7672. — — — — — & payment over of residue.]—Where the exor. has paid all the debts & legacies, after the year, from testator's death expired, & paid over the remainder of the estate to the residuary legatee, it is good evidence on *plene administravit*.—CHELSEA WATERWORKS CO. v. COWPER (1795), 1 Esp. 275, N. P.

Annotations :—*Refd.* Davis v. Blackwell (1832), 9 Blug. 5; Norman v. Baldry (1834), 6 Sim. 621.

7673. — — — — — To prove bona fides of assignment for benefit of creditors—Advertisement for creditors.]—STROUD v. DANDRIDGE, No. 7665, *ante*.

7674. Presumption of receipt of assets by representative—From payment of duty.]—(1) In answer to a plea of *plene administravit*, proof that deceased's property was sworn under a certain sum is *prima facie* evidence of assets to the amount of the smallest sum, that would pay same probate duty as the sum sworn to.

(2) Here is *prima facie* evidence of assets to the amount of £2,000 in the duty paid upon the pro-

bate (ABBOTT, C.J.).—CURTIS v. HUNT (1824), 1 C. & P. 180, N. P.

Annotation :—*As to* (1) *N.F.* Mann v. Lang (1835), 3 Ad. & El. 699.

7675. — — — — —.]—A probate stamp is *prima facie* evidence that the exor. has received assets to the amount covered by the stamp.—FOSTER v. BLAKELOCK (1826), 5 B. & C. 328; 8 Dow. & Ry. K. B. 48; 4 L. J. O. S. K. B. 170; 108 E. R. 122.

Annotations :—*N.F.* Stearn v. Mills (1833), 4 B. & Ad. 657; Mann v. Lang (1835), 3 Ad. & El. 699. *Mentd.* Bramwell v. Penneck (1827), 1 Man. & Ry. K. B. 409; Innes v. Levi (1835), 1 Hodg. 195; Robins v. Bridge (1837), 6 Dowl. 140; Newton v. Chambers (1844), 8 Jur. 244; Maybery v. Mansfield (1846), 9 Q. B. 754; Walbank v. Quarterman (1846), 3 C. B. 94; Malle v. Mann (1848), 2 Exch. 608; Brewer v. Jones (1855), 3 C. L. R. 369; Miles v. Harris (1862), 12 C. B. N. S. 550; Royle v. Busby (1880), 6 Q. B. D. 171.

7676. — — — — —.]—The inventory exhibited in the Ecclesiastical Ct. by an exor. for the purpose of obtaining probate is not in general *prima facie* evidence of his having received assets.—STEARNS v. MILLS (1833), 4 B. & Ad. 657; 1 Nev. & M. K. B. 436; 110 E. R. 603; *sub nom.* STEEN v. MILLS & WRIGHT, 2 L. J. K. B. 106.

Annotation :—*Consd.* Mann v. Lang (1835), 3 Ad. & El. 699.

7677. — — — — —.]—Upon issue joined on a plea by an exor. of *plene administravit*, the amount of the stamp upon the probate is admissible in evidence. It does not of itself furnish *prima facie* evidence of the amount of the effect which have come to the exor.'s hands.—MANN v. LANG (1835), 3 Ad. & El. 699; 1 Har. & W. 441; 5 Nev. & M. K. B. 202; 4 L. J. K. B. 210; 111 E. R. 579.

7678. — — — — —.]—Payment of probate duty is presumptive evidence of an admission, but not an absolute admission, of assets to the extent covered by the amount of duty paid.—LAZONBY v. RAWSON (1854), 4 De G. M. & G. 556; 3 Eq. Rep. 89; 24 L. J. Ch. 482; 24 L. T. O. S. 175; 1 Jur. N. S. 289; 3 W. R. 34; 43 E. R. 624, L. C.

Admission of assets by representative.]—Subsect. 8, D., *post*.

SUB-SECT. 7.—SET-OFF BY REPRESENTATIVE.

See, generally, R. S. C., Ord. 19, r. 3; SET-OFF; PRACTICE.

For set-off against legatees, see Part IV., Sect. 5, sub-sect. 3, *ante*.

7679. General rule—Debts must be in same right.]—There can be no set-off, either at law or in equity, where either of the debts is a debt in *auter droit*. A. being indebted to B. in a sum of £1,000, executed a bond to him for securing that amount & interest. B. subsequently died, having

—In an action against an administrator to which he pleads an outstanding judgment, & *plene administravit præter*, & pltf. proves assets in deft.'s hands more than sufficient to satisfy the judgment, deft. will not be allowed to give evidence of the payment of debts before the recovery of the judgment & before the receipt of the assets.—BACKHOUSE v. PALMER (1828), N. B. Dig. 337.—CAN.

s. — — — — — Of probable expenses of future litigation.]—Defts. under the item expenses of administration, in the notice given with the plea of *plene* J.—VOL. XXIV.

administravit offered evidence of the probable expenses of this & other suits: *Held*: the evidence was properly refused.—MARSHALL v. ARMSTRONG (1881) 21 N. B. R. 102.—CAN.

t. Sufficiency of evidence — To support plea.]—To support a plea of *plene administravit*, exors. gave evidence that the only personal estate consisted of testator's share in a partnership which had not yet been realised, & of household furniture specifically bequeathed:—*Held*: the plea was not proved.—MOONEY v. PLUMMER (1871), 2 V. R. (Law) 52.—AUS.

PART VII. SECT. 2, SUB-SECT. 7.

7679 i. General rule—Debts must be in same right.]—Administrator sued for intestate's debt cannot set off debt to him as administrator.—NATIONAL BANK OF AUSTRALASIA v. SWAN (1872), 3 V. R. (Law) 168.—AUS.

7679 ii. — — — — —.]—In an action against an exor. on his testator's promise, the plea, was a set-off for goods sold & money paid by deft. as exor. to pltf. :—*Held*: bad, as attempting to set off an individual debt against a demand due from deft. in his

Sect. 2.—Actions against representative: Sub-sects. 7 & 8, A.]

made his will, & appointed C. & D. his exors. & residuary legatees: an appointment of B.'s residuary estate being made, the bond is allotted to C. as part of his share: C. being the steward of A., & having a running account with him, enters the bond in that account. C. dies intestate, leaving a widow, who takes out administration to his estate, & also administration, *de bonis non* to B.; & as such last mentioned administratrix, she filed a bill as a specialty creditor against the representatives of A.:—*Held*: in this suit, the representatives of A. could not make a set-off against the demand, in respect of sums which they alleged to have been omitted, or improperly charged in the account of C., but must file a cross bill.—*GALE v. LUTTRELL* (1826), 1 Y. & J. 180; 148 E. R. 636.

Annotation:—*Consd.* *Alliance Bank v. Holford* (1864), 16 C. B. N. S. 460.

7680. ———.]—(1) S. gave a bond, conditioned for the payment of money. The obligee made C. his extrix. & residuary legatee, & died. C. proved the will assented to the bequest & died not having fully administered, leaving E. extrix. of the extrix. C., in trust for her, E.'s own benefit. A sum due on the bond in the first testator's time remained unpaid. C., during her lifetime, in consideration of a marriage about to take place between her & the father of S., gave a bond to a trustee conditioned for payment of a sum of money to the use of S., if C. should marry & survive her intended husband. She did marry & survive him & the money not having been paid in her lifetime the trustees' exor. sued E. the extrix. of C., upon that bond:—*Held*: in this action the claim of E. upon S.'s bond could not be set off.

(2) This case must be governed by 2 Geo. 2, c. 22, s. 13, which enacts that . . . if either party sue or be sued as exor. or administrator where there are mutual debts between testator or intestate & either party, one debt may be set against the other. . . . There was no debt due from C. to S., before the bond was given to pltf.'s testator as her trustee (*PARKE, J.*).—*TUCKER v. TUCKER* (1833), 4 B. & Ad. 745; 1 Nev. & M. K. B. 477; 2 L. J. K. B. 143; 110 E. R. 636.

Annotations:—*As to* (2) *Reid*. *Isberg v. Bowden* (1853), 8 Exch. 852; *Oulds v. Harrison* (1854), 10 Exch. 572; *Watkins v. Clark* (1862), 12 C. B. N. S. 277.

See, now, Jud. Act, 1873 (c. 66), s. 24 (3).

7681. ———.]—N. & C. were exors. of a will & trustees of the residuary real & personal estate of a testator who died in 1859. N. & F. were tenants for life of the residuary estate in equal shares. In Jan. 1873, C. was residing abroad, & N., being about also to go abroad, gave to P. the solr. of the exors. & trustees, an authority on behalf of both trustees to receive the rents of the real estate & pay the outgoings. Under this authority P. received the rents, & at his death a considerable sum was due from him in respect thereof. P.'s estate proved insolvent, & the usual creditor's decree was made for administration.

capacity of exor.—*GRACEY v. WILSON* (1844), 1 U. C. R. 237.—CAN.

7679 iii. ———.]—In an action by heir of deceased insolvent debtor to recover a debt contracted with his exors:—*Held*: a debt due by deceased to deft. could be pleaded in compensa-

7679 iv. ———.]—*MOFFATT v. FOLEY* (1867), 26 U. C. R. 509.—CAN.

7679 v. ———.]—The rule that debts of which two persons are reciprocally

Subsequently to the decree F. assigned to N. all F.'s interest in the sum due from P. N. was indebted to A. & B. as trustees for P. in a sum the repayment of which was secured by a mtge. of real estate belonging to N., & this sum was paid into ct. in the suit to a separate account, under an order made without prejudice to any question as to set off. N. afterwards presented a petition claiming to be entitled to set off the debt due from P. against the mtge. debt, & seeking to have the amount of the debt due from P. paid out of the fund standing to the separate account:—*Held*: (1) as regards F.'s interest there could be no set-off, inasmuch as it was not assigned to N. until after the decree; (2) the debt due from P. being either due to both trustees & exors., or if due to N. alone due to him in his character of trustee & exor., could not be set off against a debt due from him individually.—*MIDDLETON v. POLLOCK, Ex p. NUGEE* (1875), L. R. 20 Eq. 29; 44 L. J. Ch. 584; 33 L. T. 240; 23 W. R. 766.

Annotation:—*As to* (2) *Reid*. *Re Jones, Christmas v. Jones*, [1897] 2 Ch. 190.

7682. ———.]—Deft. was receiver & manager of the estate of John Grimes, deceased, under an order of Chitty, J., as well as his exor. John Grimes had guaranteed a loan made by pltf. to Joseph Grimes, in respect of which, in default of payment by Joseph Grimes, deft. had paid the sum of £550, for which he obtained judgment against Joseph Grimes. In the course of his management of the farms of John Grimes deft. bought lambs of Joseph Grimes, for which he owed £45, a debt which Joseph Grimes assigned to pltf. In an action for the £45 brought by pltf. as such assignee the deft. sought, by way of set-off & counter-claim, to set up the unsatisfied judgment for £550 against Joseph Grimes, the assignor, on the ground that he was acting as receiver & manager of John Grimes' estate in buying the lambs, & that he was entitled to set off a debt due to him as exor. against a debt due from him as receiver in respect of same estate:—*Held*: as between deft. & Joseph Grimes, the assignor, the liability in respect of the lambs was a purely personal one, & deft. was therefore not entitled to set off against it a debt due to the estate.—*NELSON v. ROBERTS* (1893), 69 L. T. 352.

7683. Representative beneficially entitled—To debt claimed to be set off—Balance of banking account.—F. had an account with the banking firm of H., with which bank A. also had an account. At the end of 1869, A. died, leaving F. her exor. & sole residuary legatee. At the time of A.'s death there stood to her account in the bank books £600 & this balance was at once transferred by the bank to the credit of F., in a fresh account with him as exor. of the late Mrs. A. Of this sum F. drew out about £200 & paid in about £100, thus leaving £500 standing to his credit. He overdraw his own private account to the extent of £300. In July, 1870, the bank stopped payment & were declared bkpts. At that time, after satisfying the legacies in A.'s will, there would have been a surplus of about £1,900 of A.'s estate, inclusive of the £500 in the bank, to which F. was entitled as residuary legatee. B., as trustee

cally debtors are extinguished by the credits of which they are reciprocally creditors is applicable to a case in which persons are reciprocally debtors & creditors in a representative character such as exors.—*STEPHAN'S ESTATE v. STEPHAN'S ESTATE* (1908), 25 S. C. 104.—S. AF.

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of H., bkpt., brought an action against F. for the £300 the amount of his overdrawn private account:—*Held*: F. could set off the £500 balance of the exorship. account, to which he was entitled as residuary legatee, against the £300, the amount of his overdrawn private account due from him to B., inasmuch as there were no equitable interests existing at that time of legatees or other third parties that could affect the £500 standing in F.'s name as exor. in the books of the bank.—*BAILEY v. FINCH* (1871), L. R. 7 Q. B. 34; 41 L. J. Q. B. 83; 25 L. T. 871; 20 W. R. 294.
Annotation:—*Expld. Re Willis, Percival, Ex p. Morier* (1879), 12 Ch. D. 491.

7684. ———.]—An exorship. account was kept with bankers in the joint names of the two exors., who were brother & sister. The brother, who was the residuary legatee under the will, kept another account of his own with the bankers. The bankers filed a liquidation petition, & at that time there was a balance standing to the credit of the joint account, but the other account was overdrawn. Securities had been set apart to answer the legacies bequeathed by the will, & testator's debts & funeral & testamentary expenses had been paid. But the exors. were jointly liable for some rates & taxes & a solr.'s bill of costs which had not been paid:—*Held*: the one account could not be set off against the other in the liquidation of the bankers. The rules of equitable set-off or mutual credit could not apply, unless the brother was so much the person solely beneficially interested in the balance of the joint account that a ct. of equity, without any terms or any further inquiry, would have compelled the sister to transfer the account into the brother's name alone.—*Re WILLIS, PERCIVAL & Co., Ex p. MORIER* (1879), 12 Ch. D. 491; 49 L. J. Bcy. 9; 40 L. T. 792; 28 W. R. 235, C. A.
Annotation:—*Consd. Re Hett, Maylor* (1904), 10 T. L. R.

See, also, BANKERS, Vol. III., p. 294, No. 925.

7685. ———.]—*MIDDLETON v. POLLOCK, Ex p. NUGEE*, No. 7681, *ante*.

7686. Debt due from plaintiff before death—Whether set off—Where cause of action accrued after death.]—A set-off for money due from pltf. to testator in his lifetime may be pleaded in answer to a declaration on a cause of action, which accrued to pltf., from defts., as exors., after the death of testator.—*BLAKESLEY v. SMALLWOOD* (1846), 8 Q. B. 538; 15 L. J. Q. B. 185; 6 L. T. O. S. 391; 10 Jur. 470; 115 E. R. 978.

Annotations:—*Consd. Mardall v. Thellusson* (1852), 18 Q. B. 857; *Rees v. Watts* (1855), 11 Exch. 410. *Mentd. Mead v. Bashford* (1851), 5 Exch. 336.

7687. Debt due from plaintiff after death—Whether set off—Where cause of action accrued before death.]—An exor. sued, as such, for a debt which accrued to pltf. from testator in his lifetime cannot set off a debt, alleged to be equal to the damages sued for, for money had & received to deft.'s use, as exor., & money due on an account stated with him, as exor., since the death of testator; the debt sued for & the debt sought to be set off not being mutual within 2 Geo. 2, c. 22,

s. 13.—*MARDALL v. THELLUSSON* (1856), 6 E. & B. 976; 28 L. T. O. S. 160; 5 W. R. 25; 119 E. R. 1127; *sub nom. MARDALL v. SABINE & TELLUSSON*, 3 Jur. N. S. 314, Ex. Ch.

Annotation:—*Consd. Rees v. Watts* (1855), 11 Exch. 410.

7688. Money given to plaintiff by testator—As advancement—Whether set-off allowed.]—To an action against an exor. on a debt due by his testator, deft. pleaded Stat. Limitations, & that at the time of the death of testator the pltf. was indebted to him in an equal amount, which being still due, deft. was willing to set off against the pltf.'s claim. To the first of these pleas pltf., for replication on equitable grounds, replied that the causes of action therein mentioned accrued within six years before the death of testator; that he by his will appointed defts. his exors., & devised certain freehold estate to them upon trust to sell, & also the residue of his personal estate, upon trust to call it in, & should, out of the moneys to arise from the sale of the real estate & the calling in of the personal estate, pay debts & legacies, & hold the residue in trust for pltf. & his other children in equal shares; averring the sufficiency of the moneys thus realised to pay all debts & legacies. To the second plea pltf. replied, for replication on equitable grounds, that testator devised & bequeathed to him certain freehold estate & a certain sum of money, & devised & bequeathed certain other property real & personal to his other children, & declared that the money & other effects then already advanced & delivered by him to his children should be deemed advancements, & that they should not be required to account for same; averring that the matters of set-off were money & effects so advanced, etc.:—*Held*: both these replications were bad.—*GULLIVER v. GULLIVER* (1856), 1 H. & N. 174; 25 L. J. Ex. 341; 27 L. T. O. S. 189; 2 Jur. N. S. 1051; 4 W. R. 653; 156 E. R. 1165.

Annotation:—*Refd. Bartlett v. Wells* (1862), 1 B. & S. 836.

7689. Set-Off of statute barred debt—How far available.]—The principle that exors. may set off & retain a legacy as against a statute barred debt due to their testator, has no application where debtor is claiming a legal right & not merely seeking testator's bounty; in such a case the exors. have no higher right of set-off than their testator would have had.—*DINGLE v. COPPEN, COPPEN v. DINGLE*, [1899] 1 Ch. 726; 68 L. J. Ch. 337; 79 L. T. 693; 47 W. R. 279.

Annotations:—*Mentd. Powell v. Brodhurst*, [1901] 2 Ch. 160; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385.

SUB-SECT. 8.—JUDGMENTS.

A. In General.

7690. Where several executors—Some not appearing—Judgment against all.]—Debt against two exors., one confesses, the other makes default, judgment is *de bonis testatoris* against both. If on a *fi. fa.* upon this a *devastavit* be returned against the defaulter, the *sci. fa.* & execution *de bonis propriis* is against him alone.—*ANON.* (1562), 2 Dyer, 210 a; 73 E. R. 463.

PART VII. SECT. 2, SUB-SECT. 8.—A.

a. Form of judgment—Payment in due course of administration—Effect of admission of assets.]—The proper form of judgment in Alberta against exors. or administrators in respect of a liability of deceased, is a judgment

for payment in due course of administration; unless there is on their part a distinct affirmative admission of assets sufficient to pay all creditors of the estate, in which event the judgment creditor may, at his election, have judgment either against the exors. or administrators personally or

judgment for payment in due course of administration.—*NORTHERN CROWN BANK v. WOODCRAFTS, LTD.*, [1919] 2 W. W. R. 347.—CAN.

b. Action against executor for recovery of legacy—Non-appearance of defendant—Order for account.]—In an

Sect. 2.—Actions against representative: Sub-sect. 1
8, A., B. (a) & (b), & C.]

7691. ———.]—In debt against three exors., if one of them on summons confess the action, & judgment be *de bonis testatoris* against all, but *si non de bonis propriis* against him who appeared, the others cannot be taken in execution on a *sci. fa.*, although a *devastavit* be found & two *nilis* returned.—**PROCTOR v. CHAMBERLAINE** (1639), Cro. Car. 564; 79 E. R. 1085.

7692. ———.]—Where there are several exors., & only some of them appear & plead, judgment must be against them all; but execution *de bonis propriis* shall go against him that has appeared (*per Cur.*).—**ANON.** (1691), 12 Mod. Rep. 10; 88 E. R. 1131.

7693. ———.]—**ROUS v. ETHERINGTON**, No. 7562, *ante*.

B. After Plea of plene administravit.

(a) *In General.*

7694. Upon failure of plea—Judgment *de bonis testatoris*.]—**ANON.** (1537), No. 7666, *ante*.

7695. Where assets found for less than claim—Whether judgment for full amount.]—(1) An exor. shall only be charged to the amount of the assets which come to his hands & not for the wrong or *devastavit* of his companion.

(2) On assets found judgment shall be for the whole debt but the execution shall be only for the assets found.—**HARGTHORPE v. MILFORTH** (1594), Cro. Eliz. 318; 78 E. R. 568.

Annotations:—As to (1) Rejd. Nation v. Tozer (1834), 4 Tyr. 561; *Champneys v. Browne* (1735), Barnes, 440.

7696. ———.]—On assets found judgment shall be for the entire debt, but the execution shall be only for the assets in hand; & a *sci. fa.* may be had afterwards on the judgment.—**WATERHOUSE v. WOODSTREET** (1597), Cro. Eliz. 592; 78 E. R. 835.

7697. ———.]—If debt be brought against an exor., who pleads that he has fully administered; & it is found that he has assets to £40, whereas the debt is £60, a judgment shall be given for the £60 against debt.; & upon that judgment, if more assets come after to the exor.'s hand, pltf. may have a *sci. fa.*—**NEWMAN & BABINGTON'S CASE** (1610), Godb. 178; 78 E. R. 108.

7698. ———.]—**PERRYMAN v. WESTWOOD** (1616), cited in 1 Vent. at p. 95; 86 E. R. 66.

7699. ———.]—On *plene administravit*, pltf. shall have judgment for the entire debt, though assets to a less amount be found.—**SNAPE v. NORGATE** (1629), Cro. Car. 167; 79 E. R. 745.

Annotation:—Mentd. Curlewis v. Mornington (1858), 27 L. J. Q. B. 269.

7700. ———.]—If an exor. plead *plene administravit* & it is found against him, pltf. shall have judgment for the entire debt; execution for assets found; & a *sci. fa.* for the residue.—**DORCHESTER v. WEBB** (1634), Cro. Car. 372; W. Jo. 345; 79 E. R. 924.

Annotations:—Rejd. Noell v. Nelson (1670), 2 Saund. 226; *Mara v. Quin* (1794), 6 Term Rep. 1. *Mentd. Cago v.*

Acton (1697), 1 Ld. Raym. 515; *Caweth v. Phillips* (1699), 1 Ld. Raym. 605; *Wangford v. Wangford* (1704), 11 Mod. Rep. 38; *Ford v. Beech* (1848), 11 Q. B. 852.

7701. ———.]—In a writ of error upon a judgment in C. B. in an action of debt against exors., who pleaded fully administered, & the issue being whether assets or no, it was found that they had assets for part only; & judgment was given to recover the whole debt.—**GAWDY v. CONGHAM** (1647), Aleyn, 37; 82 E. R. 903.

7702. ———.]—Of judgment & execution against an exor., upon a plea of *plene administravit*, when assets are found sufficient to pay but part of the debt.

Debt upon an obligation of £20 against an exor. who pleaded *plene administravit* & assets being found of £10 pltf. had judgment *quod recuperet* £10, whereas it ought to have been a judgment for the whole, & execution only for £10, unless it were returned that he had wasted, & then he might have had *sci. fa.* when more assets came to debt.'s hands; & it was held to be erroneous.—**OXENDAM v. HOBODY** (1673), Freem. K. B. 351; 89 E. R. 262; *sub nom.* **HOBODY v. OXENDEN**, 3 Keb. 239.

7703. ———.]—**HARRISON v. BECCLES** (1769), cited in 3 Term Rep. at p. 688; 100 E. R. 805.

Annotations:—Consd. Erving v. Peters (1790), 3 Term Rep. 685. *Folld. Fielden v. Fielden* (1822), 1 Sim. & St. 255. *Rejd. Hooper v. Summersett* (1810), Wright, 16.

7704. ———.]—**JACKSON v. BOWLEY**, No. 7664, *ante*.

7705. Where assets found in hands of one executor—Judgment against him only.]—**BELLEW v. JUCKLEDEN** (1639), 1 Roll. Abr. 929.

7706. ———.]—On a plea by several exors. that they have fully administered if some are shown to have assets in their hands, & the others not, the latter are entitled to a verdict.—**PARSONS v. HANCOCK** (1829), Mood. & M. 330, N. P.

Annotation:—Mentd. Stearn v. Mills (1833), 4 B. & Ad. 657.

7707. ———.]—The general rule is that a plea is an entire thing, & bad altogether if disproved in part; but to this rule there are exceptions which have been long established. For instance . . . where two exors. join in a plea of *plene administravit*, & assets are proved to be in the hands of one only (**PARKE, B.**).—**COUSINS v. PADDON** (1835), 2 Cr. M. & R. 547; 1 Gale, 305; 5 Tyr. 535; 5 L. J. Ex. 49; 150 E. R. 234.

Annotations:—Mentd. Broomfield v. Smith (1836), 1 M. & W. 542; *Dickon v. Neale* (1836), 1 M. & W. 556; *Goldamid v. Raphael* (1836), 3 Scott, 385; *Gregory v. Hartnoll* (1836), 1 M. & W. 183; *Hayselden v. Staff* (1836), 5 Ad. & El. 153; *Jones v. Nanney* (1836), Tyr. & Gr. 634; *Green v. Marsh* (1837), Will. Woll. & Dav. 343; *Flischer v. Aldi* (1838), 7 L. J. Ex. 229; *Eastmure v. Laws* (1839), 7 Scott, 461; *Kilner v. Bailey* (1839), 5 M. & W. 382; *Tuck v. Tuck* (1839), 5 M. & W. 109; *Falcon v. Benn* (1841), 2 Q. B. 314; *Turner v. Diaper* (1841), 2 Man. & G. 241; *Lord v. Ferrand* (1844), 13 L. J. Ex. 111; *Ford v. Beech* (1846), 11 Q. B. 842; *Rodgers v. Maw* (1846), 15 M. & W. 444; *Roberts v. Campbell* (1847), 10 L. T. O. S. 183; *Roche v. Champagne* (1847), 16 L. J. Ex. 249; *Wilkinson v. Kirby* (1854), 15 C. B. 430; *Parr v. Jewell* (1855), 16 C. B. 684; *Tonge v. Chadwick* (1856), 2 Jur. N. S. 232; *Traherne v. Gardner* (1857), 8 E. & B. 161.

7708. Plea of *plene administravit præter*—Judgment for amount admitted.]—**LOCKYER v. COWARD** (1770), 3 Wils. 52; 95 E. R. 928.

action against an exor. for the amount of a legacy & interest when debt. does not appear, pltf. is held entitled in the first instance to an order for an account, but not to final judgment.—**PIKE v. KENOUE** (1900), 8 Nfld. L. R. 369.—**NFLD.**

PART VII. SECT. 2, SUB-SECT. 8.—
B. (a).

7695 i. Where assets found for less than claim—Whether judgment for full amount.]—On plea of *plene administravit*, where assets were admitted to an

amount less than the claim:—*Held*: judgment should be only for the value of the assets proved, & not for the amount of the debt.—**FISHER v. TRUEMAN** (1853), 10 U. C. R. 617.—**CAN.**

(b) *Judgment quando acciderint.*

7709. May be taken immediately.]—On *plene administravit* pleaded by an exor., pltf. may immediately take judgment of assets *quando acciderint*.—SHIPLEY'S CASE (1611), 8 Co. Rep. 134 a; 77 E. R. 677.

Annotations:—*Consd.* *Dorchester v. Webb* (1634), Cro. Car. 372; *Erving v. Peters* (1790), 3 Term Rep. 685. *Fold.* *Noell v. Nelson* (1670), 2 Wms. Saund. 214. *Refd.* *Brickhead v. York* (Archbp.) (1617), Hob. 197; *Osberston v. Stanhop* (1674), Freem. K. B. 160.

7710. —.]—On *plene administravit* by an exor., pltf. may immediately take judgment of assets *quando acciderint*. A *misericordia* entered against exors. for their delay, because it was not said in the record that they came the first day.—NOELL v. NELSON (1670), 2 Wms. Saund. 214; 2 Keb. 671; 1 Lev. 286; 1 Sid. 448; 1 Vent. 94; 85 E. R. 1011, H. L.

Annotations:—*Consd.* *Erving v. Peters* (1790), 3 Term Rep. 685; *Mara v. Quin* (1794), 6 Term Rep. 1; *Smith v. Tateham* (1848), 2 Exch. 205. *Refd.* *Brickhead v. York* (Archbp.) (1617), Hob. 197. *Mentd.* *Phillips v. Bury* (1694), Skin. 447; *Reeves v. Ward* (1835), 2 Bing. N. C. 235.

7711. —.]—An extrix. pleaded the general issue, & *plene administravit*, & afterwards moved for judgment as in case of a nonsuit. The ct. discharged that rule upon a peremptory undertaking to try the first issue, & allowed pltf. to withdraw his replication to the second plea, & take judgment of assets *quando*, etc.—LUCAS v. JENNER (1833), 1 Cr. & M. 597; 2 Dowl. 64; 3 Tyr. 564; 149 E. R. 538.

7712. Where assets found for part—Judgment *quando* for residue.]—PERRYMAN v. WESTWOOD (1616), cited in 1 Vent. at p. 95; 86 E. R. 66.

7713. — — —.]—HARRISON v. BECCLES (1769), cited in 3 Term Rep. at p. 688; 100 E. R. 805.

Annotations:—*Consd.* *Erving v. Peters* (1790), 3 Term Rep. 685; *Hooper v. Summersett* (1810), Wight. 16. *Apld.* *Fielden v. Fielden* (1822), 1 Sim. & St. 255.

7714. What assets covered by judgment—Real estate.]—In case of judgment recovered against an heir, who has a reversion in fee, which is only assets *cum acciderit*; ct. will not decree a sale of the reversion, but the creditor must wait till it falls.—FORTREY v. FORTREY (1690), 2 Vern. 134; 1 Eq. Cas. Abr. 275; 23 E. R. 694.

7715. — — —.]—A lessor covenanted with his lessee for quiet enjoyment of the demised premises, & afterwards devised his real estate, subject to & charged with the payment of his debts. After the death of the lessor, the lessee was evicted, & brought his action of covenant against the exors. of the lessor, who pleaded *plene administravit*; whereupon the lessee took out judgment of assets, *quando*, etc., & procured the damages to be assessed upon a writ of inquiry. He then filed his bill against the devisees of the

lessor, for satisfaction of the damages & costs out of the real estate of the lessor devised by his will:—*Held*: although damages recovered in an action of covenant brought in respect of breaches of covenant happening after the death of testator, were not a debt within 3 Will. & Mar., c. 14, yet they were a debt payable out of the real estate of testator, under the charge of debts thereon created by his will.—MORSE v. TUCKER (1846), 5 Hare, 79; 15 L. J. Ch. 162; 6 L. T. O. S. 389; 10 Jur. 173; 67 E. R. 835.

Annotations:—*Refd.* *Re St. George's Steam Packet Co. Hamer's Devisees' Case* (1852), 2 De G. M. & G. 366; *Varlo v. Faden* (1859), 1 De G. F. & J. 211.

See, now, Land Transfer Act, 1897 (c. 65) s. 1 (4); Administration of Estates Act, 1925 (c. 23), s. 3.

7716. — Assets received before judgment.]—TAYLOR v. HOLMAN & ROBINS (1764), Bull. N. P. 5th ed. 169.

Annotation:—*Expld. & Distd.* *Smith v. Tateham* (1848), 2 Exch. 205.

7717. — Assets received since issue of writ.]—The judgment of assets *quando acciderint* embrace not only the assets received by the exor. after the judgment is signed, but also such assets as came into or ought to be in his hands between the issuing of the writ, or the plea, & the judgment in the due course of administration. To an action of *assumpsit* against debt. as exor., debt. pleaded *plene administravit præter* £10, which was no sufficient to satisfy a specialty debt. Pltf. replied that after the commencement of the suit, & after plea pleaded, certain goods of deceased had come into the exors.' hands, in value above the sum of £10, wherewith debt. ought to have satisfied the causes of action mentioned in the declaration:—*Held*: bad, as unnecessary & unprecedented; & the proper course was to take the ordinary judgment of assets *quando acciderint*.—SMITH v. TATEHAM (1848), 2 Exch. 205; 5 Dow. & L. 732; 17 L. J. Ex. 198; 11 L. T. O. S. 128; 154 E. R. 466.

Annotations:—*Refd.* *Ellis v. Watt* (1849), 13 J. P. 748. *Mentd.* *Newington v. Levi* (1871), 19 W. R. 473.

7718. For what amount judgment taken—Debt & costs.]—In *assumpsit* against an exor. he pleaded a retainer & *plene administravit præter* & pltf., admitting the truth of the pleas, took judgment of assets *quando acciderint*:—*Held* he was entitled to enter it up for the debt & costs.—COX v. PEACOCK (1835), 1 Hodg. 272; 1 Scott, 125.

C. Personal Liability of Representative.

7719. Whether representative personally liable—Plea of release to executor.]—ANON. (1564), Dal 70; 123 E. R. 281.

7720. — — —.]—Judgment against an exor. on a covenant by testator, shall be *de bonis testatoris*, although the breach was wilfully made

acciderint, or of assets *in futuro*, is to be construed as an admission by the judgment creditor that the administrator had not, when the action was commenced, assets to satisfy the claim.—*Re SMITH, CANADIAN GUARANTY TRUST CO. v. DELISLE*, [1924] 4 D. L. 1 1288; 3 W. W. R. 815.—CAN.

PART VII. SECT. 2, SUB-SECT. 8.—(

d. Whether representative personally liable—Defendant not charged as executor.]—Where a summons was not

PART VII. SECT. 2, SUB-SECT. 8.—B. (b).

7712 i. Where assets found for part—Judgment *quando* for residue.]—The practice in force before Judicature Act, under which pltf. taking issue on & falling on an exor.'s plea of *plene administravit*, could not have judgment of assets *quando*, no longer exists, & it is now proper to give pltf. judgment of assets *quando*, if his debt be established & such a judgment be desired.—MCKIBBON v. FERGAN (1893), 21 A. R. 87.—CAN.

7714 i. What assets covered by judgment—Real estate.]—On an issue of *plene administravit* real estate of an intestate unsold is not assets in the hands of his administrator for payment of debts.—CRAWFORD v. WILLOX (1850), 1 All. 634.—CAN.

7714 ii. — — —.]—CONSOLIDATED BANK OF CANADA v. CAMERON (1878), 29 C. P. 71.—CAN.

c. Effect of judgment *quando*—As admission by plaintiff of insufficiency of assets.]—A judgment of assets *quando*

Sect. 2.—Actions against representative: Sub-sect. 8, C. & D.; sub-sect. 9, A.]

by the exor. If an exor. plead a release to himself, & it be found against him, judgment shall be *de bonis propriis si non, etc.*—BRIDGMAN v. LIGHTFOOT (1623), Cro. Jac. 671; 79 E. R. 581; *sub nom.* BRIDGMAN'S CASE, Jenk. 320.

Annotation:—*Refd.* Hooper v. Summersett (1810), Wight. 16.

7721. — Plea of release to testator.]—ANON. (1564), Dal. 70; 123 E. R. 281.

7722. — Plea of previous judgment—Obtained by fraud.]—BRASEBRIDGE v. BASKERVILLE (1587), 1 And. 150; 123 E. R. 402.

7723. — ———.]—To a plea of unsatisfied judgments by an exor., pltf. may reply fraud as to one, without answering the rest. Judgment for pltf. is *de bonis testatoris*.—ENT v. WITHERS (1678), Freem. K. B. 467; 3 Keb. 825; 2 Lev. 209; 1 Vent. 321; 89 E. R. 349; *sub nom.* WITHERS v. ENT, 3 Keb. 797.

Annotations:—*Refd.* Davenport v. Calne (1687), Comb. 47; Berwick v. Andrews (1703), 2 Ld. Raym. 971. *Mentd.* Gould v. Gapper (1804), 1 Smith, K. B. 528.

7724. — Action on covenant broken by executors.]—Judgment against exors. for covenant broken by them, shall be *de bonis testatoris*.—CASTILION v. SMITH (1620), Hut. 35; Hob. 283; 123 E. R. 1082.

7725. — ———.]—BRIDGMAN v. LIGHTFOOT, No. 7720, *ante*.

7726. — ———.]—An action of covenant was brought against the exor. & the breach assigned for default of reparation committed in the time of the exor., & damages were assessed. The question was moved whether the judgment should be *de bonis propriis*, or *de bonis testatoris*. Upon view of precedents, it was adjudged that it should be *de bonis testatoris*, for this is testator's covenant, & obliged the exor. as representing him, & therefore he ought to be sued by that name.—COLLINS v. THOROUGHGOOD (1631), Het. 171; Hob. 188; 124 E. R. 429.

7727. — Plea of *ne unques executor*.]—An exor. shall never be charged *de bonis propriis*, but where he falsely pleads *ne unques son executor*.—BULL v. WHEELER (1622), Cro. Jac. 647; 79 E. R. 559.

Annotations:—*Folld.* Bridgman v. Lightfoot (1623), Cro. Jac. 671. *Refd.* Hooper v. Summersett (1810), Wight. 16.

7728. — Defendant charged as executor—Though personally liable.]—BUCKLEY v. PIRK, No. 7621, *ante*.

7729. — When judgment by default.]—If judgment go by default against an exor., it can

only be *de bonis testatoris*; but if against the heir, it may be *de bonis propriis*.—KINASTON v. CLARK (1741), 2 Atk. 204; 26 E. R. 526.

Annotations:—*Refd.* Galton v. Hancock (1743), 2 Atk. 427; *Re* Lacey, Howard v. Lightfoot, [1907] 1 Ch. 330. *Mentd.* Tyndale v. Warre (1821), Jac. 212.

7730. — Judgment on account stated with executor.]—In an action against an administrator, on promises of the intestate, an *insimul computassent* with the administrator, as such, of money due from the intestate, does not make him personally liable.—SEGAR v. ATKINSON (1789), 1 Hy. Bl. 102; 126 E. R. 62.

Annotations:—*Consd.* Powell v. Graham (1817), 1 Moore, C. P. 305. *Refd.* Thompson v. Stent (1808), 1 Taunt. 322.

D. Effect of Judgment as Admission of Assets.

7731. Judgment suffered by default.]—Judgment against an administrator by confession or default *pendente lite*, is an admission of assets, & he is estopped to say the contrary on a *devastavit* returned.—ROCK v. LAYTON (1700), 1 Com. 87; 1 Ld. Raym. 589; 1 Salk. 310; 92 E. R. 973.

Annotations:—*Folld.* Ramsden v. Jackson (1737), 1 Atk. 292; Erving v. Peters (1790), 3 Term Rep. 685; Leonard v. Simpson (1835), 2 Bing. N. C. 176; *Re* Higgins's Trusts (1861), 2 Giff. 562. *Refd.* Farr v. Newman (1792), 4 Term Rep. 621; Hooper v. Summersett (1810), Wight. 16.

7732. — ———.]—If an exor. suffer judgment to go by default, it is an admission of assets.—TREIL v. EDWARDS (1704), 6 Mod. Rep. 308; 87 E. R. 1047.

7733. — ———.]—If an exor. or administrator confesses judgment, or suffers it to go against him by default, he thereby admits assets in his hands, & is estopped to say the contrary, in an action on such judgment suggesting a *devastavit*.—SKELTON v. HAWLING (1749), 1 Wils. 258; 95 E. R. 605.

Annotations:—*Refd.* Hope v. Bague (1802), 3 East, 2; Hooper v. Summersett (1810), Wight. 16.

7734. — ———.]—In debt upon a judgment by default, against deft. as exor., the production of the judgment & of a *testatum fi. fa.* upon which the sheriff had returned *nulla bona testatoris*, & a levy of costs *de bonis propriis*:—*Held*: unanswerd, sufficient evidence of a *devastavit*.—LEONARD v. SIMPSON (1835), 2 Bing. N. C. 176; 1 Hodg. 251; 2 Scott, 335; 4 L. J. C. P. 302; 132 E. R. 69.

Annotation:—*Refd.* Lee v. Park (1836), 1 Keen, 714.

7735. — ———.]—Petitioners obtained judgment by default in an action of debt against H., the exor. of a testator. Another creditor obtained a judgment, which was registered subsequently, against H. in respect of one of his own proper debts. Part of the former debt had been satisfied under a *fi. fa.* out of the goods & chattels of H.:—*Held*: the default of H. in the former action was an

addressed to P. as exor., & the judgment was not expressed to be against him as exor., it did not make the judgment against him personally, & it was sufficient to warrant an execution against the lands of deceased.—

f. — ———.]—Though there be a decree to administer assets, a creditor will not be restrained by injunction from proceeding at law to make the personal representative liable *de bonis propriis*.—MOLYNEUX v. SCOTT (1854), 3 I. Ch. R. 291.—IR.

PART VII. SECT. 2, SUB-SECT. 3.—D.

i. Judgment suffered by default.]—Pltf. had sued deft. as administrator on a special agreement by testator leging in different counts a promise & breach of testator & deft. respectively. Deft. suffered judgment by default as to the second count, & afterwards confessed judgment as to the first. In an action of debt on the judgment, suggesting a *devastavit*:—*Held*: the admission of assets accorded

by the pleadings could not be rebutted by showing that when the original judgment was recovered there were assets to satisfy it, but that afterwards, a sale being forced, they proved insufficient.—WALTON v. ANDREW (1857), 14 U. C. R. 694.—CAN.

7731 ii. — ———.]—If exors. allow judgment to go against them by default or fail to plead *plene administravit* they admit that the estate has sufficient assets to satisfy the claim.—RUTTLE v. ROWE, [1919] 3 W. W. R. 1120; 50 D. L. R. 346; 13 Sask. L. R. 79.—CAN.

7731 iii. — ———.]—BROWN v. FOX, [1921] 3 W. W. R. 665.—CAN.

7731 iv. — ———.]—WAHL v. NUGENT, [1923] 3 W. W. R. 168.—CAN.

e. — After decree to administer assets.]—A civil-bill decree against an administrator is in the nature of a judgment *de bonis propriis*, & the ct., though it will enjoin a creditor from enforcing such a decree against the assets when a decree to administer them has been pronounced, will not restrain him from enforcing it against the administrator personally.—POWELL v. POWELL (1849), 12 I. Eq. R. 501.—

admission of assets, &, as against the lands of H., petitioners were entitled to priority.—*Re HIGGINS'S TRUSTS* (1861), 2 Giff. 562; 30 L. J. Ch. 405; 3 L. T. 803; 7 Jur. N. S. 403; 66 E. R. 236.

7736. —.]—Deft. by failing to appear in the original action, must be taken to have admitted that she had in her hands sufficient property of deceased to meet pltf.'s claim. She was now estopped from denying the truth of that admission. It must be taken that she had in her hands sufficient to satisfy pltf.'s claim, & she had failed to satisfy it. In these circumstances she became personally liable to pltf. (BIGHAM, J.).—*THOMPSON & SONS v. CLARKE* (1901), 17 T. L. R. 455.

7737. *Plene administravit* not pleaded.]—If an exor. pleads *non est factum* to a bond, & not *plene administravit* likewise, he cannot after verdict take advantage of what might have been pleaded to the action. The plea of *non est factum* only is an admission of assets, & held the same as in a case of a judgment by default against an exor.—*RAMSDEN v. JACKSON* (1737), 1 Atk. 292; 26 E. R. 187, L. C.; *sub nom.* *RICHARDSON v. JACKSON*, West temp. Hard. 237.

Annotations:—*Folld.* *Erving v. Peters* (1790), 3 Term Rep. 685. *Reid.* *Jewsbury v. Mummery* (1872), L. R. 8 C. P. 56; *Humphries v. Humphries*, [1910] 1 K. B. 796.

7738. —.]—If an exor. plead, to an action on bond, payment, & omit to plead *plene administravit*, & a verdict be given against him on such plea; it operates as an admission of assets in an action founded on that judgment, suggesting a *devastavit*.—*ERVING v. PETERS* (1790), 3 Term Rep. 685; 100 E. R. 803.

Annotations:—*Folld.* *Re Higgins's Trusts* (1861), 2 Giff. 562. *Reid.* *Hooper v. Summersett* (1810), Wight. 16; *Leonard v. Simpson* (1835), 2 Bing. N. C. 176.

7739. —.]—If deft. exor. plead to the action, & do not plead *plene administravit*, the judgment against him is evidence of a *devastavit*; & if, after the production of such judgment upon a *scire fieri* inquiry, the sheriff returns *nulla bona testatoris*, the ct. will quash the return, & award a new *scire fieri* inquiry.—*PALMER v. WALLER* (1836), 1 M. & W. 689; 5 Dowl. 172; 2 Gale, 105; Tyr. & Gr. 1014; 5 L. J. Ex. 246; 150 E. R. 611.

Annotation:—*Reid.* *Lee v. Park* (1836), 1 Keen, 714.

7740. —.]—Prior to the decree for administration of an insolvent estate, a simple contract creditor obtained a common law judgment *de bonis testatoris* against the extrix. The extrix., who was also a simple contract creditor, did not plead *plene administravit* or set up her right of retainer in the common law action:—*Held*: the judgment was conclusive that the extrix. had assets to satisfy it, & she could not retain against

the judgment creditor in the administration action.—*Re MARVIN, CRAWTER v. MARVIN*, [1905] 2 Ch. 490; 74 L. J. Ch. 699; 93 L. T. 599; 54 W. R. 74; 21 T. L. R. 765.

7741. *Plene administravit* pleaded.—Judgment for plaintiff.]—An administrator, sued in the manor ct. for a debt due from the intestate, pleaded, no assets; replication, that he had assets: issue thereon, & verdict for pltf. Judgment was entered up, execution issued, & *nulla bona* returned. Pltf. declared in debt, setting forth these proceedings, & alleging that deft. had, at the time of the recovery, assets to be administered, & had eloiigned & wasted them. Plea that, at the time of the recovery, deft. had fully administered, etc., without this, that he eloiigned or wasted, etc. Issue thereon:—*Held*: deft. could not prove that all assets which had come to his hands at the time of the former recovery had been duly administered; & pltf. might take this objection, without having replied the former recovery as an estoppel.—*DAWSON v. GREGORY* (1845), 7 Q. B. 756; 14 L. J. Q. B. 286; 5 L. T. O. S. 241; 9 Jur. 688; 115 E. R. 673.

7742. *Plene administravit præter* pleaded.]—*COOPER v. TAYLOR*, No. 7632, *ante*.

7743. Effect of *cognovit*.]—An exor. gives a creditor of testator, who is suing him at law, a *cognovit*, with stay of execution: this is not an admission of assets.—*STIRLING v.* — (1826), 4 L. J. O. S. Ch. 223.

SUB-SECT. 9.—COSTS.

A. In General.

7744. Personal liability of representative—On *devastavit*.]—Where exor. shall pay costs. An exor. brought error of a judgment after a *devastavit*, & the ct. held he ought to pay costs on affirmance.—*CASWELL v. NORMAN* (1734), 2 Stra. 977; 2 Barn. K. B. 450; Cunn. 38; 93 E. R. 979.

7745. — Refusing to join with co-executor as plaintiff—Made a defendant.]—Where an exor. institutes a suit properly, & a co-exor. refusing to join in it is made deft. this co-exor. will not be allowed his costs.—*COLLYER v. DUDLEY* (1823), Turn. & R. 421; 2 L. J. O. S. Ch. 15; 37 E. R. 1163.

Annotation:—*Mentd.* *Sellar v. Griffin* (1863), 33 L. J. Ch. 6.

7746. — Costs of parties unnecessarily added as defendants—At request of representatives.]—A party against whom a decree to account had been made, died; & a bill was filed against his

77371. *Plene administravit* not pleaded.]—If an administrator deft. has not pleaded *plene administravit* he must be taken as admitting assets to satisfy the judgment.—*LANGSTAFF v. LANGSTAFF*, [1920] 2 W. W. R. 418; 13 Sask. L. R. 265.—CAN.

PART VII. SECT. 2, SUB-SECT. 9.—A.

g. Personal liability of representative—General rule.]—The proper form of a judgment against an exor. is that pltf. recover debt & costs out of the assets of testator if deft. have so much, but, if not, the cost out of deft.'s own property.—*HAWLEY v. HAND* (1919), 45 O. L. R. 272; 43 D. L. R. 384; 16 O. W. N. 44.—CAN.

nonnull—Plea of *ne*

unques executor.]—Exors. are liable to costs on a nonsuit in an action where *ne unques exor.* is pleaded.—*MITCHELL v. LONG* (1827), 1 N. B. R. (Chp.) 76.—CAN.

k. — On action for account.]—In a suit against an exor. for an account the ct., in the special circumstances, charged the exor. with the costs of the suit, & directed the account to be taken with annual rests.—*ERSKINE v. CAMPBELL* (1850), 1 Gr. 570.—CAN.

l. — Improper conduct.]—Where exors. had improperly dealt with a portion of the funds of the estate, by allowing one of their number to retain it in his hands at a low rate of interest, the ct. refused their costs prior to decree.—*ASHBOUGH v.*

BOUGH (1864), 10 Gr. 433.—CAN.

m. — —.]—Exors. may be deprived of their costs where they have improperly managed the affairs of the estate, though not guilty of any wilful misconduct.—*KENNEDY v. PINGLE* (1879), 27 Gr. 305.—CAN.

n. — —.]—Where an exor., by his misconduct in the management of the estate, causes a suit, & but for the fact of the suit having been brought the assets would have been dissipated, the ct. will not, as a general rule, allow such exor. his costs out of the estate, although no loss has been sustained.—*SIMPSON v. HORNE* (1880), 28 Gr. 1.—CAN.

o. — —.]—An administrator cannot be deprived of costs except for

Sect. 2.—Actions against representative: Sub-sect. 9, A., B. & C.; sub-sect. 10, A.]

representatives to continue the accounts. The representatives submitted by their answer, whether certain legatees were not necessary parties. Those legatees, having been made parties by amendment stated by their answer, that their legacies had been paid. The bill was dismissed as against them, with costs, to be paid by the pltf., who was to have them over against the representatives.—*TREVELYAN v. CHARTER* (1837), 11 L. J. Ch. 274.

7747. —.]—By a lease some print-works & certain articles, matters, & things on the premises were demised, with power to the tenant to replace any of the articles, matters, & things when worn out, & to add new ones & additional ones, & to add improvements on the premises, & it was covenanted that at the end of the term a valuation of the articles, matters & things, & of the improvements, should be made, & if they exceeded a certain sum the landlord should pay the tenant the difference. In an action by the tenant against the exor. of the landlord to recover the excess:—*Held*: as this was a covenant relating to chattels it did not run with the reversion, & the exor. was only liable on it in his representative character; & as it appeared on the record that he was exor., the judgment should be that pltf. do recover the debt & costs *de bonis testatoris*, if deft. have so much; & if not, then as to the costs, *de bonis propriis*.—*GORTON v. GREGORY* (1862), 3 B. & S. 90; 6 L. T. 656; 122 E. R. 35; *sub nom.* *GARTON v. GREGORY*, 31 L. J. Q. B. 302; *sub nom.* *GREGORY v. GORTON*, 10 W. R. 713, Ex. Ch.; *subsequent proceedings, sub nom.* *COWARD v. GREGORY* (1866), L. R. 2 C. P. 153.

7748. — Unnecessary defence.]—A. filed her bill for payment of a particular legacy given her by the will of B., & also for payment to her as one of the next of kin of B., of one-third part of B.'s residuary personal estate, against the three exors. of B., & the husbands of two of them, who were married women, & who were two of B.'s next of kin. The defts., by their answer, disputed the legitimacy of A., although she was described in testator's will as his grand-daughter. On a reference directed, A.'s legitimacy was proved:—*Held*: pltf. was entitled to have her costs, relating to the inquiry into her legitimacy, paid personally by defts.—*GREEN v. CHALLENGOR* (1840), 9 L. J. Ch. 183.

7749. — —.]—A casket containing diamonds was sent to pltf.'s father, accompanied by a letter to the effect that the diamonds were to be considered as heirlooms in the family, & were to be left to the eldest son & heir, after the

death of his mother, as long as the family should continue. On the death of pltf.'s mother, who survived her husband, one of her exors., the other having renounced, refused to deliver up the diamonds to pltf., the heir, & raised the question as to their forming part of the assets of the mother:—*Held*: the diamonds formed no part of the assets of the mother, but belonged to the family as heirlooms, & ordered that the exor. who raised the question should pay the costs.—*SEALE v. HAYNE* (1863), 3 New Rep. 189; 9 L. T. 570; 9 Jur. N. S. 1338; 12 W. R. 230.

Annotation:—*Mentd.* *Shelley v. Shelley* (1868), 37 L. J. Ch. 357.

B. On Plea of plene administravit.

7750. Plea pleaded solely—Action discontinued—Representative not entitled to costs.]—A legatee brought a suit for his legacy. The exor. admitted the legacy, but pleaded *plene administravit*, & exhibited an inventory & account. The legatee proceeded no further, & the exor. was dismissed, but without costs.—*RUMSEY v. TIZARD* (1754), 1 Lee, 537; 161 E. R. 198.

7751. — Judgment of assets quando—Whether costs given out of assets quando.]—*BATT v. DESCHAMPS* (1783), 2 Tidd's Practice 9th ed. 980. *Annotation*:—*Reid.* *Cox v. Peacock* (1835), 1 Hodg. 272.

7752. — — —.]—On a judgment of assets *quando acciderint*, upon a plea by an exor. of a judgment outstanding, & *plene administravit*, pltf. is entitled to costs *de bonis testatoris*.—*DE TASTET v. ANDRADE* (1817), 1 Chit. 629, n.

7753. Plea joined with other pleas—Joinder of issue on all pleas—Representative successful on plene administravit—Whether entitled to general costs of action.]—Where an exor. pleads the general issue & *plene administravit*, & the former plea is found against him, & the latter for him, he is entitled to the *postea*.—*COCKSON v. DRINKWATER* (1783), 3 Doug. K. B. 239; 90 E. R. 633.

7754. — — — —.]—The exor. having pleaded *non assumpsit* as well as *plene administravit*, & *plene administravit præter*, etc., & thereby forced pltf. to go to trial; pltf. obtaining a verdict on the *non assumpsit*, & being entitled to judgment of assets *quando acciderint*, is entitled to the general costs of the trial, though the issue of *plene administravit* was found for deft.—*HINDSLEY v. RUSSELL* (1810), 12 East, 232; 104 E. R. 90.

Annotations:—*Reid.* *Marshall v. Wilder* (1829), 4 Man. & Ry. K. B. 607; *Squire v. Arnison* (1881), 48 J. P. 758.

—.]—Upon the issue of *non assumpsit* & *plene administravit*, pltf. joined issue, & omitted to pray judgment of assets *quando*. The first issue being found for pltf., & the second for deft., deft. is entitled to the

misconduct.—*McGREGOR v. McGREGOR* (1889), 7 N. Z. L. R. 538.—N.Z.

p. — Judgment in default of appearance—Mortgage action.]—Where an action to enforce a mtge. by foreclosure is brought against the exors. of a deceased mtgor., & an order for payment of the mtge. debt is asked against the exors., & judgment is entered for default of appearance, only the additional costs occasioned by the latter claim should be taxed against the exors. personally.—*MILES v. BROWN* (1893), 15 P. R. 375.—CAN.

q. When payable out of the estate—Executor acting reasonably in resisting claim.]—Where a father for several years had supported his married daughter & her children, but made no claim against the husband during his lifetime, & after death made a claim

against his estate:—*Held*: although the ct. considered pltf. entitled to be paid his demand, the exor. in the peculiar circumstances was justified in having resisted payment without the sanction of the ct., & was entitled to be paid his costs.—*GRIFFITH v. PATERSON* (1873), 20 Gr. 615.—CAN.

r. — —.]—*McKELLAR v. PRANGLEY* (1878), 25 Gr. 545.—CAN.

s. — —.]—*RASER v. McQUADE* (1909), 11 B. C. R. 161.—CAN.

t. When representative's costs paid by plaintiff—Charge of improper conduct—Not sustained.]—Where pltf. charged improper conduct against the administratrix, which was not sustained in evidence, he was ordered to pay all costs other than of an ordinary administration suit.—*McNEIL*

—.]—*MILLER v. McNAUGHTON* (1865), 11 Gr. 308.—CAN.

b. — — —.]—*MOODIE v. LESLIE* (1866), 12 Gr. 537.—CAN.

c. — — —.]—*HUTCHINSON v. BARGENT* (1870), 17 Gr. 8.—CAN.

d. — — —.]—*ROSEBATCH v. PARRY* (1879), 27 Gr. 193.—CAN.

PART VII. SECT. 2, SUB-SECT. 9.—B.

e. Plea pleaded solely—Judgment against assets quando.]—Where an extrix. successfully raises the defence of *plene administravit* on a motion for judgment, such extrix. is entitled to costs of the motion & action against pltf.; but pltf. is entitled to judgment against assets *quando* for his debt, with the costs of action & motion, also

postea & general costs.—HOGG v. GRAHAM (1811), 4 Taunt. 135; 128 E. R. 280.

7756. — — — — —.]—*Assumpsit* on a promissory note drawn by A., testator of deft., payable to pltf. B. Pleas, *non assumpsit*, Stat. Limitations, & *plene administravit*. The first two issues were found for pltf.s: the last for defts. The prothonotary gave pltf. costs on the whole & the *postea*; to the defts. he gave costs on the third plea only. On a motion that the prothonotary review his taxation:—*Held*: deft. having established an absolute bar, was entitled to the *postea* & the general costs; & the prothonotary must review his taxation.—RAGG v. WELLS (1817), 8 Taunt. 129; 129 E. R. 332.

7757. — — — — —.]—Where an extrix. pleaded, *non assumpsit*, *ne unques extrix.*, & *plene administravit*; & issues on the first pleas were found for pltf., & on the last for deft.:—*Held*: the last plea, being a complete answer to the action, deft. was entitled to the general costs of the trial.—EDWARDS v. BETHEL (1818), 1 B. & Ald. 254; 106 E. R. 94.

Annotation:—*Consd.* Marshall v. Willder (1829), 9 B. & C. 655.

7758. — — — — —.]—(1) Where an exor. pleads *non assumpsit* by his testator, & also *plene administravit*, & pltf. takes issue upon both pleas, & the issue upon *non assumpsit* is found for pltf., & that upon *plene administravit* for the exor., the latter is entitled to his general costs in the cause, upon the rule that there is one plea which answers the action.

(2) But where to such pleas pltf. takes issue upon the plea *non assumpsit*, & admits the truth of the plea of *plene administravit*, taking judgment of assets *quando acciderint*, & the issue upon the plea of *non assumpsit* is found for pltf., he is entitled to the general costs against the exor., upon the principle, that he forced pltf. on to trial, by a plea which he could not support.—MARSHALL v. WILLDER (1829), 9 B. & C. 655; 4 Man. & Ry. K. B. 607; 7 L. J. O. S. K. B. 325; 109 E. R. 245.

— — — — —.]—An exor. who pleads *non assumpsit* & *plene administravit*, is entitled to the general costs of the cause, if he succeeds on the latter plea.—IGGULDEN v. TERSON (1834), 2 Dowl. 277; 4 Tyr. 309.

7760. — — — — —.]—*Plene administravit* admitted—Plaintiff entitled to general costs of action.]—MARSHALL v. WILLDER, No. 7758, *ante*.

C. On Plea of *plene administravit præter*.

7761. Plea joined with other pleas—Issue joined on all pleas—Representative successful on *plene administravit præter*—Liability for costs.]—In an action for breach of warranty by a testator the exor. pleaded *non assumpsit*, *plene administravit*, & *plene administravit præter* a sum of £183 10s. The jury found for pltf. on the first two issues & for deft. on the third, & reduced the amount of pltf.'s claim from £2,700 to £575:—*Held*: the general costs of the action must be *de bonis testatoris et si non de bonis propriis* except on the

plea of *plene administravit præter*, the costs of which issue pltf. would have to pay.—SQUIRE v. ARNISON (1884), Cab. & El. 365; 48 J. P. 758; 1 T. L. R. 67.

SUB-SECT. 10.—EXECUTION.

A. In General.

Execution generally.]—See EXECUTION, Vol. XXI., pp. 407 *et seq.*

7762. Form of writ—Must follow terms of judgment.]—A *sci. fa.* on a judgment must pursue the terms of the judgment. Therefore where an exor. pleads *plene administravit* & pltf. does not take issue on it, but takes a judgment of assets *quando acciderint*, the *sci. fa.* on that judgment must only pray execution of such assets as have come to the exor.'s hands since the former judgment; & if it pray execution of assets generally, without confining it to that time, it cannot be supported. But if the exor. receive assets between the time of pltf.'s suing out the writ in the first action & the judgment, the ct. will permit pltf. to amend his judgment as to the time, by making it a judgment as of that term when he could, at the soonest, have entered it up, unless deft. can show that in point of fact some injustice will be done by it in the particular case.—MARA v. QUIN (1794), 1 Term Rep. 1; 101 E. R. 403.

Annotations:—*Consd.* Smith v. Tateham (1848), 2 Exch. 205. *Refd.* Jewesbury v. Mummery (1872), 42 L. J. C. P. 22.

7763. Garnishee proceedings—Decree in administration suit.]—Where, before an administration decree, the creditor of a deceased person had obtained judgment against deceased's extrix.; & a garnishee order *nisi* against a debtor to the estate, the ct., after decree, refused to restrain proceedings on the garnishee order.—FOWLER v. ROBERTS (1860), 2 Giff. 226; 5 W. R. 492; 66 E. R. 95.

7764. — — — — —.]—A judgment debtor who is an exor. or administrator is within the garnishee clauses of C. L. P. Act, 1854 (c. 125); & therefore, a debt due to such judgment debtor, in his representative capacity, may be attached by a judgment creditor of the exor. in same right.—BURTON v. ROBERTS (1860), 6 H. & N. 93; 29 L. J. Ex. 484; 158 E. R. 39.

7765. — — — — —.]—(1) A judgment creditor obtained a garnishee order *nisi* under C. L. P. Act, 1854 (c. 125), against the exors. of P., a debtor of the judgment debtor. At that time P.'s estate was being administered in the Ct. of Ch., & after the service of the garnishee order the exors. paid the personal estate in their hands into ct., & a sufficient sum to answer P.'s debt to the judgment debtor was carried to the separate account of the judgment debtor in the suit. The judgment debtor afterwards filed a petition for liquidation, & obtained an injunction restraining the judgment creditor from proceeding with his garnishee order. The trustee in the liquidation then applied in the suit for payment to him of the sum standing to

against assets *quando*.—MILLAR & Co. v. KEANE (1889), 14 L. R. Ir. 49.—IR.

f. — — — — —.]—COCKLE v. TREACY, [1896] 2 I. R. 267.—IR.

PART VII. SECT. 2, SUB-SECT. 9.—C.

7761 i. Plea joined with other pleas—

Issue joined on all pleas—Representative successful on plene administravit præter—Liability for costs.]—To an action upon covenant & in debt against an administrator, deft. pleaded as to \$5,000, payment, & to the whole declaration outstanding judgments & *plene administravit præter*. Pltf. suc-

ceeded upon the plea of payment & deft. succeeded upon the other plea:—*Held*: pltf. was entitled to the general costs of the action & deft. to the costs of the issue upon which he was successful.—MCARTHUR v. MACDONNELL (1886), 3 Man. L. R. 629.—CAN.

Sect. 2.—Actions against representative: Sub-sect. 10, A., B. (a) & (b), C. & D. (a) & (b).]

the separate account of the judgment debtor:—*Held*: there was no debt owing to the judgment debtor in the hands of the exors. of P. at the time when they were served with the garnishee order, within C. L. P. Act, 1854 (c. 125), ss. 61, 62, & consequently the judgment creditor had no charge on the fund in ct.

(2) If a garnishee order is made against the exors. of a debtor of the judgment debtor, it ought to appear on the face of it that they are sought to be charged as exors.—*STEVENS v. PHELIPS* (1875), 10 Ch. App. 417; 44 L. J. Ch. 689; 23 W. R. 716, L. JJ.

Annotations:—*Generally*, *Mentd.* *Re* London Cotton Mills Co., *Re* Brander (1876), 25 W. R. 109; *Re* Watt, *Ex p.* Joselyne (1878), 8 Ch. D. 327.

7766. — Where no judgment obtained.]—Creditors of testator in an action for administration of the real & personal estate of testator moved for an injunction to restrain the devisees of real estate of testator from dealing with a fund in ct., which was paid into ct. in a partition action between the devisees, & represented rents & profits of real estate of testator:—*Held*: the fund could not be attached by the creditors until a judgment in the creditors' action had been obtained.—*Re* MOON, *HOLMES v. HOLMES*, [1907] 2 Ch. 304; 76 L. J. Ch. 535; 97 L. T. 748; 51 Sol. Jo. 552.

Annotation:—*Consd.* *Re* Welch, *Mitchell v. Willders*, [1910] 1 Ch. 375.

—.]—*See* EXECUTION, Vol. XXI., pp. 617 et seq.

7767. Sequestration—Failure to pay money ordered.]—Writ of sequestration issued against the property of a personal representative, who was in default for non-compliance with an order for payment of money, without attachment of his person.—*SYKES v. DYSON* (1870), L. R. 9 Eq. 228; 39 L. J. Ch. 288; 21 L. T. 696.

7768. Equitable execution—Not granted in absence of personal representative.]—S. being entitled to a freehold subject to a mtge., a judgment creditor shortly before the death of S. applied for a receiver by way of equitable execution. The application was adjourned, & in the meantime S. died intestate. Two days after his death an order for a receiver was made without reviving the action or bringing the heir-at-law before the ct.:—*Held*: the order was ineffectual, having been made after the death of S. & in the absence of any person to represent his estate.

What is commonly called equitable execution is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law, & it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the ct. Assuming, therefore, that execution at law can be issued against the estate of a deceased person without any leave of the ct. (as to which *quære*) a receiver

by way of equitable execution cannot be appointed of the estate in the absence of the persons on whom the estate has devolved.—*Re* SHEPHARD, *ATKINS v. SHEPHARD* (1889), 43 Ch. D. 131; 59 L. J. Ch. 83; 62 L. T. 337; 38 W. R. 133; 6 T. L. R. 55, C. A.

Annotations:—*Reid.* *Blackman v. Fysh*, [1892] 3 Ch. 209; *Duke v. Davis*, [1893] 2 Q. B. 260; *Stewart v. Rhodes*, [1900] 1 Ch. 386. *Mentd.* *Holmes v. Millage*, [1893] 1 Q. B. 551; *Re* Potts, *Ex p.* Taylor, [1893] 1 Q. B. 648; *Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Minter v. Kent*, *Sussex & General Land Soc.* (1895), 72 L. T. 186; *Re* Goudie, *Ex p.* Official Receiver, [1896] 2 Q. B. 481; *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *Ellis v. Wadeson*, [1899] 1 Q. B. 714; *Thompson v. Gill*, [1903] 1 K. B. 760; *R. v. Selfe*, [1908] 2 K. B. 121; *Morgan v. Hart*, [1914] 2 K. B. 133.

—.]—*See* EXECUTION, Vol. XXI., pp. 664 et seq.

B. For Debts of Deceased.

(a) Judgment recovered in Deceased's Lifetime.

See, generally, EXECUTION, Vol. XXI., pp. 407 et seq.

7769. Execution awarded before death of testator—Whether binding on goods in hands of representative.]—A. recovered in debt, & had execution against B. Deft. B. died, & the sheriff levied the money upon the exors. of B. This was nought, for the writ was *fi. fa. de bonis & catallis* B., which cannot be after his death (*per* CUR.).—*THOROUGHGOOD'S CASE* (1598), Noy, 73; 74 E. R. 1041.

Annotations:—*Reid.* *Clark v. Withers* (1704), 2 Ld. Raym. 1072; *Giles v. Grover* (1832), 9 Bing. 128; *Ellis v. Griffith* (1846), 16 M. & W. 106.

7770. — — —.]—If deft. die after execution awarded, & before it is served, yet the *teste* of the writ binds the goods in the hands of his administrator.—*FARRER v. BROOKS* (1674), 1 Mod. Rep. 188; 86 E. R. 819.

7771. — — —.]—*Fi. fa.* delivered to the sheriff after deft.'s death but tested before is well enough.—*SPRINGER v. SOMMERVILLE* (1729), Bunb. 271; 145 E. R. 670.

7772. — — —.]—With respect to a *fi. fa.* the law is perfectly clear. . . . That writ directs the sheriff to seize the goods & chattels of deft.; & whatever goods & chattels he had at the time of the *teste* of the writ, or which may have come to his possession before the return of it, may be seized in the hands of his exors., except so far as Stat. Frauds may have effected an alteration in favour of purchasers (*PARKE, B.*).—*ELLIS v. GRIFFITH* (1846), 4 Dow. & L. 279; 16 M. & W. 106; 16 L. J. Ex. 66; 8 L. T. O. S. 166; 10 Jur. 1014; 153 E. R. 1118.

7773. — — —.]—*RANKEN v. HARWOOD, RANKEN v. BOULTON*, No. 8314, *post*.

7774. Execution awarded against representatives—Only binding on goods of testator.]—*Re* HASSEL (1627), Litt. 53; 124 E. R. 133.

7775. No power to obtain charging order—Until judgment obtained against representative.]—Under

PART VII. SECT. 2, SUB-SECT. 10.—B. (a).

g. Execution issued on *ex parte* order.]—Orders should not be made *ex p.* allowing issue of execution against goods of testator or intestate in the hands of an exor. or administrator.—*Re* ONTARIO TRUSTS CORPN. & *BEHMER* (1894), 26 O. R. 191.—CAN.

h. Priority of registered execu-

tions.]—Registered executions existing in debtor's lifetime have priority over an execution in a suit brought after debtor's death against his administrators.—*MERCHANTS BANK OF CANADA v. AMUNDSEN, Re* AMUNDSEN ESTATE & *MERCHANTS BANK OF CANADA*, [1920] 2 W. W. R. 202.—CAN.

k. Execution against legal representative of legal representative.]

The judgment-debtor under a simple money-decree died before execution was taken out against him. Execution of the decree was sought against his legal representative, into whose hands it was found that certain of the assets of deceased judgment-debtor had come; but before anything was recovered the legal representative died:—*Held*: the decree-holder was entitled to execute his decree against the legal representa-

Judgments Act, 1838 (c. 110), s. 14, there is no power after the death of a judgment debtor to make a charging order against his exor. in respect of a judgment debt of deceased, unless in some way judgment has been first obtained against the exor. *Qu.*: whether such a judgment can be obtained under the present practice. An order obtained by a judgment creditor after the death of the judgment debtor gave him liberty to issue execution against debtor's exor., & ordered that, unless sufficient cause were shown to the contrary, the interest of debtor in a sum of consols should stand charged with the amount of the judgment. Before the order was made absolute, judgment was pronounced for the administration of debtor's estate:—*Held*: the order could not be treated as charging the interest of the exor., & having regard to the judgment for administration, the ct. ought not to correct the form of the order; therefore, the order was bad.—*STEWART v. RHODES*, [1900] 1 Ch. 386; 69 L. J. Ch. 174; 82 L. T. 337; 48 W. R. 354; 16 T. L. R. 203; 44 Sol. Jo. 259, C. A.

(b) *Judgment recovered against Representative.*

7776. After plene administravit pleaded—Execution for assets found.]—*HARGTHORPE v. MILFORTH*, No. 7695, *ante*.

7777. ———.]—*WATERHOUSE v. WOOD-STREET*, No. 7690, *ante*.

7778. ———.]—*DORCHESTER v. WEBB*, No. 7700, *ante*.

7779. ———.]—*OXENDAM v. HOBODY*, No. 7702, *ante*.

C. *For Private Debts of Representative.*

See EXECUTION, Vol. XXI., pp. 505, 506, Nos. 791–802.

D. *Personal Liability of Representative.*

(a) *In General.*

7780. Necessity for proof of devastavit.]—If *nulla bona* be returned to a *fi. fa. de bonis testatoris*, & a *devastavit* be suggested on the roll, a writ of inquiry shall be directed to the sheriff, & if by inquisition the *devastavit* be found & returned, there shall be a *sci. fa. quare executionem non de bonis propriis*, to which, upon *scire feci* returned, the exor. may appear & traverse the inquisition; but if he make default, or it be found against him, or two *nihilis* be returned instead of *scire feci*, the judgment shall be *de bonis propriis*; but although he neglect to appear & traverse the *devastavit* returned, he may be relieved on *audita querela*.—*MOUNSON (LORD) v. BOURN* (1639), Cro. Car. 527; W. Jo. 417; 79 E. R. 1056.

Annotation:—*Reid. Rock v. Layton* (1700). 1 Ld. Raym. 589.

7781. Necessity for second action suggesting devastavit.]—Where judgment is obtained against

an exor. in an action on the bond of his testator, execution cannot be issued in the first instance against the goods of the exor., although he has been guilty of a *devastavit*, & has no goods of testator in his hands, but an action must first be brought suggesting a *devastavit*.—*WARD v. THOMAS* (1833), 2 Dowl. 87; 1 Cr. & M. 532; 2 L. J. Ex. 217; 149 E. R. 510.

7782. Necessity for previous writ de bonis testatoris—& return of devastavit.]—Pltfs., as holders, sued deft. E. H., jointly with another person, upon a bill of exchange accepted by her deceased husband in his lifetime & the writ of summons, which was directed to her as “E. H., extrix., etc., of H., deceased,” & was indorsed according to the Bills of Exchange Act, 1855 (c. 67), was served upon her on June 26. On July 10 following judgment for want of appearance was signed by pltfs. against her, describing her as “extrix. etc.,” & on the same day a writ of *ca. sa.* was issued thereon, directing the sheriff to “take E. H., extrix., etc., of H., deceased, etc., to satisfy the sum which pltfs. lately recovered against E. H., extrix., etc.,” whereupon she was taken & kept in prison for three or four days, when, on payment of debt & costs, etc., she was released. A rule nisi having been obtained to set aside the writ of *ca. sa.* on the ground that the judgment was against the deft. as extrix. & that no writ of *fi. fa. de bonis testatoris* had been issued, & no return of “*devastavit*” been made by the sheriff:—*Held*: discharging the rule, whatever may have been the form of the judgment it was impossible that an execution issued against deft., in her character of extrix., without a previous writ *de bonis testatoris*, & a return of *devastavit*, could be supported, & it was not a case in which, in the exercise of their discretion the ct. ought to impose any terms at all upon deft., who had suffered a considerable wrong at the hands of pltfs. They also declined to amend the proceedings.—*MCSTEPHENS v. HARTLEY* (1869), 20 L. T. 225.

7783. Judgment by default against one of several executors—Whether personal execution limited to executor in default.]—*ANON.* (1562), No. 7690, *ante*.

7784. ———.]—*PROCTOR v. CHAMBERLAINE*, No. 7691, *ante*.

7785. ———.]—*ANON.* (1691), No. 7692, *ante*.
Effect of judgment as admission of assets.]—*See* Sub-sect 8, D., *ante*.

(b) *Liability to Attachment.*

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 6 *et seq.*

7786. Not liable for attachment—Non-performance of undertaking entered into by deceased.]—No attachment against an administrator for not performing a rule of ct. entered into by the

tive of the legal representative to the extent of any assets of the original judgment-debtor which might have come into her possession.—*JAFRI BEGAM v. SAIRA BIBI* (1900), 1 L. R. 11 All. 367.—*IND.*

PART VII. SECT. 2, SUB-SECT. 10.—
B. (b).

1. General rule.]—Land which belonged to testator cannot be taken in execution on a judgment recovered against his exor. for a debt due by testator.—*DOE d. HARE v. MCCALL* (1828), 1 N. B. R. (Chp.) 90.—*CAN.*

m. Return of nulla bona—Judg-

ment for recovery de bonis testatoris.]—A judgment against an exor. to recover *de bonis testatoris* will warrant an execution against testator's lands, on the return of *nulla bona*.—*DOE d. JESSUP v. BARTLET* (1834), 3 O. S. 206.—*CAN.*

n. Who entitled to surplus—After sale in execution.]—Where lands have been sold by a sheriff under a *fi. fa.* upon a judgment against an exor. or administrator, the heir-at-law is entitled to recover the surplus from the sheriff.—*RUGGLES v. BEIKIE* (1834), 3 O. S. 276.—*CAN.*

o. Judgment against one of several

executors.]—Lands may be sold on a judgment against one of several exors. in the same manner as if it had been against all.—*DOE d. SMITH v. SHUTER* (1838), 5 O. S. 655.—*CAN.*

p. After ne unques executor pleaded.]—*MCDADE d. O'CONNOR v. DAFOR* (1858), 15 U. C. R. 386.—*CAN.*

PART VII. SECT. 2, SUB-SECT. 10.—
D. (b).

q. Not liable for attachment—Non-payment of sum awarded by arbitrator.]—Where exors. submitted to

Sect. 2.—Actions against representative: Sub-sect. 10, D. (b). Part VIII. Sect. 1: Sub-sects. 1, 2, 3 & 4. Sect. 2: Sub-sect. 1.]

intestate.—*NEWTON v. WALKER* (1741), Willes, 315; 125 E. R. 1191.

7787. — Failure to pay costs.]—An order on a person as administrator to pay costs is equivalent to an order to pay out of deceased's estate, & if the assets have been properly exhausted, no attachment will be granted for disobedience to such order. *Semble*: an administrator might be guilty of such misconduct as to make him personally liable for costs, but mere delay in taking out administration is not such misconduct.—*WILLIAMS v. DAVIES, In the Goods of WILLIAMS* (1864), 3 Sw. & Tr. 437; 4 New Rep. 301; 33 L. J. P. M. & A. 127; 10 L. T. 583; 28 J. P. 664.

7788. — Non-payment of debt—Debtors Act,

1869 (c. 62), s. 4.]—*Re WOODWARD, WOODWARD v. WOODWARD* (1886), 30 Sol. Jo. 753.

Annotation:—Expld. Re Bourne, Davey v. Bourne, [1906] 1 Ch. 697.

7789. — — — — —.]—Where a creditor has obtained in an administration action an order against the exor. for personal payment of his certified debt, & he is the only creditor of testator's estate, the fiduciary relation which originally existed between the exor. & the creditor is at an end; & the creditor is not entitled to put in force against the exor. the punitive jurisdiction reserved to the ct. under above Act, by issuing a writ of attachment, or to obtain an order for payment into ct. of money in the exor.'s hands, for the purpose of founding that jurisdiction.—*Re THOMAS, SUTTON, CARDEN & Co., LTD. v. THOMAS, [1912] 2 Ch. 348; 81 L. J. Ch. 603; 106 L. T. 996; 56 Sol. Jo. 571, C. A.*

Part VIII.—Administration by Court.

SECT. 1.—JURISDICTION.

SUB-SECT. 1.—OF CHANCERY DIVISION.

See, now, Jud. Act, 1873 (c. 66), s. 34 (3); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 56 (1).

7790. General rule.]—The granting administration is in the Ecclesiastical Ct., but the distribution does more properly belong to this ct. [Ct. of Ch.] (*TREVOR, M.R.*).—*SHUTE v. SHUTE* (1700), 2 Eq. Cas. Abr. 157; Prec. Ch. 111; 22 E. R. 135.

Annotation:—Mentd. Mundy v. Mundy (1793), 2 Ves. 122.

7791. Estate of deceased insolvent.]—The jurisdiction of this ct. [the Ct. of Ch.] to administer the estate of a deceased insolvent is not taken away by Judgments Act, 1838 (c. 110). Demurrer to a bill by the creditors' assignee of a deceased insolvent for the administration of his subsequently-acquired assets, overruled.

The official assignee not a necessary party to such a bill.—*GALSWORTHY v. DURRANT* (1860), 2 De G. F. & J. 466; 30 L. J. Ch. 402; 3 L. T. 427; 7 Jur. N. S. 113; 9 W. R. 290; 45 E. R. 702, L. C.

Reid. Re Smith, Green v. Smith (1883), 24 Ch. D. 672.

See Sect. 7, post.

7792. Estate of deceased lunatic.]—The Ct. of Ch., in the exercise of its ordinary equitable jurisdiction, can entertain a suit against a committee of a lunatic's estate, asking for an account of his dealings therewith during the period of his committee-ship. Where, therefore, persons claiming under the will of a deceased lunatic, made prior to his lunacy, instituted a suit against the committee of his estate, whom he had appointed as his exor., alleging fraudulent dealings on the part of the committee with the estate of the lunatic during his committee-ship, & praying for the usual administration decree, & for an account of his dealings with the lunatic's estate during such committee-ship, a demurrer by the com-

mittee to so much of the bill as asked for the account as last mentioned, upon the ground that the Ct. of Ch. had not jurisdiction to take such account, & that it should be taken in lunacy, was overruled.—*SCAMMELL v. LIGHT* (1802), 4 Giff. 127; 1 New Rep. 83; 32 L. J. Ch. 53; 7 L. T. 414; 8 Jur. N. S. 1122; 11 W. R. 83; 66 E. R. 618.

SUB-SECT. 2.—OF COUNTY COURT.

In general.]—See COUNTY COURTS, Vol. XIII., p. 473, Nos. 223-228; BANKRUPTCY, Vol. IV., p. 503, No. 4538.

Transfer to Chancery Division—Amount exceeding jurisdiction.]—*See COUNTY COURTS, Vol. XIII., p. 495, Nos. 448-454.*

SUB-SECT. 3.—FOREIGN DOMICIL AND ASSETS.

See, generally, CONFLICT OF LAWS, Vol. XI., pp. 300 et seq.

7793. Discretion of court—Though more important questions to be decided in foreign suit.]—This ct. [the Ct. of Ch.] may properly entertain a suit instituted to carry into execution the trusts of a will made in the Scottish form, & for administration of the real & personal estate of a testator who had, up to the time of his death, resided partly in England, though not domiciled there, & died possessed of personal estate in England, the bulk of his property being real & heritable property in Scotland, though it appeared that the more important questions arising in the suit would be determined in the Scottish cts., & this ct. might adopt any proceedings in the Scottish cts. This ct. would entertain such a suit, if only to clear the estate of debts:—*Held*: this question was one which could not properly be raised on a motion

sum,

to discharge an order for service of a copy of the bill on defts. abroad, defts. not having appeared, & the motion was refused.—**MEIKLAN v. CAMPBELL** (1857), 24 Beav. 100; 28 L. T. O. S. 351; 53 E. R. 295.

In what cases granted.]—See **CONFLICT OF LAWS**, Vol. XI., pp. 315, 386, Nos. 54, 627–634.

By what law governed.]—See **CONFLICT OF LAWS**, Vol. XI., pp. 386, 387, Nos. 635–637.

Restraint of foreign proceedings.]—See **CONFLICT OF LAWS**, Vol. XI., pp. 480–484, Nos. 1335–1365.

SUB-SECT. 4.—COURTS OF DOMINIONS AND DEPENDENCIES.

See cases *infra*.

SECT. 2.—PARTIES.

SUB-SECT. 1.—WHO MAY COMMENCE PROCEEDINGS.

See, generally, **PRACTICE**; R. S. C., Ord. 16, rr. 33, 34, 35, 38.

7794. Only persons having sufficient interest—Persons neither creditors nor legatees.]—Bill to discover a personal estate & will; defts. demur, for that plf's. are neither creditors nor legatees, & that defts. have proved the will, & if not duly proved plf's. have a remedy in the Spiritual Ct.

The demurrer will be allowed (*per CUR.*).—**BLONDELL v. PANNETT** (1673), *Cas. temp. Finch*, 88; 23 E. R. 47.

PART VIII. SECT. 1, SUB-SECT. 4.

r. *Probate Court—Removal of executors.]—*Where a bill was filed by devisees against exors. of their testator's will, alleging the inability of the exors. to attend to the trusts of the will on account of bodily infirmities, & praying for the appointment of a trustee or trustees in their stead, the ct. dismissed the bill, on the ground that the jurisdiction to interfere in such a case belongs to the probate & surrogate cts., & not the Ct. of Ch.—**CORRIAL v. HENRY** (1851), 2 Gr. 310.—**CAN.**

s. — *To distribute undivided portion of estate.]—*The Ct. of Probate has the same jurisdiction over any undivided portion of an estate as it has where there is an intestacy as to the whole estate.—*Re McDONALD'S ESTATE* (1853), 2 N. S. R. (James) 123.—**CAN.**

t. — *To settle accounts.]—*The Ct. of Probate has all the power of the Ct. of Ch. to enable it to settle the accounts of an estate.—*Re McDONALD'S ESTATE* (1855), 2 N. S. R. (James) 312.—**CAN.**

u. — *To issue licence to sell land for payment of debts.]—*Where a petition to the Probate Ct. for a licence to sell land for payment of debts contains the statements required by the Act, & due notice has been given to the parties interested, the ct. has jurisdiction over the matter.—**DORR v. BOWEN v. ROBERTSON** (1861), 6 All. 131.—**CAN.**

v. — *To award remuneration to an executor.]—*The ct. will not refer it

to the surrogate judge to settle the amount of compensation or commission to be allowed to an administrator or exor., but having possession of the subject matter of litigation will finally dispose of the rights of all parties.—**MCLENNAN v. HEWARD** (1862), 9 Gr. 270.—**CAN.**

w. *Local masters—Service out of jurisdiction.]—*The jurisdiction of local masters in administration suits is not interfered with by O. J. Act, r. 422. In such matters there is power to direct service to be made out of the jurisdiction.—*Re ALLAN, POCKOCK v. ALLAN* (1882), 9 P. R. 277.—**CAN.**

x. — *To consolidate motions.]—*An application to consolidate two motions for administration & partition pending before a local master should be made to him, & not to a judge in chambers.—**LAMBIER v. LAMBIER** (1883), 9 P. R. 422.—**CAN.**

y. *High Court—Application to remove cause—Discretion of judge.]—*Upon an application under Surrogate Cts. Act, s. 34, to remove a cause from a surrogate ct. into the High Ct., the importance of the case & its nature are not to be tried on counter-affidavits; it is enough if it appears from the nature of the contest & the magnitude of the estate that the higher ct. should be the forum of trial. Much is left to the discretion of the High Ct. judge as to the disposal of each application.—*Re REITH v. REITH* (1908), 16 O. L. R. 168; 11 O. W. R. 883.—**CAN.**

z. — *Where immovable property out of jurisdiction.]—*The ct. assumes jurisdiction in regard to

7795. — Contingent interest.]—Testator devised certain estates by name, together with his farming stock & furniture, to his beloved wife to sell, to discharge all his creditors; & he constituted his wife & T. his exors., whom he appointed to sell & dispose of all his estates & chattels, in such manner as they should jointly agree upon, or not to sell if it seemed most advisable to keep them, or in any way they should think proper, so that every creditor had his money, & if sold, all overplus to his wife, towards her support & her family. Upon demurrer:—*Held*: testator's children had such an interest in the devised estates as enabled them to sustain a bill against the widow & her co-exor., impeaching a sale on the ground of fraud, & praying an account of the rents & profits.—**WOODS v. WOODS** (1836), 1 My. & Cr. 401; **Donnelly**, 61; 40 E. R. 429, L. C.

Annotations:—**Mentd.** **Gilbert v. Bennett** (1839), 10 Sim. 371; **Crockett v. Crockett** (1842), 1 Hare, 451; **Hodgson v. Green** (1842), 11 L. J. Ch. 312; **Raikes v. Ward** (1842), 1 Hare, 445; **Longmore v. Elcum** (1843), 2 Y. & C. Ch. Cas. 363; **Thorp v. Owen** (1843), 2 Hare, 607; **Crockett v. Crockett** (1848), 2 Ph. 553; **Parkinson's Trust** (1851), 1 Sim. N. S. 242; **Webb v. Wools** (1852), 2 Sim. N. S. 267; **Greene v. Greene** (1869), 17 W. R. 487; **Lambe v. Eames** (1871), 6 Ch. App. 597.

7796. — —.]—The contingent interest of a testator's widow under an ultimate limitation of personalty, in the event of the death of all his children under twenty-one, to those who would then be entitled, under Statute of Distributions, 1671 (c. 10), is sufficient to make her a proper party, as co-pltf. with the children, in a suit for administration of the estate.—**ROBERTS v. ROBERTS** (1848), 2 Ph. 534; 17 L. J. Ch. 174; 11 L. T. O. S. 285; 12 Jur. 148; 41 E. R. 1050, L. C.

Annotations:—**Consd.** **Greenwood v. Roberts** (1851), 15 Beav. 92; **Davis v. Angel** (1862), 31 Beav. 223. **Dbtd.** **Clowes v. Hilliard** (1876), 4 Ch. D. 413. **Refd.** *Re Parsons*. **Stockley v. Parsons** (1890), 45 Ch. D. 51. **Mentd.** **A.-G. v. Munro** (1848), 2 De G. & Sm. 122.

immovable properties situate outside the jurisdiction in cases where it can act *in personam* either to compel the owner to give effect to legal obligations into which he has entered or to a trust reposed in him.—**NISTARINI DASSI v. NUNDO LALL BOSE** (1899), 1 L. R. 26 Cal. 891; 3 C. W. N. 670.—**IND.**

5. — *To set aside deeds obtained by fraud of executor.]—*Where the primary object of a suit instituted on the original side of the High Ct. was the administration of the estate of a deceased testator resident within its jurisdiction, the principal exor. being also resident there & the actual administration going on there:—*Held*: the High Ct. in its ordinary original jurisdiction has a right to order administration of such an estate & as ancillary to such an order to set aside deeds obtained by the fraud of the exor.—**BENODE BEHARI BOSE v. SRIMATI NISTARINI DASSI** (1905), 9 C. W. N. 96.—**IND.**

h. *Court of Sessions & Court of Chancery.]—*An exor. questioned the jurisdiction of the Ct. of Session in the administration of an estate regarding the apportionment of rents upon a Scotch estate as between heir & exor., & a balance of accounting arising upon West Indian property which had belonged to deceased. The estate had been put under an administration suit in Ch., which was still in dependence:—*Held*: both cts. had jurisdiction to try the questions, but the *forum conveniens*, as regarded the matter of apportionment was the Ct. of Session.—**MARTIN v. STOPFORD-BLAIR'S EXECUTORS** (1879), 7 Ll. (Ct. of Sess.) 329; 17 Sc. L. R. 208.—**SCOT.**

Sect. 2.—Parties: Sub-sects. 1 & 2, A.]

7797. ———.]—Testator by his will made in 1854 divided the residue of his estate into fifteen parts, which he distributed among his nephews & nieces. One of the fifteen parts he disposed of in the following words: "In trust for my nephew, J., in case he should marry my niece E., during his life subject to the proviso hereinafter contained, & from after his decease, in trust for the eldest or only child, if any, of the said J., who shall be living at his decease, & the heirs, exors. & administrators of such eldest or only child; but in case the said J. shall not marry my said niece, then I do direct that bequest to the said J. shall not take effect, but that such share shall fall into & become part of my general residuary estate for the benefit of the other legatees named in this my will." Shortly after the date of the will, & in the lifetime of testator, J. married, but not the lady mentioned in the will. There was some evidence to show that testator assented to the marriage. On bill filed by infant son of J.:—*Held*: pltf. had no sufficient interest to entitle him to file a bill to have the share ascertained & secured.

An existing interest, whether it be present or vested, or whether it be contingent, however future & remote it may be, if it be a present interest the party representing it has a right to file a bill to have the share secured; but the mere expectation of a future event happening, which may give interest, gives no such right.—*DAVIS v. ANGEL* (1862), 4 De G. F. & J. 524; 31 L. J. Ch. 613; 6 L. T. 880; 8 Jur. N. S. 1024; 10 W. R. 722; 45 E. R. 1287, L. C.

Annotations:—*Consd.* Bright v. Tyndall (1876), 4 Ch. D. 189. *Foll.* Clowes v. Hilliard (1876), 4 Ch. D. 413. *Dist.* Peacock v. Colling (1885), 54 L. J. Ch. 743. *Refd.* Re Parsons, Stockley v. Parsons (1890), 45 Ch. D. 51. *Allard v. Walker*, [1896] 2 Ch. 369; *Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812; *Re Mudge*, [1914] 1 Ch. 115. *Mentd.* Re Sheppard's Trusts (1862), 31 L. J. Ch. 788; Powell v. Rawle (1874), 22 W. R. 629.

7798. ———.]—Testator gave his estate to such of his three grandchildren, S., M., & E., as should survive their father & attain twenty-five, but in case two only of them should die in the lifetime of their father or under twenty-five, & the amount to which the surviving grandchild would then become entitled should exceed £10,000, then the excess should go to the person or persons, exclusive of the surviving grandchild, who, under Statute of Distributions, 1671 (c. 10), would immediately on the decease of the survivor of the other two grandchildren, be entitled to testator's personal estate if he had then died intestate. S. & E. died under twenty-five, E. being the survivor of the two, & at her death M. was the sole next of kin of testator, supposing him to have died at that time:—*Held*: the persons who at the death of E. would have been the next of kin of testator if M. also had then been dead, were entitled to file a bill for the administration of his estate.—*WHITE v. SPRINGETT* (1869), 4 Ch. App. 300; 38 L. J. Ch. 388; 20 L. T. 502; 17 W. R. 336, L. JJ.

Annotations:—*Refd.* Re Taylor, Taylor v. Ley (1885), 52 L. T. 839. *Mentd.* Clarke v. Hayne (1889), 42 Ch. D. 529.

PART VIII. SECT. 2, SUB-SECT. 1.

7804 i. Personal representative.]—Since Administration of Justice Act, an exor. or administrator is not entitled to come to the ct. for the purpose of administering the estate of deceased, even where the personal assets are

insufficient for the satisfaction of the debts.—*Re SHIPMAN, WALLACE v. SHIPMAN* (1876), 24 Gr. 177.—*CAN.*

k. — Difficultly experienced in administering estate.]—Trustees & exors. stand in a different position from creditors or *cestuis que trust* as to the right

7799. ———.]—A fund was bequeathed to trustees upon trust to pay the income to a legatee, with power in certain events to advance to him so much of the corpus as the trustees should think proper, with remainder to his issue, but if he should die without issue upon trust to divide the fund or so much thereof as should not have been advanced to the legatee, among his surviving brothers & sisters:—*Held*: a sister had such an interest in the fund as entitled her during the life of the legatee to bring an action to administer the trust.—*PEACOCK v. COLLING* (1885), 54 L. J. Ch. 743; 53 L. T. 620; 33 W. R. 528, C. A.

7800. ———.]—*Re ASHTON* (1900), 44 Sol. Jo. 429.

7801. ——— *Present or vested interest.]*—*DAVIS v. ANGEL*, No. 7797, *ante*.

7802. ——— *Not mere expectation—Of happening of future event.]*—*DAVIS v. ANGEL*, No. 7797, *ante*.

7803. ———.]—(1) Bequest on the death of testator's daughters without issue to the persons who would be entitled under Statute of Distributions, 1671 (c. 10), if testator had then died intestate. Administration action brought in the lifetime of the daughters, & before they had had any issue, by persons who would then be next of kin if the daughters were dead without issue. On demurrer:—*Held*: pltf. had only an expectation & not an interest, & were not entitled to maintain the action.

(2) Pltf. can only be added under R. S. C., 1875, Ord. 16, r. 2, where there has been a *bond fide* mistake.—*CLOWES v. HILLIARD* (1876), 4 Ch. D. 413; 46 L. J. Ch. 271; 25 W. R. 224.

Annotations:—*As to* (1) *Consd.* Peacock v. Colling (1885), 54 L. J. Ch. 743; *Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51. *Refd.* Fussell v. Dowling (1884), 27 Ch. D. 237; *Molyneux v. Fletcher*, [1898] 1 Q. B. 648; *Re Mudge* (1913), 83 L. J. Ch. 243. *As to* (2) *Refd.* Duckett v. Gover (1877), 25 W. R. 455.

7804. Personal representative.]—Testator gave the residue of his real & personal estate to five persons in equal shares, & appointed three of the five his exors. All three exors. proved the will. One of the exors. then filed a bill for administration & partition against another of the exors., not making the third exor. a party. On this bill an administration decree was made, & the third exor. & the other residuary legatees were served with the decree. The third exor. refused to come in under the decree & account, & the other residuary legatees appealed from the decree on the ground that the decree could not be properly made in the absence of the third exor. The ct. considered there was great difficulty in making a decree against a person, who ought to be an accounting party, in his absence, & pltf.'s counsel, at the suggestion of the ct., consented to have the decree quashed, with liberty to amend the bill by adding the third exor. as a deft.—*LATCH v. LATCH* (1875), 10 Ch. App. 464; 44 L. J. Ch. 445; 23 W. R. 686, L. JJ.

7805. Appointee of fund.]—*Re NEWBERRY, ALLCROFT v. FARNAN*, No. 7976, *post*.

7806. Annuitant—Annuity not in arrear—Accounts insufficient.]—An annuity was by will

to have the estate administered in the ct., & cannot, without experiencing some difficulty in carrying out the trusts or administering the estate, file a bill for that purpose.—*COLE v. GLOVER* (1869), 16 Gr. 392.—*CAN.*

l. Infant — By next friend.]—An

charged upon the general residue of testator's estate. The annuity was not in arrear, but accounts, though asked for, had not been supplied until after the issue of the writ, & were still insufficient:—*Held*: the annuitant was entitled to administration.—*WOLLASTON v. WOLLASTON* (1877), 7 Ch. D. 58; 47 L. J. Ch. 117; 26 W. R. 77; *sub nom.* *WOOLASTON v. WOOLASTON*, 37 L. T. 631.

7807. ——— *Jud. Act, 1875 (c. 77), s. 10.*—Testator covenanted to pay to trustees during the life of D. an annuity of £500 for the benefit of her & her children. After testator's death the trustees issued an originating summons for the administration of his estate on the ground that it was insufficient to provide for the payment of the annuity in full. No payment of the annuity was at the time in arrear:—*Held*: although above sect. gave a right to an annuitant to prove in administration proceedings for the capital value of an annuity, yet it conferred no right upon the annuitant to obtain an order for administration so long as the annuity was punctually paid, although the estate might be insolvent, & the summons must therefore be dismissed.—*Re HARGREAVES, DICKS v. HARE* (1890), 44 Ch. D. 236; 59 L. J. Ch. 375; 62 L. T. 819; 6 T. L. R. 264, C. A.

Annotations:—*Consd.* *Re Beeman, Fowler v. James*, [1896] 1 Ch. 48. *Refd.* *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233. *Mentd.* *Re Hall, Hope v. Hall*, [1918] 1 Ch. 502.

7808. Legatee—Or assignee thereof.—A party entitled to, or taking by assignment a legacy, or a share of a residuary estate, may institute a suit for the administration of such estate at any time before the complete administration of the assets, or before such legacy or residuary share is withdrawn from its position as assets unadministered, & constituted a trust fund applicable to the specific trusts of the will.

Semble: where the right is unnecessarily exercised, the ct. may make the decree without costs.—*CAFE v. BENT* (1845), 5 Hare, 24; 67 E. R. 812.

Annotations:—*Mentd.* *Morgan v. Morgan* (1851), 14 Beav. 72; *Re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111.

7809. ———.]—On a bill filed by a pecuniary legatee against the exors. of a will for payment of a legacy, it appearing that the residuary legatee had already filed a bill against the exors. & legatees for administration of the trusts of the will, which suit had been ordered to stand over for a year, & it appearing to be a question whether pltf.'s legacy was primarily charged on a particular real estate of testator, to which real estate the residuary legatee was entitled as heir or devisee of testator, & it being admitted that there was sufficient personal estate to pay all debts & legacies:—*Held*: the exors. raising the question, the residuary legatee was a necessary party in the legatee's suit.—*DE ZICHY (COUNTESS) v. LONSDALE (EARL)* (1845), 5 L. T. O. S. 328; 9 Jur. 785.

7810. ——— *Payment of legacy into court—Suit*

infant, moving by his next friend, can properly make an application for an administration order.—*Re HILL*, 10 C. L. T. Occ. N. 87.—CAN.

m. ———.]—An administration of an estate in which infants were interested was made on the mere suggestion of their next friend that it would be for their benefit, without going into the merits of the case between pltf. & the exor.—*Re WILSON, LLOYD v. TICHBORNE* (1881), 9 P. R. 89.—CAN.

n. Legatee—Or his personal representative.—An order may be obtained under the general orders for the administration of the personal estate of testator by the personal representative of a legatee as well as by the legatee himself.—*SIMPSON v. HORNE* (1880), 28 Gr. I.—CAN.

o. Widow of intestate.—The widow of an intestate entitled, under Intestates' Estates Act, 1890, to a charge for £500 upon his real & personal

dismissed.]—A bill was filed by a legatee against the exors. of a testator for the payment of his legacy. Upon the exors. paying into ct. the amount of the legacy, together with the costs of the suit to pltf., the bill was ordered to be dismissed against all the exors. except one, who was the representative of an incumbrancer of the legacy, & between whom & pltf. a question of account was raised in the suit.—*SAWYER v. MILLS* (1849), 1 Mac. & G. 390; 1 H. & Tw. 569; 19 L. J. Ch. 242; 15 L. T. O. S. 293; 13 Jur. 1061; 41 E. R. 1316.

7811. ——— *Of residue.*—*CAFE v. BENT*, No. 7808, *ante*.

7812. ——— *Residue unascertained.*—A residuary legatee has a right to institute a suit where the estate is considerable, & it is uncertain whether there will be a residue or not.—*Re SIMMOND'S ESTATE, MORGAN v. MIDDLEMISS* (1866), as reported in 14 W. R. 414.

Annotations:—*Mentd.* *Re Segelcke, Ziegler v. Nicol*, [1906] 2 Ch. 301; *Re Yates, Singleton v. Povah* (1922), 128 L. T. 619.

Creditor.—*See Sect. 6, post.*

SUB-SECT. 2.—WHO ARE NECESSARY PARTIES.

A. In General.

See, generally, PRACTICE; R. S. C., Ord. 16, r. 39.

7813. All persons interested—Suit against executors.—*ATWOOD v. HAWKINS* (1673), *Cas. temp.* Finch, 113; 23 E. R. 62.

Annotation:—*Mentd.* *East India Co. v. Coles* (1783), 3 Swan. 142, n.

7814. ——— *By co-executor.*—One of three exors. & trustees filed a claim to have testator's real & personal estate administered, making his co-exors. alone, not including any person beneficially interested, parties:—*Held*: the suit was defective.—*LESLIE v. SMITH* (1851), 5 De G. & Sm. 78; 18 L. T. O. S. 119; 15 Jur. 1120; 64 E. R. 1026.

7815. ——— *Suit by residuary legatee.*—*SHERRIT v. BIRCH* (1791), 3 Bro. C. C. 229; 29 E. R. 505.

7816. ———.]—The strict rule, that all persons, materially interested, must be parties, dispensed with, where it is impracticable, or very inconvenient; as in the case of a very numerous assocn. in a joint concern; in effect a partnership.

Generally, a residuary legatee must bring before the ct. all persons, interested in the residue. Exception, where not necessary or convenient.—*COCKBURN v. THOMPSON* (1809), 10 Ves. 321; 33 E. R. 1005, L. C.

Annotations:—*Refd.* *Long v. Yonge* (1830), 2 Sim. 369; *Willats v. Busby* (1842), 5 Beav. 193; *Wilson v. Stanhope* (1846), 2 Coll. 629; *Bedford v. Ellis*, [1901] A. C. 1; *Markt v. Knight S.S. Co., Sale & Frazar v. Knight S.S. Co.*,

estate, has a sufficient interest in the real estate to entitle her to maintain an action for its administration.—*M'FERRAN v. M'FERRAN*, [1897] 1 I. R. 66.—IR.

PART VIII. SECT. 2, SUB-SECT. 2.—A.

p. Attorney-General—Where charity bequest declared void.—The A.-G. is a necessary d-ft. to a bill filed to administer a estate, & declare a

Sect. 2.—Parties: Sub-sect. 2, A. & B. (a).]

[1910] 2 K. B. 1021. *Mentd.* York Corpn. (1737), *West temp. Hard.* 293; *Wallworth v. Holt* (1841), 5 My. & Cr. 619; *Deeks v. Stanhope* (1844), 14 Sim. 57; *Powell v. Wright* (1844), 7 Beav. 444; *Scott v. Scott*, [1912] P. 241.

7817. Alleged creditor of estate—Debt satisfied improvidently—Suit against executors.]—(1) A person having a claim against a testator's estate prevailed upon the exors. to hand over to him part of testator's assets under circumstances from which he must have known that in so doing the exors. were acting hastily, improvidently, & against their duty as exors.:—*Held*: such person was a proper party to a suit instituted by a legatee against the exors. for the administration of the estate, although the bill contained no charge of collusion or insolvency.

(2) A person appointed by will receiver of testator's real estates with a salary is a proper party to a suit for the administration of those estates.—*CONSETT v. BELL* (1842), 1 Y. & C. Ch. Cas. 569; 11 L. J. Ch. 401; 6 Jur. 869; 62 E. R. 1020.

Annotations:—As to (1) *Reid*, *Stainton v. Carron Co.* (1854), 18 Beav. 146. *Generally*, *Mentd.* *Finden v. Stephens* (1846), 1 Coop. temp. Cott. 318; *Alexander v. Brame* (1855), 25 L. T. O. S. 298.

7818. Receiver appointed by will—Of testator's realty.]—*CONSETT v. BELL*, No. 7817, *ante*.

7819. Devisees of realty—Suit by residuary legatee—Of realty & personalty.]—Testator, by his will, having given several pecuniary legacies, devised two estates, L. & D., to his children, as tenants in common in fee, & made his wife residuary legatee of all his real & personal estates, & appointed K. & B. his exors. Testator died in July, 1841, leaving his wife, then *enceinte*, & four children him surviving. The other child was born in Nov. following. The wife filed her bill against the two exors., K. & B. & also against testator's five children, all of them infants, praying for an account of the personal property of testator, & an account of the rents & produce of his real estates devised to pltf., & also for an account of the rents, profits, & produce of the two estates L. & D., which had been mixed by K. & B. with the personal estate of testator, & the rents & profits of the real estate devised to pltf., & the same secured; & in the meantime, that the whole of the moneys might be secured by the direction of the ct., for the benefit of pltf. & the children of testator. To this bill defts., K. & B. having demurred, for multifariousness & for want of equity. Demurrer overruled.

There is certainly an equity. . . . The children ought to be made parties. . . . The accounts cannot be taken without the children. . . . A demurrer ought not to be filed without good grounds to support it (*per CUR.*).—*SANDERS v. KELSEY* (1846), 7 L. T. O. S. 506; 10 Jur. 833.

7820. Claimant to property used by deceased—As executor of another—Administration of de-

legacy for religious purposes void.—*LONG v. WILMOTTE* (1863), 2 Ch. Ch. 87.—CAN.

PART VIII. SECT. 2, SUB-SECT. 2.—B. (a).

7823 i. General rule—Should be made a party.]—Where the will had not been proved, a bill filed for an account against persons said to be in possession of the assets, was dismissed on the ground that the personal representative was

a necessary party.—*ZIMMERMAN v. O'REILLY* (1868), 14 Gr. 646.—CAN.

7823 ii. ———.]—A motion for an administration order was refused with costs on the ground that no personal representative of deceased was a party.—*IRWIN v. BICK* (1874), 6 P. R. 183.—CAN.

7823 iii. ———.]—*MCDUGALL v. GAGNON* (1906), 4 W. L. R. 425; 16 Man. L. R. 232.—CAN.

ceased's estate.]—*BARKER v. ROGERS, ROGERS v. ROGERS*, No. 8216, *post*.

7821. Bankrupt beneficiary—Prior to vesting of property—Under bankruptcy.]—In a suit for the administration of a testator's estate, A., in whom certain leaseholds were vested, was made a party. A. became bkpt., & an official assignee was appointed. Before the creditors' assignee was appointed A. put in a plea, alleging his bkpcy.:—*Held*: the plea could not be supported, & bkpt. was a necessary party prior to the creditors' assignee having been appointed & having elected to take the leaseholds; until that time there could be no final vesting of the property.—*TURNER v. NICHOLLS* (1849), 16 Sim. 565; 18 L. J. Ch. 278; 13 Jur. 293; 60 E. R. 994.

7822. Title of plaintiff beneficiary doubtful—Persons disputing title joined.]—Where, in an administration action, the title of pltf. as a beneficiary was doubtful, & the trustee of the will was the sole deft., the ct., on the application of the trustee, ordered that the person interested in disputing pltf.'s claim should be made a deft.—*DAY v. RADCLIFFE* (1876), 24 W. R. 844.

B. Personal Representatives.**(a) In General.**

See R. S. C., Ord. 16, rr. 8, 46.

7823. General rule—Should be made a party.]—Bill to discover the estate, etc. Deft. demurs, for that the administrator of him, of whose estate a discovery is sought, is not made a party, & pleads Stat. Limitations.

Demurrer & plea both allowed (*per CUR.*).—*RUMNEY v. MEAD* (1677), *Cas. temp. Finch*, 303; 23 E. R. 166.

7824. ———.]—Pltf. did not make exors. or administrators parties; therefore ordered to amend his bill.—*A.-G. v. TWISDEN* (1678), *Cas. temp. Finch*, 336; 23 E. R. 184, L. C.

7825. ———.]—(1) No suit for the administration of an estate can be sustained unless a personal representative of testator or intestate, properly constituted in this country, be made a party to it.

(2) Where a demurrer is allowed for want of parties, it is not of course to give leave to amend by adding parties, but it is discretionary with the ct., & depends on the probability of making the suit effective.—*TYLER v. BELL* (1837), 2 My. & Cr. 89; *Donnelly*, 190; 6 L. J. Ch. 169; 40 E. R. 575, L. C.

Annotations:—As to (1) *Consd.* *Silver v. Stein* (1852), 21 L. J. Ch. 312. *Reid*, *Bond v. Graham* (1842), 1 Haro. 482; *Carmichael v. Carmichael* (1846), 9 L. T. O. S. 17; *Hervey v. Fitzpatrick* (1854), *Kay*, 421; *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341. As to (2) *Reid*, *Kay v. Wall* (1845), 9 Jur. 128. *Generally*, *Reid*, *Creasor v. Robinson* (1851), 14 Beav. 589. *Mentd.* *Smith v. Smith* (1856), 21 Beav. 385.

7823 iv. ———.]—No legal proceedings can be instituted against an estate, or for the recovery of, or laying claim to any assets belonging to an estate, without joining the exor. of such an estate as a party to the suit.—*FITZGERALD v. GREEN* (1910), E. D. L. 209.—S. AF.

*Necessity for re-grant.]—*The legal personal representative of a deceased intestate is a necessary party to a suit for the

7826. ———.]—(1) A fund was alleged to have been carried in an administration suit, "to a separate account, intituled the general account." In another suit, to give effect to the assignment of a share of the fund:—*Held*: the legal personal representative of testator was a necessary party.

(2) The ultimate limitation of a legacy was to a party's "personal representatives or next of kin":—*Held*: both classes must be made parties to a suit affecting the fund.—*SALMON v. ANDERSON* (1846), 11 Beav. 445; 50 E. R. 415.

7827. ———.]—A claim filed for the administration of personal estate dismissed with costs, on the grounds that there was no personal representative of testator before the ct., & that the claim erroneously stated that deft. was the exor. of the extrix. of testator, & sought relief against him in that capacity.—*BOULDING v. BOULDING* (1852), 16 Jur. 1154; 1 W. R. 49.

7828. ———.]—The ct. will not, under Court of Chancery Procedure Act, 1852 (c. 86), dispense with the personal representative of a trustee, where such personal representative has necessarily active duties to perform in the execution of the trust.—*FOWLER v. BAYLDON* (1853), 9 Hare, App. 11. p. lxxviii; 68 E. R. 802.

Annotation:—*Reid*. *Curtius v. Caledonian Fire & Life Insee.* (1881), 51 L. J. Ch. 80.

7829. ———.]—A legacy was bequeathed with a direction that it should be paid as soon as conveniently might be after testator's death, which took place in 1822. An annuity charged by the will on the real estate terminated in 1856. In 1858, the legatee filed a bill, insisting that the legacy was charged on the real estate, & ought to be paid out of a fund arising from it, & set apart to answer the annuity. The bill made the trustees of this fund parties, but no personal representative of testator. It was not proved that the personal estate was exhausted:—*Held*: whether the real estate was charged or not with the legacy, the personal estate was primarily liable, & the bill was too late, & was defective for want of parties, & leave to amend at the hearing was refused.—*BRIGHT v. LARCHER* (No. 2) (1859), 4 De G. & J. 608; 28 L. J. Ch. 837; 33 L. T. O. S. 354; 5 Jur. N. S. 1233; 7 W. R. 658; 45 E. R. 236, L. JJ.

Innotations:—*Mentd.* *Bright v. Legerton* (No. 1) (1860), 29 Beav. 60; *Re Rowe, Jacobs v. Hind* (1889), 58 L. J. Ch. 703.

7830. ———.]—The legal personal representative of a testator is a necessary party to a suit for the administration of his real & personal estate; if he is not made a party, no decree can be made. In such a suit, even although an exor. *de son tort* & the trustees of the real estate are before the ct.—*ROWSELL v. MORRIS* (1873), L. R. 17 Eq. 20; 43 L. J. Ch. 97; 29 L. T. 446; 22 W. R. 67.

Annotations:—*Consd.* *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198. *Reid*. *Nokes v. Gandy* (1874), 13 L. J. Ch. 276.

7831. ———.]—**Effect of Jud. Act, 1873 (c. 66).**]

Administration of his personal estate, & no decree can be made in such a suit in Ireland against a party who had obtained a grant of letters of administration in England, which has not been re-sealed in Ireland, even though such party is resident in Ireland. *M'SWENEY v. MURPHY*, [1919] 1 Ir. 16.—IR.

7833 i. Representatives of particular character—Sufficiency of—Administrator *ad litem*.—The ct. may proceed without any personal representative

of deceased where none has been appointed, or may appoint some person to represent the estate for the purpose of the suit. This does not apply to cases where parties have a beneficial or substantial interest, but only to cases of mere formal parties.—*SHERWOOD v. FREELAND* (1857), 6 Gr. 305.—CAN.

7833 ii. ———.]—An application for the appointment of a person to represent the estate of deceased was refused where it was considered

—Above Act has not altered the former practice of the Ch. Ct., which required that for the purpose of general administration of an intestate's estate a general administrator must be before the ct. Where, therefore, A. commenced a suit to administer an intestate's estate, claiming to be the sole next of kin of intestate & alleging that intestate's estate had been improperly distributed amongst his illegitimate children:—*Held*: an administrator *ad litem* appointed by the Probate Div. for the purpose of being made a party to the suit to substantiate the proceedings therein, did not sufficiently represent intestate's estate for the purposes of the suit.—*DOWDESWELL v. DOWDESWELL* (1878), 9 Ch. D. 294; 48 L. J. Ch. 23; 38 L. T. 828; 27 W. R. 241, C. A.

7832. ———.]—Where an originating summons was taken out against an alleged administratrix, for an account & administration, & it subsequently transpired that deft. was not the administratrix & that there was, in fact, no exor. or administrator of the estate, but that deft. had intermeddled, leave was refused to amend the summons & describe deft. as administratrix *de son tort*, because an administrator *de son tort* is not liable to account until it has been proved that he has intermeddled, & this can only be done in an action & cannot be done on an originating summons, it not being a matter falling within R. S. C., Ord. 55, at all.—*Re CHALMERS, CHALMERS v. CHALMERS* (1921), 65 Sol. Jo. 475.

7833. Representatives of particular character—Sufficiency of—Administrator *ad litem*.—*WILLIS v. HURLOCK* (1822), 1 Coop. temp. Cott. 367; 47 E. R. 899.

7834. ———.]—A bill was filed by a residuary legatee, against A. & B., the administrators of deceased's effects, for an account of the assets received by them. A. died without having appeared to the bill: & C. obtained letters of administration of his goods, limited for the purpose only to attend, supply, substantiate & confirm the proceedings in the suit, until a final decree should be made & executed; & C. was brought before the ct., by a supplemental bill:—*Held*: owing to the limited nature of those letters of administration, an account of A.'s receipts could not be taken, but a general administrator to A. must be brought before the ct.—*CLOUGH v. DIXON* (1841), 10 Sim. 564; 59 E. R. 734; *sub nom.* *CLOUGH v. BOND*, 11 L. J. Ch. 52; 6 Jur. 49.

Annotation:—*Reid*. *Faulkner v. Daniel* (1843), 3 Hare, 199.

7835. ———.]—The ct. will not decree a general account & administration of assets, in a suit in which deceased is represented by an administrator *ad litem* merely.—*CROFT v. WATERTON, WATERTON v. CROFT* (1844), 13 Sim. 653; 60 E. R. 254.

Annotation:—*Dbtd.* *Davis v. Chanter* (1848), 2 Ph. 545.

7836. ———.]—**Suit against executor of**

that deceased could not be said to be interested in the matters in question in the suit, or that the personal representative, if appointed, would be merely a formal party.—*LEONARD v. CLYDESDALE* (1874), 6 P. R. 142.—CAN.

r. ———.]—*Administratrix de bonis non—Married woman.*—Where plff., a married woman, who was an unpaid legatee, obtained letters of administration *de bonis non*, & filed a bill against the administrator to have the estate administered in Equity, &

Sect. 2.—Parties: Sub-sect. 2, B. (a).]

testator's executor.]—A. devised his real & personal estate, charged with the payment of his debts, to B., whom he appointed his exor., & B. devised them to C., whom he appointed his exor., upon trust for the payment of his own & A.'s debts. After the death of A. & B. a bill was filed on behalf of the creditors of A. against C. & D., charging that, by collusion between C. & D., the latter had fraudulently obtained large sums of money arising from the real & personal estate of A., & praying that the transactions between C. & D. might be set aside, & for the due administration of A.'s estate. There were also some charges of misapplication of A.'s assets by B., & the bill prayed that B.'s estate might be charged with the losses occasioned thereby. To this bill, D. having refused probate of B.'s will, a person was made a deft. who had obtained a grant of letters of administration of B.'s estate, authorising him to attend, supply, substantiate & confirm the proceedings which had been already had, or which might be had in the suit, until a final decree should be had:—*Held*: B.'s estate was sufficiently represented in the suit by this administrator.—*ELLICE v. GOODSON* (1845), 2 Coll. 4; 63 E. R. 610.

Annotations:—*Refd.* *Robinson v. Bell* (1847), 11 Jur. 1049; *Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294. *Mentd.* *Re Toleman, Westwood v. Booker*, [1897] 1 Ch. 866.

7837. ———.]—The ct. will direct a party to appear in a suit & represent the estate of a deceased deft., who had died intestate, though no letters of administration had been granted.—*ELY (DEAN & CHAPMAN) v. EDWARDS* (1853), 22 L. J. Ch. 630; 17 Jur. 219.

Annotation:—*Refd.* *Edwards v. Batley* (1854), 2 Eq. Rep. 705.

7838. ———.]—*DOWDESWELL v. DOWDESWELL*, No. 7831, *ante*.

7839. ———.]—*Executor de son tort.*]—A bill by a creditor to administer the estate of a testator alleged that testator by his will gave to his wife, the use for her life of half his estate, & appointed her guardian of his children; that administration with the will annexed had been granted to deft., who was "the only legal personal representative & also heir of the undisposed of moveables & immoveables," & that she had received & entered into possession of all the real & personal estate of deceased. Plea, that deft. was not, nor had ever been, administratrix with will annexed or legal personal representative of deceased:—*Held*: if deft. was not administratrix, she was extrix. *de son tort*, & the bill could be sustained.—*RAYNER v. KOEHLER* (1872), L. R. 14 Eq. 202; 41 L. J. Ch. 697; 27 L. T. 506; 20 W. R. 859.

Annotations:—*Dbtd.* *Cary v. Hills* (1872), 42 L. J. Ch. 100; *Rowse v. Morris* (1873), L. R. 17 Eq. 20. *Foll.* *Coote v. Whittington* (1873), L. R. 16 Eq. 534. *Consd.* *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198.

7840. ———.]—To a bill filed by a legatee for general administration against deft. who, it was stated, had proved the will, & had possessed himself of the assets & made various payments, it was pleaded in bar to the whole bill that he had not proved the will, & was not the legal

personal representative of deceased:—*Held*: the plea was a good one, & must be allowed, & without liberty to amend.—*CARY v. HILLS* (1872), L. R. 15 Eq. 79; 42 L. J. Ch. 100; 28 L. T. 6; 21 W. R. 166.

Annotations:—*Consd.* *Coote v. Whittington* (1873), L. R. 16 Eq. 534. *Refd.* *Rowse v. Morris* (1873), L. R. 17 Eq. 20.

7841. ———.]—Where a person possesses himself of the assets of a testator or of an intestate without having administered, a bill for an account, to the extent of the specific assets he has received, will lie against him as exor. *de son tort*, though there is no legal personal representative.—*COOTE v. WHITTINGTON* (1873), L. R. 16 Eq. 534; 42 L. J. Ch. 846; 29 L. T. 206; 21 W. R. 837.

Annotations:—*Dbtd.* *Rowse v. Morris* (1873), L. R. 17 Eq. 20. *Consd.* *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198. *Refd.* *Nokes v. Gandy* (1874), 43 L. J. Ch. 276.

7842. ———.]—*ROWSELL v. MORRIS*, No. 7830, *ante*.

7843. ———.]—*Re CHALMERS, CHALMERS v. CHALMERS*, No. 7832, *ante*.

7844. Must be constituted in this country—Will of testator proved abroad.]—Testator resident in India & having all his property there, bequeathed his residuary estate to L., but if she should die before him, then to her children. L. died before testator & the exor., who was also resident in India, proved the will there & remitted the residue to his agent in England, with directions to pay it to L. or her children. A suit having been instituted by the children, who were infants, against the exor. & his agents to have the residue secured:—*Held*: administration to testator ought to have been taken out in this country & administrator made a party to the suit.—*LOGAN v. FAIRLIE* (1825), 2 Sim. & St. 284; 3 L. J. O. S. Ch. 152; 57 E. R. 355; *on appeal* (1835), 1 My. & Cr. 59.

Annotations:—*Refd.* *A.-G. v. Dimond* (1831), 1 Cr. & J. 356; *Tyler v. Bell* (1837), 2 My. & Cr. 89; *Bond v. Graham* (1842), 6 Jur. 620; *Hervey v. Fitzpatrick* (1854), 2 Rep. 444. *Mentd.* *Re Ewin* (1830), 1 Cr. & J. 151; *Bruce* (1832), 2 Cr. & J. 436; *A.-G. v. Forbes* (1834), 2 Cl. & Fin. 48; *A.-G. v. Hope* (1834), 4 Tyr. 878; *Coombe v. Trist* (1835), 1 My. & Cr. 69; *Arnold v. Arnold* (1837), Donnelly, 252; *Charitable Donations Comm. v. Devereux* (1842), 13 Sim. 14; *Thomson v. Advocate General* (1845), 12 Cl. & Fin. 1; *A.-G. v. Napier* (1851), 20 L. J. Ex. 173.

7845. ———.]—To a suit in respect of an unadministered part of a testator's estate, which has been remitted from India, & remains in the hands of an exor. residing in England, but who was only constituted exor. of testator in India, against such exor. a personal representative constituted in England is a necessary party.—*BOND v. GRAHAM* (1842), 1 Hare, 482; 11 L. J. Ch. 300; 6 Jur. 620; 66 E. R. 1121.

7846. Where personal representative bankrupt—Whether assignees should be joined.]—Pltf. in an administration suit is not compellable to make the representatives or assignees of a deceased or bkpt. exor. of testator, whose estate is sought to be administered, parties to the suit.—*MASTERS v. BARNES* (1843), 2 Y. & C. Ch. Cas. 616; 13 L. J. Ch. 31; 2 L. T. O. S. 206; 7 Jur. 1167; 63 E. R. 276.

an account taken, & pltf. did not make her husband a party to the suit:—*Held*: the bill should be amended by making pltf.'s husband a co-pltf.—*WALSH v. NUGENT* (1896), 1 N. B. Eq.

7839 i. ———.]—*Executor de son tort.*]—In a suit for the administration of the assets, it is not sufficient to bring

an exor. *de son tort* alone before the ct. The legal personal representative must be a party.—*SHEAN v. MAHER* (1835), 1 Jo. Kz. Ir. 440.—*IR.*

7847. ———.]—In a suit for the administration of assets, by residuary legatees against the exors., one of whom had become bkpt. after suit commenced:—*Held*: the assignees of such bkpt. exor. were necessary parties, they having to account for sums received by bkpt.—*LEWIN v. ALLEN* (1860), 2 L. T. 799; 8 W. R. 603.

7848. Personal representatives as beneficiaries.]—*SALMON v. ANDERSON*, No. 7826, *ante*.

7849. Estate of testator the residuary estate of prior testator—Dealings between the several representatives—Representatives of prior testator to be joined as parties.]—The residuary estate of one testator having devolved upon another, it is proper to join the exors. of the first testator in a suit to administer the estate of the second, & to take the accounts of both estates in one suit.

Where the residuary estate of one testator devolves upon another testator, the exors. of the first testator may well be joined in a suit for the administration of the estate of the second testator, in all cases in which there have been such dealings between the two sets of exors. as would prevent the rights of the parties suing from being fully & fairly worked out, if the suit for the administration of the estate of the first testator were brought by the exors. of the second (*TURNER v. -*).—*YOUNG v. HODGES* (1852), 10 Hare, 158; 68 E. R. 880.

7850. Deceased possessing no interest.]—(1) Testator, after giving the income of his residuary real & personal estate to A. for life & after her decease to B., for life, directed his trustees then to sell his estates, & divide the proceeds amongst "the following persons, or their heirs, for ever: the grandchildren of D., & the grandchildren of E.'s":—*Held*: the ct., being satisfied that neither the heirs-at-law nor the personal representatives of the deceased grandchildren had any reasonable ground of claim, it was not necessary to make them parties to the suit.

(2) A distinction between suits by creditors & suits by legatees is that, in suits by creditors, where one sues on behalf of others, the law gives a power to the trustees to deal with the estate, which it does not give in the case of legatees.—*DOODY v. HIGGINS* (1852), 9 Hare, App. I. xxxii; 1 W. R. 30; 68 E. R. 774.

Annotations:—*Generally*, *Mentd.* *Low v. Smith* (1856), 25 L. J. Ch. 503; *Watters v. Jones* (1860), 2 L. T. 205; *Pigott v. Pigott* (1863), 2 New Rep. 14; *Re Preston's Trusts* (1863), 1 New Rep. 470; *Nelson v. Monro* (1879), 41 L. T. 209; *Keay v. Boulton* (1883), 25 Ch. D. 212; *Re Stannard, Stannard v. Burt* (1883), 52 L. J. Ch. 355.

7851. Appointment by court—Where no other representative.]—A suit was instituted against a person who was extrix. & legatee for life of residue under a will, by the person entitled in remainder, for the administration of testator's estate. Pending the suit the extrix. died. The title deeds of leaseholds, being part of testator's property, were then in the hands of her solr., who claimed a lien upon them for his costs of the suit. Pltf. revived the suit against the administrator *de bonis non* of testator, & obtained the common administration decree. A bill was then filed in the name of the administrator against the solr. for the delivery up of the deeds. It was alleged on the part of pltf. that the extrix. was a debtor to the estate but had died insolvent:—*Held*: until it was shown, which could not be done in the absence of her personal representative, that the extrix. was indebted to the estate, she, & through her the

solr., had a lien upon the deeds for the costs of the suit, as costs incurred by a trustee in the execution of a trust.

Semble: the ct., under the above circumstances, there being no personal representative of the extrix., would appoint a person to represent her estate for the purpose of these proceedings.—*TURNER v. LETTS* (1855), 7 De G. M. & G. 243; 3 Eq. Rep. 846; 24 L. J. Ch. 638; 25 L. T. O. S. 154; 1 Jur. N. S. 1057; 3 W. R. 494; 44 E. R. 95, L. JJ.

Annotations:—*Mentd.* *Belaney v. French* (1873), 8 Ch. App. 919, n.; *Re Austin, Ex p. Yalden* (1876), 4 Ch. D. 129; *Re Dee Estates, Wright v. Dee Estates*, [1911] 2 Ch. 85.

—.]—*See, further*, Part II., Sect. 12, sub-sect. 10, *ante*.

Only executors proving will.]—*See* Nos. 7864, 7865, *post*.

7852. When dispensed with—Representative not known.]—No good cause of demurrer that an exor. is not a party, when pltf. alleges in his bill, he knows not who is exor., & prays deft. may discover him.—*BOWYER v. COVERT* (1682), 1 Vern. 95; 23 E. R. 337, L. C.

7853. — Suit against consignee of legacy moneys—Legacies specifically appropriated.]—A clear ascertained fund was remitted from abroad by an exor. to a person in England, to distribute between the legatees. The ct. determined the rights of the legatees, without having a legal personal representative before the ct., the consignee being a party to the suit.—*ARTHUR v. HUGHES* (1841), 4 Beav. 506; 49 E. R. 435.

7854. — Under Chancery Procedure Act, 1852 (c. 86), s. 44.]—Above sect. does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the ct.—*SILVER v. STEIN* (1852), 1 Drew. 295; 61 E. R. 465.

Annotations:—*Consd.* *Maclean & Maclean v. Dawson* (1859), 1 Sw. & Tr. 425. *Reid.* *Ashmall v. Wood* (1855), 4 W. R. 60; *James v. Aster* (1856), 27 L. T. O. S. 33; *Maclean v. Dawson* (No. 1) (1859), 27 Beav. 21; *Curtis v. Caledonian Fire & Life Insce.* (1881), 30 W. R. 125.

7855. — —.]—*FOWLER v. BAYLDON*, No. 7828, *ante*.

7856. — —.]—A bill of foreclosure was filed by a sub-mtgee.; the mtgee. had died, & his representative was not known:—*Held*: the ct. could not, under above sect., direct the suit to proceed in the absence of a representative of the mtgee., against whose estate a decree was asked.—*BRUITON v. BIRCH* (1853), 1 Eq. Rep. 136; 22 L. J. Ch. 911; *sub nom.* *BRUITON v. HUGHES*, 21 L. T. O. S. 123.

Annotations:—*Distd.* *Band v. Randle* (1854), 23 L. T. O. S. 21. *Reid.* *Curtis v. Caledonian Fire & Life Insce.* (1881), 30 W. R. 125.

See, now, R. S. C., Ord. 16, r. 46.

7857. — Appointment of receiver—In creditor's action.]—The ct., in a creditor's administration action, there being real estate of an intestate but no personal estate, will appoint a receiver of rents & profits of the real estate where no legal personal representative is before the ct., & all possible efforts have been made to procure the appointment of such representative.—*Re DAWSON, CLARKE v. DAWSON* (1906), 75 L. J. Ch. 201; 94 L. T. 130; 50 Sol. Jo. 223.

See, further, Part II., Sect. 12, sub-sect. 10, D., *ante*.

2.—Parties: Sub-sect. 2, B. (b) & (c).]

(b) Where More than One Representative.

7858. General rule—All properly made parties.]

—A person cannot bring a bill in equity for an account against one co-exor. only, either as a creditor or as residuary legatee.—*SCURRY v. MORSE* (1724), 9 Mod. Rep. 89; 2 Eq. Cas. Abr. 168; 88 E. R. 333.

7859. ———.]—A. is made an extrix.; she being an infant administration *durante minore ætate* is committed to B. A. afterwards comes of age. B. dies, & C. becomes his representative; on a bill brought against A. for an account of the personal estate of her testator, C. must be made a deft. In bills of this sort all persons who have possessed themselves of testator's estate ought to be made defts.—*GLASS v. OXENHAM* (1710), Barn. Ch. 332; 2 Atk. 121; 27 E. R. 667.

Annotation:—*Reid*. *Holland v. Prior* (1831), 1 My. & K. 237.

7860. ———.]—Though every trustee of part of the personal estate is not to be called to account by a particular pecuniary legatee, but only by the exor. or administrator, & though such trustee who receives the trust money, & thereby becomes a debtor, is not to be considered & chargeable as exor., merely because he is so named in a will, yet where he is made a co-exor., & does not renounce, whilst he receives the trust money, he is properly made a deft. to a suit for a general account, & is accountable therein for his receipts; & this, the more especially, since his being named exor. is a release of the debt at law.—*MOORE v. MOORE* (1755), 2 Ves. Sen. 596; 28 E. R. 380, L. C.

Annotations:—*Mentd.* *Doc d. Wightwick v. Truby* (1771), 2 Wm. Bl. 911; *Goold v. White* (1854), Kay, 683.

7861. ———.]—*HAMP v. ROBINSON* (1865), 3 De G. J. & Sm. 97; 46 E. R. 574.

7862. ———.]—(1) In an action commenced in the High Ct. in 1905, & transferred to the county ct., against one of two exors. of a testator, who died in 1897, in respect of claims accruing due in 1903 & 1904 upon a guarantee given by testator, plffs. alleged a *devastavit* to have been committed by deft., in wrongfully handing over assets of testator to a beneficiary under the will in 1898, more than six years before the commencement of the action, without making any provision for future liability under the guarantee. The county ct. judge having given judgment for plffs., adjudging that deft. had committed a *devastavit*, & ordered execution against deft. *de bonis propriis*:

Held: the claim in respect of the *devastavit* was barred by Stat. Limitations, & therefore the order for execution *de bonis propriis* was wrong.

(2) In this action plffs. cannot obtain adminis-

tration. They have not brought the other exor. ———.]—It may be that he has received assets which are available, & the estate, if it were worked out, may be amply sufficient to satisfy plffs.' claim (*BUCKLEY, L.J.*).—*LACONS v. WARMOLL*, [1907] 2 K. B. 350; 76 L. J. K. B. 914; 97 L. T. 379; 23 T. L. R. 495, C. A.

Annotations:—*As to* (1) *Reid*. *Re Croydon, Hincks v. Roberts* (1911), 55 Sol. Jo. 632; *Re Blow, St. Bartholomew's Hospital v. Camden*, [1914] 1 Ch. 233; *Re Richardson, Pole v. Pattendon*, [1919] 2 Ch. 50. *As to* (2) *Reid*. *Re Blow, St. Bartholomew's Hospital v. Camden*, [1914] 1 Ch. 233.

7863. Disclaimer & renunciation by one executor—Possession of assets afterwards obtained—As agent of former co-executor—Not proper party.]

If one of two persons named trustees & exors. disclaims & renounces, & afterwards possesses himself of assets as the agent of the other, who has accepted the trust & proved the will, he does not thereby become accountable as a trustee & exor., & ought not to be made a party to a suit for the administration of the estate.—*DOVE v. EVERARD* s. & M. 231; Taml. 376; 30 E. R. 89.

Annotations:—*Consd.* *Bartlett v. Wood* (1860), 2 L. T. 144. *Mentd.* *A.-G. v. Chesterfield* (1854), 18 Beav. 596.

7864. Only those proving will.]—If a deft. dies, having appointed two or more exors. & all of them do not prove the will, it is sufficient for plffs. to revive the suit against those who prove.—*STRICKLAND v. STRICKLAND* (1842), 12 Sim. 463; 11 L. J. Ch. 197; 59 E. R. 1210.

Annotation:—*Mentd.* *Vickers v. Bell, Bell v. Vickers* (1863), 9 L. T. 600.

7865. ———.]—An allegation that A., B., & C. were named exors., & that A. & B. proved the will & are the personal representatives of testator, may be proved by the production of the probate; & in the absence of any denial of that fact by the answers, or any averment that C. also proved, C. is not a necessary party to the suit.—*DYSON v. MORRIS* (1842), 1 Hare, 413; 11 L. J. Ch. 241; 6 Jur. 297; 66 E. R. 1091.

Annotations:—*Reid*. *Vickers v. Bell, Bell v. Vickers* (1863), 9 L. T. 600. *Mentd.* *Crawford v. Fisher* (1842), 1 Hare, 136; *Holland v. Baker* (1843), 3 Hare, 68; *Jones v. Howells* (1843), 2 Hare, 312; *Lewis v. Hinton* (1844), 2 L. T. O. S. 455; *Parker v. Carter* (1845), 4 Hare, 400; *Wilson v. Short* (1848), 6 Hare, 366; *Wilkinson v. Fowkes* (1851), 9 Hare, 193; *Stanford, Spalding & Boston Banking Co. v. Ball* (1862), 8 Jur. N. S. 420.

7866. Suit by one executor—All co-executors to be made defendants.]—*LATCH v. LATCH*, No. 7804, *ante*.

7867. One executor resident abroad.]—Plff. brought an action against S., resident in this country, & B., resident at P., abroad, the two exors. of the will of a testatrix & also against other members of her family who were resident in this country. Testatrix had died possessed, as plff.

PART VIII. SECT. 2, SUB-SECT. 2.—
B. (b).

7864 i. Only those proving will.]—An exor. who has not proved is not a necessary party to a suit for administration of testator's assets.—*DREDGE v. MATHESON* (1879), 5 V. L. R. 266.—*AUS.*

a. Disclaimer & renunciation by one executor—Competency of co-executor to sue.]—In an action by two exors. under a will, one of them filed disavowal of the proceedings in his name:—*Held*: not competent for one of the joint exors. to bring an action without the consent of the other, & should he do so, he must do so in his own name alone.—*CLEMENT v. GIER, PETTIS v.*

DRUMMOND & CLEMENT (1851), 4 L. C. R. 193. — *CAN.*

t. ———. Necessity for proof of.]—A residuary devisee filed a bill against one of three exors. & trustees, to have the trusts in the will carried out; alleging that the other two persons named as exors. & trustees had renounced probate, & had never acted in the trusts. Deft.'s residence was unknown to plff., & service had been effected by advertisement, the bill was taken against him *pro confesso*, & there was no evidence other than such admission of deft., as to the other parties having renounced or refused to act. The ct. refused to make any decree in the absence of the co-exors.—

LANE v. YOUNG (1870), 11 Gr. 100.—*CAN.*

a. ———.]—Testator devised his real estate to two persons as his exors., but only one of them proved the will. An appln., by a person claiming to be a legatee & creditor, for an administration order was dismissed, the exor. who had proved the will having alone been served with notice, & it not being shown that the other exor. had renounced or disclaimed.—*Re PETTER, MCKINLEY v. BRADLE* (1871), 6 P. R. 157.—*CAN.*

7867 i. One executor resident abroad.]—Where on an application for an administration order it appeared that two exors. had proved the will, but only

alleged, of certain assets in this country & also at P., the latter forming part, as pltf. alleged, of the estate of his late wife, who had died intestate at P. Deft., B., was sued in his personal capacity as well as being one of the exors. of testatrix. Pltf. claimed administration of the estate of testatrix; an inquiry what assets belonging to the estate of his late wife, were received by testatrix during her lifetime or by defts. or any of them; an account of their dealings with any assets which they or any of them had taken possession of; & an order for transfer & delivery up of any of the assets that remained or payment of damages for any of which had been converted by defts. or any of them. Deft., B., was therefore, sued as one of a number joint & several tortfeasors:—*Held*: deft., B., was a necessary & proper party to the action as framed, & therefore he was rightly served with the writ out of the jurisdiction.—*Re BECK, ATTIA v. SEED* (1918), 87 L. J. Ch. 335; 118 L. T. 629; 34 T. L. R. 286, C. A.

Annotation:—*Mentd.* Payne v. British Time Recorder Co., 2 K. B. 1.

(c) *Death of Personal Representative.*

7868. Joinder of representative of deceased.—*GLASS v. OXENHAM*, No. 7859, *ante*.

7869. —.]—The exor. or administrator of a deceased exor. or administrator stated to have received monies in that character, although sometimes treated as a mere debtor to the estate of the original testator or intestate, is properly made a deft., together with the continuing exor. or new administrator of such testator or intestate, in a suit for the administration of his assets.—*HOLLAND v. PRIOR* (1834), 1 My. & K. 237; *Coop. temp. Brough.* 426; 47 E. R. 152, L. C.

Annotations:—*Reid.* Sreenutty Soorjee money Dossee v. Denobundus Mullick (1857), 6 Moo. Ind. App. 526; *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198; *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233.

7870. — **General representative—Not representative ad litem.**—*CLOUGH v. DIXON*, No. 7834, *ante*.

7871. —.]—Testator died, having appointed two exors., one of whom died before answer, having possessed assets & proved the surviving exor. answered bill of revivor & supplement:—*Held*: the personal representative of the deceased exor., who had possessed assets, must be before the ct.—*BRYDGES v. BRANFIL* (1842), as reported in 11 L. J. Ch. 249.

7872. — **Not compellable.**—*MASTERS v. BARNES*, No. 7846, *ante*.

General account asked.—A bill sought to charge the survivor of two exors. with a loss occasioned by a breach of trust committed by both, & also asked a general account of testator's estate:—*Held*: the representatives of the deceased exor. were necessary parties to the suit; *secus*, if no general account had been prayed.—*HIGGS v. PENN* (1845), 14 L. J. Ch. 326.

7874. —.]—Testator appointed three persons his exors., who proved the will. One of them died,

& a bill was filed by the residuary legatees of testator against the survivors, alleging that the exors. had committed a breach of trust, & praying that the two survivors might be held liable, & for the administration of testator's estate. One of them by his answer submitted, that the representatives of the deceased exor. ought to be made parties to the suit:—*Held*: notwithstanding Ord. 32 of Aug. 1841, the representatives of the deceased exor. ought to be parties to the suit.—*HALL v. AUSTIN* (1846), 2 Coll. 570; 15 L. J. Ch. 384; 7 L. T. O. S. 279; 10 Jur. 452; 63 E. R. 865.

Annotation:—*Reid.* Coppard v. Allen (1864), 2 De G. J. & Sm. 173.

7875. —.]—Where testator had devised & bequeathed his property to his wife for life or widowhood, with remainders over to other parties, after her death or second marriage, & appointed two persons his joint exors., but some of the parties entitled in remainder, & also the next of kin, as well as one of the exors., had died, & no personal representatives of any of the deceased persons were before the ct., the remaining exor. being sole deft. on a suit for the administration of testator's estate, & maintenance for the infant pltf.:—*Held*: notwithstanding 15 & 16 Vict. c. 86, the sole surviving exor. did not sufficiently represent the interests of all parties under the will, but the representatives of the deceased remaindermen, & the other exor. must be before the ct.—*HEADDEN v. EMMOTT* (1853), 22 L. T. O. S. 166.

7876. — **Representation of original testator—Must be averred.**—*BOULDING v. BOULDING*, No. 7827, *ante*.

7877. Where representative dispensed with—No representative appointed—No assets.—Where there was neither representative nor assets of an exor., who had died indebted to the estate, for the administration of which the suit was brought, an objection for the want of such a representative was overruled.—*MILES v. HAWKINS* (1826), 1 *Coop. temp. Cott.* 366; 47 E. R. 898; *sub nom.* *HAWKINS v. MILES*, 4 L. J. O. S. Ch. 139.

7878. — **Estate of deceased representative in England—Estate administered by deceased in India.**—A., one of the exors. of the will of B., who died in India, proved the will, & possessed testator's assets in India. The widow & extrix. of A. proved her husband's will, & possessed his assets in India, & having afterwards come to England, she was made a party to a suit for the administration of B.'s estate:—*Held*: it was not necessary that an administrator of A.'s estate in England should be also a party to this suit.—*ANDERSON v. CAUNTER* (1833), 2 My. & K. 763; 39 E. R. 1136.

Annotation:—*Consd.* Tyler v. Bell (1837), 2 My. & Cr. 89.

7879. — **No general account asked.**—*HIGGS v. PENN*, No. 7873, *ante*.

7880. — **Incapacitated persons interested in estate—Saving of expense.**—*WHITTINGTON v. GOODING* (1852), 10 Hare, App. I. xxix; 68 E. R. 1130.

7881. — **Surviving executor co-executor of deceased—Heir of deceased party to suit.**—Testator

one had been served with notice of the application, the other being out of the jurisdiction, an order was refused until the absent exor. should be served.—*Re FREERORN, FREERORN v. CARROLL* (1874), 6 P. R. 188.—*CAN.*

b. *Where representative an infant*

Appearance by guardian.—Administration proceedings taken against an infant co-exor. without observing the usual practice of serving the official guardian, were held to be invalid. *N. MASSEY v. CROOKSHANKS* P. R. 475.—*CAN.*

PART VIII. SECT. 2, SUB-SECT. 2.—**B. (c).**

c. *Where representative dispensed with—Surviving executor co-executor of deceased.*—Testator had appointed four exors., three of whom died, but those so dying had never received

Sect. 2.—Parties: Sub-sect. 2, B. (c), C., D. & E.]

directed his two sons, who were also his exors., to carry on his trade with his general personal estate, for the benefit of themselves & the widow & sisters, which the sons did accordingly. One of the sons died intestate. A bill was then filed for an account against the surviving son, who continued to carry on the trade; but no letters of administration being taken out to the son who had died, there was no personal representative before the ct. His eldest son & heir-at-law was, however, a party:—*Held*: his legal personal representative was not a necessary party to the suit.—*GODDARD v. HASLAM* (1855), 1 Jur. N. S. 251; 3 W. R. 357.

7882. — No allegations as to rendering accounts—By deceased executor.]—When all the exors. under a will act, & one dies, in a suit to administer the estate, in the absence of allegations of rendering any account by the deceased exor., or of receipt of assets by any of the exors., common decree ordered without the representative of the deceased exor.—*MONTGOMERY v. FLOYD* (1868), 18 L. T. 847.

C. Heir-at-Law.

See R. S. C., Ord. 16, rr. 32 (a) (b), 35.

7883. Whether necessary party—Estate of realty in India—Liable for payment of debts.]—(1) A person, in satisfaction of a previous debt due from him, gave his creditor a bill of exchange, & before the bill arrived at maturity went to India, whence he never returned. As soon as circumstances would permit after his death in India, his will was proved by his exors. in England, & within six years after his death a creditor's bill was filed against the exors.:—*Held*: pltf. was not barred by Stat. Limitations.

Qu.: whether, when a debtor dies abroad & the cause of action or suit has not accrued in his lifetime, a suit may not be instituted for the administration of his effects at any time within six years after probate of his will.

(2) Real estate in India being made by statute personal assets for the payment of the debts of a deceased debtor, it is unnecessary to make debtor's heir-at-law a party to a suit instituted for the administration of the assets.—*STORY v. FRY* (1842), 1 Y. & C. Ch. Cas. 603; 11 L. J. Ch. 373; 6 Jur. 1029; 62 E. R. 1035.

Annotation:—*Generally*, *Mentd.* *Towns v. Mead* (1855), 16 C. B. 123.

7884. — Administration of realty—& personality.]—In a suit by persons interested under the will of a testator, to administer his real & personal estate, it is not necessary to make the heir-at-law a party, or to prove the will.—*MARRIOTT v. MARRIOTT* (1846), 15 L. J. Ch. 422.

7885. — Not where possessing no interest.]—*DOODY v. HIGGINS*, No. 7850, *ante*.

D. Next of Kin.

See R. S. C., Ord. 16, rr. 32 (a) (b), 33.

7886. Next of kin at specific period—At death of life tenant—All living at time of suit.]—Where

property is bequeathed to A. for life, & after his decease to such persons as shall then be testator's next of kin; upon a bill filed for the protection of the property, the next of kin of testator living at the time of filing the bill must be made parties to the suit.—*WARDELL v. CLAXTON* (1842), 1 Y. & C. Ch. Cas. 265; 62 E. R. 883; *sub nom.* *WARDLE v. HARGREAVES*, 11 L. J. Ch. 126; 6 Jur. 478.

Annotation:—*Consd.* *Fowler v. James* (1846), 1 Coop. temp. Cott. 290.

7887. — Suit during life of life tenant—Presumptive next of kin.]—Where property is settled in trust, in remainder, for the persons who should be the next of kin of the tenant for life at her death the presumptive next of kin are not necessary parties to a suit instituted for the execution of the trusts during the lifetime of the tenant for life.—*FOWLER v. JAMES* (1847), 1 Ph. 803; 1 Coop. temp. Cott. 290; 16 L. J. Ch. 266; 41 E. R. 838, L. C.

Annotations:—*Reid.* *Roberts v. Roberts* (1848), 2 De G. & Sm. 29. *Mentd.* *Paul v. Paul* (1880), 43 L. T. 239.

7888. — Specific period in dispute—All possible next of kin.]—If, in an administration suit instituted by the next of kin of a testator at his death, the question is whether testator, by the words "my next of kin," meant his next of kin at his death or at a future period, not only the exor., but also the person or persons who may, by possibility, be the next of kin at that period, ought to be made defts.—*URQUHART v. URQUHART* (1844), 13 Sim. 613; 8 Jur. 161; 60 E. R. 239.

Annotations:—*Mentd.* *Nicholson v. Wilson* (1845), 9 Jur. 389; *Seifferth v. Badham* (1846), 9 Beav. 370; *Wharton v. Barker* (1858), 4 K. & J. 483; *Lee v. Lee* (1860), 1 Drew. & Sm. 85.

7889. Next of kin generally—To be made parties.]—*SALMON v. ANDERSON*, No. 7826, *ante*.

7890. — Bequest to heirs after specific period—Probable failure of heirs.]—Testator gave his real estate to trustees upon trust to lay out the rents during twenty-one years from his death, in the purchase of freehold or copyhold lands, & to convey them at the end of that term to the person then answering the description of testator's heir. The personal estate was bequeathed to the same trustees to lay out in land for the same purpose. In a suit instituted shortly after testator's death, by a person claiming to be the heir-at-law, for the administration of testator's estate:—*Held*: the next of kin were necessary parties, as in the event of there being no heir of testator living at the end of the twenty-one years, they would have an interest.—*RING v. JARMAN* (1851), 17 L. T. O. S. 87; 15 Jur. 942.

7891. — When dispensed with—Service of notice of decree.]—A bill was filed by the heir-at-law of a testator, who was also a legatee under the will, against the exors. & trustees, praying for execution of the trusts, for a declaration of the rights of pltf. & "all other parties" in the real & personal estate; for the usual accounts, & for the administration of the estate. The only defts. to the bill were the trustees & exors., & an infant devisee. The bill alleged that various questions arose as to the rights of the parties & of testator's

any portion of the assets. In a suit for the administration of the estate, a demurrer *ore tenus* that the representatives of such deceased exors. should be parties, was overruled. *WEBSTER v. LEYS* (1881), 28 Gr. 471.—*CAN.*

PART VIII. SECT. 2, SUB-SECT. 2.—C.

*d. Whether necessary party—Where no realty.]—*In a suit to administer the estate of testator, the heir-at-law ought to be a party. But where the personal representative filed a

bill against the devisee, alleging that no lands had descended, & the answer was silent, & no objection was raised at the hearing, the ct. in the circumstances made a decree in the absence of the heir.—*TIFFANY v. TIFFANY* (1863), 9 Gr. 158.—*CAN.*

heir-at-law & next of kin; that it was believed that two persons mentioned by name were testator's next of kin, & that it was intended to serve these two persons with notice of any decree which might be made in the suit. They were not, however, made defts. Demurrer, on the ground that it appeared from pltf.'s own showing that the next of kin of testator in the bill named were necessary parties, but yet that they were not made parties, nor any person or persons representing a common interest with the next of kin, overruled with costs.—*SNEPP v. SNEPP* (1858), 30 L. T. O. S. 348; 4 Jur. N. S. 202; 6 W. R. 355.

7892. Representatives appearance—One on behalf of himself & others.]—The bill alleged that pltf. represented one of four next of kin of an intestate, & prayed the usual administration accounts against the administrator, & the apportionment of one-fourth of the residue & its payment to pltf. Pltf. served the three other next of kin with copies of the bill, under the 23d Order of Aug., 1841. Deft., the administrator, claimed to be allowed for certain payments out of intestate's estate, as having been made with the sanction of one of such three next of kin. The ct. disallowed an objection by the administrator at the hearing that the three next of kin who had been served with copies of the bill, but did not appear, were necessary parties, & made a decree in their absence.—*KNIGHT v. CAWTHRON* (1847), 1 De G. & Sm. 714; 17 L. J. Ch. 103; 10 L. T. O. S. 303; 12 Jur. 33; 63 E. R. 1263.

7893. Next of kin of living person—Unascertained class.]—The circumstances were such that it was impossible to make her next of kin [of the wife] parties, because she being alive, her next of kin under the Statutes of Distribution were necessarily an unascertained class (*CHITTY, J.*).—*FUSSELL v. DOWDING* (1884), 27 Ch. D. 237; 53 L. J. Ch. 924; 51 L. T. 332; 32 W. R. 790.

E. Legatees.

See R. S. C., Ord. 16, r. 34.

7894. Legacy charged on realty—All legatees must be parties—Suit by legatees.]—Every legatee whose legacy is charged on real estate ought to be before the ct.—*MORSE v. SADLER* (1787), 1 Cox, Eq. Cas. 352; 29 E. R. 1199.

7895. ———.]—Testator by his will bequeathed certain legacies, charging them generally on his real estate, but he did not appoint any trustees competent to sell & give discharges. To a bill filed by two of the legatees, it was objected at the hearing, that the other legatees were not before the ct.:—*Held*: notwithstanding Ords. 30, 40, of Aug. 1841, they were necessary parties.—*STRICKLAND v. STRICKLAND* (1842), 6 Jur. 550.

7896. Pecuniary legacies—Legatees not necessary parties—Suit to recover legacies.]—Devise of a legacy of £100 apiece to three children, & the residue of his estate equally to be divided amongst them; two had received their legacies, & the third exhibited a bill for her legacy, to which deft. demurred, for that the other two were not made parties.

The demurrer as to the legacy will be overruled, but it will be allowed as to the share of the residuary

part (*per CUR.*).—*DUNSTALL v. RABETT* (1676), Cas. temp. Finch, 243; 23 E. R. 133.

7897. ———.]—*MORSE v. SADLER* (1787), 1 Cox, Eq. Cas. 352; 29 E. R. 1199.

7898. ——— Suit by residuary legatees.]—A person to whom a legacy or an annuity is given, to be paid out of the residue after the death of the legatee for life of such residue, is not a necessary party to a suit for administration of the estate, brought by legatees of aliquot shares of the ultimate residue.—*FISK v. NORTON* (1843), 2 Hare, 381; 67 E. R. 156.

7899. ——— Legatees not proper parties—Suit for administration.]—It is perfectly settled, as a general rule, that a pecuniary legatee is not a necessary or proper party to a bill for an account of the personal estate. It is the duty of the exors. to protect the estate against improper demands. But where a question directly occurred between the residuary legatee & a pecuniary legatee, which it was found impossible to determine in a general administration suit, & a suit was afterwards instituted by the residuary legatee against the pecuniary legatee & the exor. to determine it, a demurrer by the pecuniary legatee, on the ground that he had improperly been made a party, was, under the special circumstances, overruled.—*HERTFORD (MARQUIS) v. DE ZICHI (COUNT & COUNTESS)* (1845), 9 Beav. 11; 15 L. J. Ch. 58; 6 L. T. O. S. 97; 50 E. R. 246.

7900. ———.]—Where a pecuniary legacy is given a legatee in such terms as to leave the construction of the will in this respect doubtful, it is irregular to make the legatee a party to a suit for the administration of the estate of testator.—*CRACKENTHROP v. JOUNING* (1849), 19 L. J. Ch. 133; 15 L. T. O. S. 21; 14 Jur. 360.

7901. Legacy in common—Co-legatees not necessary parties.]—Where a legacy is given to A. & B., in equal moieties a bill will lie by A. for his moiety, without making B. a party to the suit.—*HUGHSON v. COOKSON* (1839), 3 Y. & C. Ex. 578; 8 L. J. Ex. Eq. 68; 160 E. R. 832.

7902. Exceptions to master's report—Taken by some legatees—Others must be joined.]—In a suit to administer the estate of a testatrix, who had made bequests to a great number of legatees, a reference was directed to the master to take accounts which would involve accounts of all the legacies. The master made a report as to a few only of the legatees, reserving the consideration of the bequests made to the others till afterwards, so that the decision upon the legacies contained in the report might govern him in his judgment upon the others, which were mostly in the same situation. Exceptions having been taken to the report by the legatees whose legacies were reported upon, the ct., at the hearing upon the exceptions, declined, in the absence of the other legatees, to make a final order which should be binding upon the exceptants.—*LEE v. PAIN* (1844), 4 Hare, 201; 8 Jur. 705; 67 E. R. 619; *subsequent proceedings* (1845), 4 Hare, 251.

Annotations:—Mentd. *Bourne v. Hartley*, *Bourne v. Mahon* (1854), 2 Eq. Rep. 910; *Benham v. Newell* (1855), 24 L. J. Ch. 424; *Palmer v. Newell* (1855), 20 Beav. 32; *Pritchard v. Norris* (1855), 25 L. T. O. S. 60; *Thurnall v. Rayner* (1856), 4 W. R. 404; *Cruse v. Howell* (1858), 4 Drew. 215; *Johnstone v. Harrowby* (1859), 7 W. R. 610; *Tatham*

PART VIII. SECT. 2, SUB-SECT. 2.—E.

• General rule.]—Legatees are not necessary parties deft. in an administration suit.—*HARRISON v. SHAW* (1866), 2 Ch. Ch. 44.—*CAN.*

Sect. 2.—Parties: Sub-sect. 2, E., F. & G.: sub-sects. 3 & 4.]

r. Drummond (1864), 10 Jur. N. S. 557; Wilson v. O'Leary (1872), 7 Ch. App. 448; Whyte v. Whyte (1873), L. R. 17 Eq. 50; Dimond v. Bostock (1875), 10 Ch. App. 358; Re Smith's Trusts (1878), 9 Ch. D. 117; Blakey v. Latham (1889), 41 Ch. D. 518; Re Stephenson, Donaldson v. Bamber, [1897] 1 Ch. 75; In the Goods of Hubbock (1905), 21 T. L. R. 333; Re Whiston, Whiston v. Woolley (1923), 93 L. J. Ch. 113.

7903. Bequest of legacy equal to share of other legatees—Other legatees must be joined.]—Testator covenanted to bequeath to one of his sons a sum which would make that son's share equal to the share of any of the younger children. The son filed his bill for an account against the exors.:—*Held*: the other children of testator were necessary parties.—*HILL v. HILL* (1848), 12 Jur. 972.

7904. Legatee of moiety—Suit by owner of other moiety.]—*HUGHSON v. COOKSON*, No. 7901, *ante*.

7905. ———.]—Bequest in trust to invest & pay the interest of a moiety to A., & afterwards to her children, & the other moiety to B., & afterwards to her children. The interest on a moiety of £1,000 invested on mtge. was paid to A. for thirty years. On her death, the mtge. was got in:—*Held*: A.'s children could maintain a suit for their moiety, without making B. & her children parties.—*HARES v. STRINGER* (1852), 15 Beav. 206; 51 E. R. 516.

7906. Legacy assigned — Assignee necessary party—Suit by legatee to recover.]—The assignee of a legatee is a necessary party to a suit brought by the legatee for the recovery of the legacy, where the assignment took place before the institution of the suit.—*CAMPBELL v. DICKENS* (1840), 4 Y. & C. Ex. 17; 160 E. R. 901.

F. Residuary Legatees and Devisers.

See R. S. C., Ord. 16, rr. 33, 35.

7907. Suit against executor — By legatee.]—In a bill against the exor., either by creditors or legatees, it is not necessary to make the residuary legatee a party.—*LAWSON v. BARKER* (1783), 1 Bro. C. C. 303; 28 E. R. 1147.

7908. ———.]—*DE ZICHY (COUNTESS) v. LONSDALE (EARL)*, No. 7809, *ante*.

7909. ——— By grantor of annuity—Claiming consideration therefor.]—*BROWN v. DOWTHWAITE* (1816), 1 Madd. 446; 56 E. R. 164.

7910. ——— By annuitant.]—Testator gave & devised all his real & personal estate to trustees, who were also his exors., upon trust to sell & convert his real estate & such of his personal estate as was not money or invested in the funds, & out of the proceeds to pay his debts, etc., & a legacy of £1,000; & upon trust to invest the residue in the funds, & out of the dividends to arise from the investment of such residue to pay certain annuities; & subject to such trusts, he bequeathed the residue of his trust estate to certain persons. One of the annuitants filed her bill against the trustees, not making the other annuitants or the residuary legatees parties, & praying that the

estates should be sold, & a sufficient investment made to secure her annuities:—*Held*: the other annuitants & the persons interested in the residue were necessary parties, the bill praying that the whole estate might be sold.—*MILLER v. HUDDLESTONE* (1843), 13 Sim. 467; 1 L. T. O. S. 226; 7 Jur. 504; 60 E. R. 181.

Annotations:—Consd. Jennings v. Paterson (1851), 15 Beav. 28. *Mentd. Ward v. Bassett* (1846), 5 Hare, 179.

7911. Suit by same residuary devisees or legatees — Remainder to be made parties.]—*DUNSTALL v. RABETT*, No. 7896, *ante*.

7912. ———.]—*SHERRIT v. BIRCH* (1791), 3 Bro. C. C. 229; 29 E. R. 505.

7913. ———.]—*PARSONS v. NEVILLE* (1791), 3 Bro. C. C. 365; 29 E. R. 586, L. C.

7914. ———.]—*COCKBURN v. THOMPSON*, No. 7816, *ante*.

7915. ———.]—Some of the residuary legatees under a will may file a claim against the exors., without making the other residuary legatees parties, but the others ought to be summoned before the master.—*WATSON v. YOUNG* (1850), 1 Sim. N. S. 114; 15 Jur. 162; 61 E. R. 45.

7916. ———.]—The administrator of A. entitled to a moiety of a definite sum, appropriated in respect of two thirteenth shares of a residue, & also entitled to a tenth part of the other moiety, filed a claim against the exor. for payment:—*Held*: the persons entitled to the other shares were necessary parties.—*WOODFORD v. WOODFORD* (1851), 17 L. T. O. S. 250.

G. Appointees, Annuitants, and Remaindermen.

7917. Appointees—Where part only of fund appropriated.]—(1) Under the will of her husband a woman had a general power of appointment over a sum of £20,000 consols, which was to be raised & invested out of the husband's personal estate, & in aid thereof out of his realty. Upon the husband's death a suit was instituted against the wife as his extrix. & against the devisees in trust of his real estate, who had power to sign receipts, for the administration of his real & personal estate. Pending the suit the wife died having by her will appointed to various persons the £20,000 consols part only of which, by reason of the deficiency in the husband's personalty had been appropriated & invested. Upon a bill filed against the wife's exors. to revive the administration suit:—*Held*: as to that part of the appointed fund which was invested & appropriated, supposing the object of the suit to be to make it contributory to the husband's assets, the appointees were necessary parties, but, as to the remainder of the fund they were not necessary parties.

(2) Where appointees are numerous, they may be represented as defts. to a suit by some on behalf of the rest.—*MILBANK v. COLLIER* (1844), 1 Coll. 237, 63 E. R. 400; *sub nom. MILLBANK v. COLLIER*, 3 L. T. O. S. 200.

7918. Remaindermen — Representatives where deceased.]—*HEADDEN v. EMMOTT*, No. 7875, *ante*.

PART VIII. SECT. 2, SUB-SECT. 2.—F.

79071. Suit against executor — By legatee.]—Where a will supported by the exor. had been condemned & no case of fraud, neglect, or collusion had been made out against the exor. in the conduct of the former cause, the

ct. refused to permit the matter to be re-opened by a new suit on behalf of the residuary legatee though a minor.—*DUFFY v. BRADY* (1841), Milw. 582.—*IR.*

*l. ——— To enforce provisions of will.]—*Where land was devised in

equal moieties to A. & B., charged with the support of C., & B. parted with his land without fulfilling the obligation resting upon him:—*Held*: A. was a necessary party to an action to enforce the provisions of the will.—*SMITH v. BEATON* (1892), 25 N. S. R. (13 R. & G.) 60.—*CAN.*

7919. — Sult against executor.]—In an action against an exor., plff., as administrator of M. deceased, who was tenant for life under testator's will, claimed a declaration that a sum of money, which debt. had raised for payment of debts by mtge. of part of testator's estate, & had subsequently paid off out of income received by him during M.'s life, was payable out of the corpus of the mortgaged estate. Pltf. also claimed repayment of the money, an account, &, if & so far as necessary, administration of the trusts of the will. The defence was that debt. had acted on what he believed to be the true construction of the will, & that the question at issue was one of construction which affected the estate of M. & the devisees in remainder, & ought not to be decided in the absence of the latter. On preliminary objection:—*Held*: the remaindermen were not necessary parties.—*Re* WARD, BEMMENT v. BALLS (1878), 47 L. J. Ch. 781.

7920. Co-annuitants—Sult by one annuitant.]—MILLER v. HUDDLESTONE, No. 7910, *ante*.

SUB-SECT. 3.—REPRESENTATIVE PARTIES.

R. S. C., Ord. 16, rr. 9, 32 (a) (b).

7921. General rule.]—Persons interested in an estate the subject of an administration action to which they had not been made parties, & whose rights or interests may be affected by an order directing accounts & inquiries, are not bound by the proceedings under that order—at any rate where they ought to be served—unless they are served with notice of the order, or an order has been made appointing a member of their class to represent them in the action.

When the absent parties are numerous, & have the same interest, Ord. 16, r. 9, seems to apply; & if one of them is sued as a debt. an order should be obtained in the form "it appearing that the residuary legatees," or whatever the class may be, "are numerous, & that A. is one of such class, order that A. do defend in the cause," or matter, "on behalf or for the benefit of all persons so interested" (KAY, J.).—MAY v. NEWTON (1887), 34 Ch. D. 317; 56 L. J. Ch. 313; 56 L. T. 140; 35 W. R. 363.

7922. Appointment a matter of convenience.]—Where a class of persons entitled is numerous, it is a question of convenience whether the ct. will require them all to be made parties. One of a numerous class of residuary legatees permitted to sue on behalf, etc., in the absence of the greater portion of them.—HARVEY v. HARVEY (1841), 4 Beav. 215; 49 E. R. 321; *subsequent proceedings* (1842), 5 Beav. 134.

7923. — What amounts to inconvenience—Class interested twenty in number.]—Twenty creditors, interested in a real estate, are not so large a number that the ct. will, on the ground of inconvenience alone, allow a few of them to represent the others, & dispense with such others as parties in a suit to recover the estate against the whole body of creditors.—HARRISON v. STEWARDSON (1843), 2 Hare, 530; 1 L. T. O. S. 311; 67 E. R. 219.

Annotation:—Mentd. Courage v. Wardell (1845), 9 Jur. 1055.

7924. — — —.]—Bill by four of the next of kin of an intestate, for the administration

of his estate, on behalf of themselves & all others the next of kin. The bill alleged that the next of kin were very numerous, but no evidence of that fact was adduced. Upon an affidavit, under 13 & 14 Vict. c. 35, that the next of kin were upwards of twenty in number, the ct. made the usual administration decree.

I think that, before making the decree, there ought to be some evidence of the number of the next of kin. This evidence may be supplied by affidavit (KNIGHT BRUCE, V.-C.).—SMITH v. LEATHART (1851), 20 L. J. Ch. 202.

7925. Evidence of number of class—Affidavit.]—SMITH v. LEATHART, No. 7924, *ante*.

7926. Appointee.]—MILBANK v. COLLIER, No. 7917, *ante*.

7927. Next of kin.]—KNIGHT v. CAWTHRON, No. 7892, *ante*.

7928. Form of order for.]—MAY v. NEWTON, No. 7921, *ante*.

SUB-SECT. 4.—PARTIES OUT OF JURISDICTION.

See, generally, PRACTICE; R. S. C., Ord. 11.

7929. Whether dispensed with.]—ROGERS v. LINTON (1725), Bunb. 200; 145 E. R. 647.

Annotation:—*Reid*. Willats v. Busby (1842), 5 Beav. 193.

7930. — Foreign trustees & cestuis que trust — Not unless special difficulty or inconvenience.]—(1) Testator directed his debts to be paid, & appointed exors. in England & other exors. in Italy, directing the English exors. to transmit the residue to the Italian exors., & bequeathing such residue amongst classes of persons alleged to reside in Italy:—*Held*: the sum to be paid over, being the residue after payment of debts, the Italian exors. must be regarded as simply trustees of that fund, & not as exors. holding it charged with debts, &, therefore, inquiries must be directed to ascertain the persons beneficially entitled to the fund under the bequest.

(2) Where a trust fund is to be administered under the direction of the ct., the general rule requiring the *cestuis que trust* to be parties is applicable to foreign trustees & *cestuis que trust*, residing out of the jurisdiction, unless a special case of difficulty or inconvenience in the application of the rule be shown.—WEATHERBY v. ST. GIORGIO (1843), 2 Hare, 624; 12 L. J. Ch. 412; 1 L. T. O. S. 167; 7 Jur. 717; 67 E. R. 257.

7931. — — — Representative residing in Ireland.]—Upon the death of an accounting party in an action, the ct. may, upon an *ex p.* application under R. S. C., 1875, Ord. 50, r. 4, make an order that the action be continued between the continuing parties & the exor. of the will of the deceased party, notwithstanding that such exor. is resident in & has proved the will in Ireland. For the purposes of making such an order, the ct. will require an affidavit showing the circumstances under which the order is applied for.—JAMESON v. MARSHALL (1882), 46 L. T. 480.

7932. Party sued as executor & joint tortfeasor.]—*Re* BECK, ATTIA v. SEED, No. 7867, *ante*.

Service out of jurisdiction.]—*See* Sect. 4, subsect. 4, B., *post*.

Sect. 2.—Parties: Sub-sects. 5, 6 & 7.]**SUB-SECT. 5.—MISJOINDER OF PARTIES.**

See R. S. C., Ord. 16, rr. 11, 12.

7933. Misjoinder of co-plaintiffs—Creditor & administrator—Against party holding some assets.]—A., a creditor, & B., the administrator, with the will annexed of a testator, cannot join as co-pltfs. in a bill against C., who holds part of testator's assets. If in a suit in which A., a creditor, & B., an administrator, are made co-pltfs., B. dies, after a decree for the administration of the personal estate, B.'s personal representatives ought, in the further prosecution of the suit, to be made parties in respect of B.'s possession of assets; but as they are accounting parties in respect of such possession, they must be made defts., & not co-pltfs.—**BARNES v. LEVER** (1823), 1 L. J. O. S. Ch. 165.

7934. Mortgagee of testator's estate—Mortgagee in possession.]—Devisees & legatees filed a bill against the trustees & exors. of the will & a mtgee. in possession of part of the estates, alleging that the trustees & exors., colluding with the mtgee., refused to make him account for the rents which he had received or to redeem the mtge., & praying for an account of testator's assets, & that the mtge. might be redeemed. A demurrer by the mtgee. for multifariousness was allowed.

I am of opinion that this bill is multifarious, because it seeks something to be done with which the mtgee. has no concern, & it would be a grievous hardship upon him if he were to be kept before the ct. until the various objects to which this bill relates had been accomplished (**SHADWELL, V.-C.**).—**PEARSE v. HEWITT** (1835), 7 Sim. 471; 7 L. J. Ch. 286; 58 E. R. 918.

Annotations:—**Reid.** **Lund v. Blanshard** (1844), 4 Hare, 9; **Jerdein v. Bright** (1861), 2 John. & H. 325.

7935. — Having exercised power of sale.]—Pltf. in an administration action in the county ct. sought to add as co-deflt. a person who, having been mtgee. of certain real property of deceased, had exercised his power of sale. The county ct. judge had refused to make the order, on the ground that, as mtgee. so selling, he was only in the position of a debtor to the estate:—**Held**: pltf. was entitled to a rule nisi for a mandamus to compel the county ct. judge to add such party.—**GOODWIN v. LLOYD** (1885), 2 T. L. R. 188, D. C.

7936. Next of kin—Having no interest.]—Testator, by his will, gave an annuity to his wife A., & gave all the residue of his real & personal property to his son B.; but directed that, in the event of the death of B. under twenty-five, his real & personal property should go to his own right heirs, exors., & administrators. B., who was an infant, was testator's heir-at-law, & B. & A. would have been entitled to his personal property under the

Statutes of Distribution, if he had died intestate. A bill was filed by B. against A., & against C., D., & E., who were the persons who would have been entitled to testator's real & personal property, if he had died intestate & without issue, for the administration of his estate:—**Held**: (1) the ct. would, at the hearing of the cause, decide the question whether C., D., & E. ought to remain parties to the suit; & (2) from want of interest, they ought not so to remain, & the bill would be dismissed against them accordingly.—**WILKINSON v. GARRETT** (1846), 2 Coll. 643; 15 L. J. Ch. 416; 7 L. T. O. S. 488; 10 Jur. 560; 63 E. R. 898.

7937. Debtor to estate—Except in cases of collusion or fraud—Or partnership.]—The general rule of the ct. in administration suits is, that a creditor or legatee cannot make a debtor to the estate under administration a co-deflt. with those who represent the estate, unless there has been collusion between the personal representative, bound to get in the estate & administer it, & the debtor to that estate, or where deceased was partner with others, & the estate could not be ascertained without partnership accounts.—**BURROWES v. GORE** (1858), 6 H. L. Cas. 907; 32 L. T. O. S. 21; 4 Jur. N. S. 1245; 6 W. R. 609; 10 E. R. 1551, H. L.

Annotations:—**Mentd.** **Mutlow v. Bigg** (1874), L. R. 18 Eq. 246; **Re Plumtre's Marriage Settlement**, **Underhill v. Plumtre**, [1910] 1 Ch. 609; **Re Turner, Klaffenberger v. Groombridge**, [1917] 1 Ch. 422; **Re Jordison, Raine v. Jordison**, [1922] 1 Ch. 440.

7938. Pecuniary legatees.]—**HERTFORD (MARQUIS) v. DE ZICHI (COUNT & COUNTESS)**, No. 7899, *ante*.

7939. —.]—(**CRACKENTHORP v. JOUNING**, No. 7900, *ante*).

SUB-SECT. 6.—ADDING PARTIES.

See, generally, PRACTICE; R. S. C., Ord. 16, rr. 2, 11, 13.

7940. Within discretion of court—Order to add not of course.]—**TYLER v. BELL**, No. 7825, *ante*.

7941. After replication.]—Liberty given, after replication, to amend bill, without withdrawing replication, by changing one of defts., who was the administrator, which was, in effect, adding a party.—**ANDREE v. —** (1792), 2 Dick. 768; 21 E. R. 469, L. C.

7942. Pendente lite—Mortgagees added.]—Where parties to an administration suit have, *pendente lite*, mortgaged their shares, the mtgees. may be made parties to the suit by a supplemental order under 15 & 16 Vict. c. 86, s. 52.—**BRANDON v. BRANDON** (1863), 3 New Rep. 287; 9 L. T. 570.

PART VIII. SECT. 2, SUB-SECT. 5.

7937 i. Debtor to estate—Except in cases of collusion or fraud—Or partnership.]—Although the general rule is that in an administration suit a debtor to the estate is not a proper party in the absence of collusion or insolvency, it is not limited to these cases, but applies equally when the creditor has obtained property from an exor. acting hastily, improvidently, or contrary to his duty, which is known to such creditor.—**BANK OF TORONTO v. BEAVER & TORONTO MUTUAL FIRE INSURANCE CO.** (1878), 26 Gr. 102.—**CAN.**

7937 ii. —.]—Persons

who have possessed themselves of the property of deceased, or are debtors of the estate generally, cannot be made parties to a suit against the exor., yet this rule is relaxed in the case of surviving partners of deceased, whom it is allowed to make parties with the exor. in order that pltf. may have an account of the personal estate entire.—**BURN v. BURN** (1884), 8 O. R. 237.—**CAN.**

7937 iii. —.]—**PHILIPS v. PHILIPS** (1844), 6 I. Eq. R. 509.—**IR.**

g. Infants—On appeal by executors—In same interest.]—Where exors. have appealed, infants in the same interest

need not appear, & will not be allowed costs if they do.—**McLAREN v. COOMBS** (1867), 2 Ch. Ch. 124.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 6.

h. Within discretion of court—To prevent further litigation.]—Where a determination of the proper construction of a will is necessary to entitle pltf. to succeed, it is not an improper exercise of discretion to require the surviving legatee, or his representative, to be added as a party, so as to prevent an adjudication being had as to his rights under the will behind his back, & to have the question decided in one

7943. Pending decree — Executor.] —PITT v. BREWSTER (1721), 1 Dick. 37; 21 E. R. 181.

*Annotation:—*Reid. White v. Hall (1830), 1 Russ. & M. 332.

7944. After decree — Mortgagee of share of legatee.]—After decree for administration of testator's estate had been made at the suit of a mtgee. of the share of one of the residuary legatees, the same residuary legatee made another mtge. of his share by a deed in which pltf. concurred & by which it was agreed that the two incumbrances should rank *pari passu*. An order on further consideration was then made without laying the new incumbrance before the ct.:—*Held*: he might be brought before the ct. by supplemental order under Tenancy Procedure Act, 1852 (c. 86), s. 52, without a supplemental bill.—FREEMAN v. PENNINGTON (1861), 3 De G. F. & J. 295; 31 L. J. Ch. 216; 5 L. T. 514; 10 W. R. 184; 45 E. R. 892, L. JJ.

7945. — Executor — Proving will after decree.] —HALDANE v. ECKFORD, No. 7583, *ante*.

7946. — — — — —.]—After a decree made in an administration suit, in which one exor. was deft., another exor. returned from abroad & proved the will:—*Held*: he might be made a deft. by supplemental order.—GUTHRIE v. WALROUD (1874), 30 L. T. 377; 22 W. R. 723.

7947. — — — — —.]—Re DRACUP, FIELD v. DRACUP (1892), 36 Sol. Jo. 327.

7948. Adding plaintiff under R. S. C., Ord. 16, r. 2.—Only where bona fide mistake.] —CLOWES v. HILLIARD, No. 7803, *ante*.

SUB-SECT. 7.—EFFECT OF DEATH OR CHANGE OF PARTIES.

See, generally, PRACTICE; R. S. C., Ord. 17.

7949. Death of plaintiff—Co-plaintiff—Being administrator — Representatives joined as defendants.] —BARNES v. LEVER, No. 7933, *ante*.

7950. — — — — — No legal representative — Order to revive or dismiss.]—On the death of one of several co-pltfs. it was ordered that the survivors should revive within a limited time, or that the bill should be dismissed, notwithstanding there was no legal personal representative, it being their duty to obtain administration.—SANER v. DEAVEN (1852), 16 Beav. 30; 51 E. R. 687.

7951. — — — — — Tenant for life—Devolution of property to one of defendants—Suit continued at his instance.]—A tenant for life in an administration suit was sole pltf., & after decree, died. The title to the property thereupon devolved upon one of defts., an infant. On motion by such infant to revive the suit on his behalf, the common order to revive was made without bill being filed.—IRVING v. PEARSON (1868), 18 L. T. 283.

*Annotation:—*Folld. Auston v. Gilman (1872), 26 L. T. 129.

7952. — — — — — Heir-at-law—Revivor by co-heirs—Being infants.]—Where proceedings had been taken in a suit which was abated by the death of a party:—*Held*: there was no jurisdiction to make

an order against infant heirs to revive & trust they should be bound by the proceedings.—CAPPs v. CAPPs (1868), 4 Ch. App. 1.

*Annotations:—*Apld. Auster v. Haines (1869), 4 Ch. App. 445. Distd. Egremont v. Thompson (1869), 17 W. R. 900; Grunwell v. Garnor (1869), 39 L. J. Ch. 77; Haldane v. Eckford, [1879] W. N. 80. Reid. Griffin v. Morgan (1868), 19 L. T. 714; Scott v. Duncombe (1870), 39 L. J. Ch. 644; Peter v. Thomas-Peter (1884), 26 Ch. D. 181.

7953. — — — — — Revivor by party served with decree—Taking benefit thereunder.]—A person served with notice of decree who elects to take a benefit under it is entitled to the usual order of revivor.—AUSTEN v. GILMAN (1872), 26 L. T. 129; 20 W. R. 361, 461.

7954. Death of defendant—Suit continued against representatives—Only such as prove will.]—STRICKLAND v. STRICKLAND, No. 7864, *ante*.

7955. — — — — — & other original defendants.]—Deft. having died before appearing to the bill, his representative was brought before the ct. by means of a bill to which none of defts. in the first suit were made parties. Upon an objection as to parties:—*Held*: all defts. in the first suit ought to have been made parties in the second suit.—FOSTER v. FOSTER (1849), 16 Sim. 637; 18 L. J. Ch. 356; 13 Jur. 399; 60 E. R. 1021.

7956. — — — — — Representative residing in Ireland.]—JAMESON v. MARSHALL, No. 7931, *ante*.

7957. — — — — — Insolvent & intestate—No representative obtainable.]—Where one of two trustees sought to be fixed with a breach of trust, in an administration suit, died insolvent & intestate, & no personal representative could be obtained to his estate, the ct., under 15 & 16 Vict. c. 86, s. 44, ordered the cause to proceed in the absence of any personal representative of such deceased trustee.—BAND v. RANDLE (1854), 2 Eq. Rep. 439; 23 L. T. O. S. 21; 2 W. R. 331.

*Annotation:—*Folld. Moore v. Morris (1871), L. R. 13 Eq. 139.

7958. Change of interest of party—Defendant made plaintiff—Inheritor of property of deceased plaintiff.]—IRVING v. PEARSON, No. 7951, *ante*.

7959. — — — — — Plaintiff made defendant—Becoming trustee on attainment of majority.]—Where a testator appointed his two infant sons trustees on their attaining the age of twenty-one, & an administration action was commenced on the elder son attaining twenty-one, in which the infant son was made a pltf. & the elder son deft.; on the younger son attaining twenty-one, & becoming a trustee, & thus changing his interest & liability, the ct., on an *ex p.* application under R. S. C., Ord. 17, r. 4, made him a co-deft.—Re GOOLD, GOOLD v. GOOLD (1884), 51 L. T. 417.

7960. Birth of children—After institution of suit—Bound by supplemental order.]—Where, after an administration suit had been instituted, a child was born who took an interest in the property:—*Held*: there was jurisdiction to make an order under 15 & 16 Vict. c. 86, s. 52, bringing the child before the ct. & directing that he should be bound by the previous proceedings in the suit.—EGREMONT v. THOMPSON (1869), 4 Ch. App. 448; 17 W. R. 900, L. C.

*Annotation:—*Apld. Askew v. Rooth (1875), 44 L. J. Ch. 200.

action.—CLIFTON v. CRAWFORD (1899), 18 P. R. 316.—CAN.

k. Individual creditors—In suit by representative body.]—In an administration suit it is extremely undesirable

that individual creditors should be added as parties unless they show some very strong reason.—VASSONJI TRICUMJI & Co. v. ESMAILBHAI SHIVJI (1909), 1 L. R. 34 Bom. 420.—IND.

PART VIII. SECT. 2, SUB-SECT. 7.

1. Change of interest of party—By assignment pendente lite—Discretion of court.]—Where a party to an administration suit assigns his interest

Sect. 2.—Parties: Sub-sect. 7. Sect. 3:

7961. — After decree made—Jurisdiction of court to bind by supplemental order.]—In an administration suit a decree was made & a copy served upon testator's married daughter, her husband, & two infant children, who were not parties to the suit. After further proceedings had been taken it was discovered that the daughter had, previously to some of these proceedings, given birth to two other children:—*Held*: there was no jurisdiction to make a supplemental order under 15 & 16 Vict. c. 86, s. 52, to bring these children before the ct. & bind them by the proceedings.—*AUSTER v. HAINES* (1869), 4 Ch. App. 445; 38 L. J. Ch. 385; 20 L. T. 152; 17 W. R. 900, L. C.

Annotations:—*Distd.* Egremont v. Thompson (1869), 4 Ch. App. 448. *Foll.* Scott v. Duncombe (1870), L. R. 9 Eq. 665. *Distd.* Haldane v. Eckford, [1879] W. N. 80. *Reid.* Peter v. Thomas-Peter (1884), 26 Ch. D. 181.

7962. — — — — —.]—Upon the birth of a child who is a necessary party as one of a class entitled, the usual supplemental order may be obtained after decree.—*GRUNWELL v. GARNER* (1869), L. R. 8 Eq. 355; 39 L. J. Ch. 77; 20 L. T. 693.

Annotation:—*Overd.* Scott v. Duncombe (1870), L. R. 9 Eq. 665.

7963. — — — — —.]—After a decree had been made in an administration suit an infant was born, who soon after his birth became interested in possession in the estates, but was overlooked in the subsequent proceedings. A sale having been made & approved, upon investigation of the title the omission was discovered:—*Held*: it was not necessary to revive the suit, but a supplemental order was made that the proceedings should be of the same force & effect as if the infant had been made a party immediately after his birth.—*WALKER v. WALKER* (1870), L. R. 9 Eq. 663; 22 L. T. 201.

Annotation:—*Reid.* Scott v. Duncombe (1870), 39 L. J. Ch. 644.

7964. — — — — —.]—After decree in an administration suit children were born who were interested in the estate to be administered. Subsequently to their birth, two orders were made in the suit without the children being brought before the ct.:—*Held*: the proceedings which had taken place since the children's birth could not be made binding upon them by a supplemental order.—*SCOTT v. DUNCOMBE* (1870), L. R. 9 Eq. 665; 39 L. J. Ch. 644; 22 L. T. 540.

7965. — — — — —.]—After the decree was made in an administration suit the number of a class interested in the residue of the estate of testatrix was increased by the birth of a child of one of the tenants for life. Some proceedings were taken in the suit after his birth:—*Held*: the infant could not be bound by the proceedings by means of the common order to revive, but a supplemental bill must be filed.—*ASKEW v. ROTH* (1875), 44 L. J. Ch. 200; 31 L. T. 819, L. C. & L. JJ.

pendente lite, it is always at the discretion of the ct. to require the assignee to be made a party. The ct. is less likely to require the assignee of debt to be made a party than the assignee of plff. who being *dominus litis* makes

PART VIII. SECT. 3, SUB-SECT. 1.
m. When action necessary—Va
validity of an award cannot be tried on motion for an administration order, but a bill must be filed, more

SECT. 3.—WHAT MATTERS MAY BE DETERMINED OR DEALT WITH.

SUB-SECT. 1.—BY ACTION.

7966. Not goodwill of solicitor's business.]—*SPICER v. JAMES* (1830), Collyer's Law of Partnership, 2nd. ed. p. 104.

7967. Not questions between estates of residuary legatee, tenant for life & tenant in tail—Form of suit.]—A suit was instituted in the Ct. of Ch. in Ireland, by the trustees of A.'s will, for carrying the trusts thereof into execution, & for administration of his estate; & B., one of debts thereto, & who was entitled to the residue of A.'s estate, having died before decree, bills of revivor & supplement & amendment were filed by plffs. in the original suit, against B.'s personal representatives & against all the parties interested under his will in his real & personal estates; & a decree was made directing accounts to be taken of the personal estates, debts & legacies, of A. & of B. respectively. By a subsequent decree, certain unpaid legacies of B., & the interest on them, were declared, in the event of his personal estate being found insufficient, to be charged on his real estates; the principal not to be raised until after the death of C., the tenant for life thereof under B.'s will, but the interest to be paid out of the rents & profits during C.'s life. On a question subsequently arising between C. & D. the tenant in tail of the real estates after C.'s life estate, whether a fund in ct., part of B.'s personal estate, should be applied exclusively in payment of arrears of interest on the legacies, or ratably in payment of the legacies & of the interest; the ct. made orders directing the fund to be applied exclusively in payment of the arrears of interest; & refused to direct an inquiry as to how much of the fund in ct. was principal, & how much accumulated interest:—*Held*: any question as to the application of B.'s personal estate could not be regularly adjudicated in this form of suit, between co-debts. C. & D.; & the orders appealed from were affirmed, with a variation & declaration that they should be without prejudice to any question between C. & D. as to the manner in which the principal & interest of the legacies should be paid.—*COOTE v. TRENCH* (1842), 9 Cl. & Fin. 71; 6 Jur. 591; 8 E. R. 343, H. L.

Annotation:—*Reid.* Shore v. Shore (1857), 4 Drew. 219.

7968. Not to raise money on mortgage for repairs—By infant—Debts Recovery Act, 1839 (c. 47).]—In a creditor's suit the ct. has no jurisdiction, under above Act, or 2 & 3 Vict. c. 60, to extend the sum to be raised by way of mtge. by an infant for payment of the debts of his ancestor or devisor, so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mtge., & where a mtge. is much more beneficial for the infant than a sale would be.—*HILL v. MAURICE* (1847), 1 De G. & Sm. 214; 16 L. J. Ch. 280; 9 L. T. O. S. 71; 11 Jur. 795; 63 E. R. 1038.

7969. Enforcement of voluntary assignment by testator—Covenant for further assurance.]—The ct.,

ELLIOTT (1860), 1 Ch. Ch. 320.—**CAN.**
n. — — —.]—An administration order was refused where the grounds on which it was claimed were properly the subject for a bill.—*CAMERON v. MACDONALD, Re MACDONALD* (1866), 2 Ch. Ch. 29.—**CAN.**

o. — — Administration of real

in the administration of assets, enforced against the estate voluntary assignments, made by testator, of annuities, mtge. debts & policies of assurance, of which assignments no notice had been given in his lifetime to the mtgors. or grantors, such assignments containing covenants for further assurance by testator, his exors. & administrators.—*COX v. BARNARD* (1850), 3 Hare, 310; 68 E. R. 370.

Annotations:—*Mentd.* *Voyle v. Hughes* (1854), 2 Sm. & G. 18; *Re Cavendish, Browne's Settlement, Trusts, Horner v. Rawle* (1916), 61 Sol. Jo. 27.

7970. Disputed claim by creditor.—25 & 26 Vict. c. 42, renders it obligatory on the Ct. of Ch. to decide all questions of law or fact on the determination of which the title of any party to relief or remedy in equity depends.

In an administration suit, where it is sought to prove an alleged debt, the existence or amount of which is disputed, the ct. will try the question, & will not as heretofore require claimant to establish the alleged debt by action at law.—*Re HOOPER'S ESTATE, BAYLIS v. WATKINS* (1862), 3 De G. J. & Sm. 348; 1 New Rep. 115; 32 L. J. Ch. 55; 7 L. T. 843; 8 Jur. N. S. 1165; 11 W. R. 130; 46 E. R. 670, L. JJ.

Annotations:—*Expld.* *Curlewis v. Carter* (1863), 33 L. J. Ch. 370. *Mentd.* *Re M'Veagh, M'Veagh v. Croall* (1863), 32 L. J. Ch. 521.

7971. Sale of heirlooms.—The ct. cannot order a sale of heirlooms, for the convenience or advantage of the persons taking the estate with which they devolve.

But where in an administration suit a strong case was made for the sale of heirlooms settled by the will, liberty was given to take proceedings for obtaining a private Act, & to apply in the suit as to the costs of such proceedings if they should prove unsuccessful.—*D'EYNCOURT v. GREGORY* (1876), 3 Ch. D. 635; 25 W. R. 6.

Annotation: *Reid. Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136.

7972. Transfer of business to limited company — Not authorised by testator.—Testator who died in 1879, by his will gave an annuity to his wife, & legacies of considerable amount to trustees for the benefit of his seven daughters & their husbands, & children, & he bequeathed one moiety of his share of the businesses carried on by him in partnership with his two eldest sons to trustees upon trust for his youngest son, & he devised & bequeathed the residue of his real & personal estate to his two eldest sons in equal moieties, & he authorised his trustees to postpone the realisation of his estate & to carry on & manage any trades or businesses in which he might be engaged at his death, for so long as they should think fit. Testator, at the time of his death, carried on business in partnership with his two eldest sons, in various mining & colliery properties & ironworks. Actions had been commenced for the administration of his estate, & it was stated that testator's share in the partnership businesses could not be realised without considerable loss, & if realised at once would not be sufficient to pay all the legacies bequeathed in full. Application was made for the sanction of the ct. to a scheme whereby a limited co. was to be formed to take over the businesses in which testator was a partner, & to consist in the first instance of persons interested

in testator's estate, to whom it was proposed to allot debentures, preference & ordinary shares, in lieu of their several interests in testator's estate:—*Held*: the ct. had no jurisdiction to sanction such a scheme, which was in no way authorised by testator's will.—*Re CRAWSHAY, DENNIS v. CRAWSHAY* (1888), 60 L. T. 357; 5 T. L. R. 144.

Annotations:—*Follid.* *Re Morrison, Morrison v. Morrison*, [1901] 1 Ch. 701. *Consd.* *Re Tollemache*, [1903] 1 Ch. 457. *Reid.* *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534.

7973. ———.]—The ct. has no jurisdiction to sanction an agreement by which exors. & trustees propose to concur in converting into a limited co. a business in which their testator was partner where, by the terms of the agreement, testator's share in the business will be exchanged for shares & debentures which the exors. & trustees are not authorised by the will to hold.—*Re MORRISON, MORRISON v. MORRISON*, [1901] 1 Ch. 701; 70 L. J. Ch. 399; 84 L. T. 383; 49 W. R. 441; 17 T. L. R. 330; 45 Sol. Jo. 344; 8 Mans. 210.

Annotations:—*Consd.* *Re Tollemache*, [1903] 1 Ch. 457. *Reid.* *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534.

SUB-SECT. 2.—BY SUMMONS.

A. Under Chancery Practice Amendment Act, 1852, s. 45.

7974. Discretion of court—Married woman—Husband not a party.—Where a married woman & pecuniary legatee took out a summons in chambers for administration of testator's real & personal estate, the summons being afterwards confined to the personalty, & the husband was not served or made a party to the summons, & the evidence that he was either dead or out of the jurisdiction was insufficient, the summons was dismissed as being, under the circumstances of the case, an inconvenient mode of administration.—*LESITER v. CAMM* (1866), 14 L. T. 97.

7975. Estate of married woman—Under power in deed.—The Master of the Rolls or a Vice-Chancellor has jurisdiction under sect. 45 of the above Act to make an order in chambers upon summons to administer the effects bequeathed by a married woman under a power contained in a deed.—*SEWELL v. ASHLEY* (1853), 3 De G. M. & G. 933; 43 E. R. 365; *sub nom.* *ASHLEY v. SEWELL* 10 Hare, App. lxvi; 22 L. J. Ch. 659; 21 L. T. O. S. 39; 17 Jur. 269; 1 W. R. 260, L. JJ.

Annotations:—*Distd.* *Re Newbery, Allcroft v. Farnan* (1862), 10 W. R. 378. *Follid.* *Re Berkeley's Estate, Berkeley v. Mason* (1875), L. R. 19 Eq. 467.

7976. ——— Under power in will.]—Although on the authority of *Sewell v. Ashley*, No. 7975, *ante*, the ct. has jurisdiction to make an order on summons to administer the effects of a married woman bequeathing her property, under a power contained in a deed, it has no jurisdiction to make such order in the case of a married woman bequeathing property under a power contained in a will, at the instance of an appointee.

The party, who was claiming under the exercise of a power, was neither creditor, specific, pecuniary nor residuary legatee, nor next of kin, except in so far as being an appointee by will she could be

estate.]—An administration of the real estate may only be had in a very special case, & should be sought by

action & not summary application.—*Re ARMOUR, MOORE v. ARMOUR* (1884), 10 P. R. 448.—CAN.

p. Preservation of assets & account. *TOM v. DEANE* (1845), 8 L. Eq. R. 39.—IR.

Sect. 3.—What matters may be determined or dealt with: Sub-sect. 2, A. & B.]

called a legatee (KINDERSLEY, V.-C.).—*Re NEWBERRY, ALLCROFT v. FARNAN* (1862), 10 W. R. 378.

7977. ———.]—A married woman, having under a will an absolute power over a fund, made a will whereby she appointed it specifically to trustees upon trust for A. for life, with remainders over; & made a residuary gift to the same trustees upon certain trusts. One only of the trustees proved the will:—*Held*: the ct. had jurisdiction under sect. 45 of the above Act, to make an order upon summons by A. for administration of the estate of the married woman. Under the above sect., the only person to be served with the summons is the exor. or administrator of deceased; but the ct. has power to direct service of the order upon other persons with the like effect as when service of a decree is directed under sect. 42.—*Re BERKELEY'S ESTATE, BERKELEY v. MASON* (1875), L. R. 19 Eq. 467; 44 L. J. Ch. 554; 23 W. R. 687.

7978. Questions of construction.—Practice of the ct. in granting or refusing the common administration decree, upon summons, in cases involving complicated questions.

Testator gave his estate to plffs., his exors., in trust for his son for life, remainder to his daughter-in-law for life, remainder to their children. The son effected a compromise with an annuitant under the will, by means of part of testator's assets advanced by plffs. He died leaving his widow his extrix. & universal legatee. A decree was made to administer the first testator's estate, wherein the exors. were disallowed both the money advanced for the compromise & the annuity which was the subject of it. They filed a second bill against the widow & children to have the rights of the parties under the compromise settled, & to determine other questions arising between them & the son. A demurrer for multifariousness & want of equity was overruled.

When there is a demurrer for multifariousness on the record, deft. may demur *ore tenus* for want of equity.

It would be a sufficient cause [against a summons] to state that there are complicated questions, involving the rights of various parties, arising from the dealings & transactions which the exors. had during the lifetime of the tenant for life (ROMILLY, M.R.).—*RUMP v. GREENHILL* (1854), 20 Beav. 519; 24 L. J. Ch. 90; 24 L. T. O. S. 124; 1 Jur. N. S. 123; 3 W. R. 51; 52 E. R. 701.

7979. ———.]—Proceedings for the administration of testator's estate were commenced by summons before a judge in chambers under the above Act, a decree pronounced, & accounts taken under it, & a question was then raised as to the construction of testator's will, involving the rights of parties:—*Held*: where a question of construction is a simple one, the judge in chambers may pronounce a decree upon the rights of the parties, without directing a bill to be previously filed.—*WEST v. LAING* (1855), 3 Drew. 331; 26 L. T. O. S. 66; 4 W. R. 1; 61 E. R. 929.

———.]—Where the representative of an extrix. upon being called upon to account offers a round sum, but in effect refuses a detailed

account, & there is a question of construction, a person taking an interest under the will is justified in filing a bill [for administration] & it is not a case coming within the above Act & plff. is entitled to his costs.—*SMITH v. SPILSBURY* (1860), 1 Drew. & Sm. 151; 8 W. R. 596; 62 E. R. 335.

7981. Setting aside release.—An order was made against an exor., in chambers, for taking the accounts, under the above Act. The exor. insisted on a release:—*Held*: there being no jurisdiction to set aside the release on summons, the order was irregular.—*ACASTER v. ANDERSON* (1855), 19 Beav. 161; 24 L. J. Ch. 437; 24 L. T. O. S. 249; 3 W. R. 156; 52 E. R. 310.

Compare Nos. 7999, 8000, post.

7982. Charge of breach of trust.—The only administration decree which can be obtained upon summons in chambers under sect. 45 of the above Act is the usual decree to make an exor. or administrator account for the personal estate which he may have received. The ct. cannot in any stage of a suit engraft upon such a decree, whether made upon bill, or upon claim, or upon summons in chambers, a decree to make an exor. or administrator account for what he might, without his wilful neglect or default, have received: a decree of this nature being totally different in its principle from the usual decree.—*PARTINGTON v. REYNOLDS* (1858), 4 Drew. 253; 27 L. J. Ch. 505; 31 L. T. O. S. 7; 4 Jur. N. S. 200; 6 W. R. 388; 62 E. R. 98.

Annotation:—Reid. Re Stevens, Cooke v. Stevens, [1897] 1 Ch. 422.

7983. ———.]—In an administration suit, commenced by summons, the chief clerk certified that testatrix had contracted to sell a house & furniture for a certain sum; that the exors. had completed the contract by assignment, but had included in such assignment another house without any additional consideration. An attempt was made, on the cause coming on for further consideration to charge the exors. with a breach of trust in respect of the latter house:—*Held*: this could not be done upon an administration summons, though an inquiry might be had, if desired.—*Re DELEVANTE'S ESTATE, DELEVANTE v. CHILD* (1860), 1 L. T. 397; 6 Jur. N. S. 118.

Compare Nos. 7995, 7996, post.

7984. Sale of real estate.—The ct. has jurisdiction, under sect. 47 of the above Act, to make an order on summons for the administration & sale of testator's real estate, where the will only gives the exors. a power to sell such estate, & to give receipts, without vesting the estate in them by devise.—*COLMAN v. TURNER* (1870), L. R. 10 Eq. 230; 39 L. J. Ch. 776; 18 W. R. 963; *sub nom.* *COLEMAN v. TURNER*, 22 L. T. 836.

7985. Claim against Crown.—Where three suits were instituted for the administration of the estate of an intestate & the Crown who claimed the property was deft. in all, two of them being by bill, & one by summons:—*Held*: such suit could be properly instituted against the Crown by summons, & a decree was made in all three suits.—*POLINI v. GRAY, LANE v. GRAY, PRANDO v. GRAY* (1873), 22 W. R. 255.

B. By Originating Summons.

See R. S. C., Ord. 55, rr. 3, 4.

7986. General rule.—The ct. has jurisdiction to determine upon an originating summons under

PART VIII. SECT. 3, SUB-SECT. 2.—B.

7986 i. General rule.—In matters of

difficulty & importance it is desirable that exors. & trustees should have the right to have such questions dealt with

summarily in the Supreme Ct. by originating summons.—*Re DE BLOIS* (1912), 11 E. L. R. 578.—CAN.

R. S. C., Ord. 55, r. 3, such questions only as the ct. could have determined in an administration action before the order came into existence.

In this case . . . the question is one between the trustees of the will of a legal devisee of real estate of a testatrix, & the trustees of a resettlement made by another person claiming as legal devisee in remainder of the estate, & is not a question which would formerly have been determined in an action for the administration of testatrix's estate. The trustees of C.'s will are, in short, taking out a summons which has nothing to do with any question arising upon an administration of their estate or trust, & I think therefore that Ord. 55, r. 3, does not apply to this case, & that I have no power to determine the question raised upon an originating summons (NORTH, J.).—*Re CARLYON, CARLYON v. CARLYON* (1886), 56 L. J. Ch. 219; 56 L. T. 151; 35 W. R. 155.

Annotation:—*Reid. Re Davies, Davies v. Davies* (1888), 38 Ch. D. 210.

7987. Questions of fact in dispute.—A summons is not the proper way of trying a question of debt where the dispute turns on questions of fact, but where there is no dispute of fact the validity of the debt can be decided just as well on a summons as in an action (LINDLEY, L.J.).—*Re POWERS, LINDSELL v. PHILLIPS* (1885), 30 Ch. D. 291; 53 L. T. 647, C. A.

Annotations:—*Folld. Nutter v. Holland*, [1894] 3 Ch. 408. *Mentd. Re Frisby, Allison v. Frisby* (1889), 43 Ch. D. 106.

7988. ———.]—It is clear that there are facts in dispute, & if so this procedure is not the proper way to deal with the matter. I agree with what

Lindley said in *Re Powers, Lindsell v. Phillips*, No. 7987, *ante*, "a summons is not the proper way of trying a disputed debt where the dispute turns on a question of fact" (LOPES, L.J.).—*NUTTER v. HOLLAND*, [1894] 3 Ch. 408; 63 L. J. Ch. 932; 71 L. T. 508; 43 W. R. 18; 38 Sol. Jo. 707; 7 R. 491, C. A.

Annotations:—*Mentd. Crompton & Evan's Union Bank v. Hurton*, [1895] 2 Ch. 711; *Pullinger v. Barnato, Barnato-Pullinger Pool* (1896), 12 T. L. R. 280.

7989. Questions between parties claiming under will & adverse claimant.—*Re CARLYON, CARLYON v. CARLYON*, No. 7986, *ante*.

7990. ———.]—The ct. has no jurisdiction on originating summons, under R. S. C., Ord. 55, r. 3, to decide a question between persons claiming under a will & a person claiming adversely to the will, & it makes no difference that the latter person submits to be bound by the order made on the summons.—*Re BRIDGE, FRANKS v. WORTH* (1887), 56 L. J. Ch. 779; 56 L. T. 726; 35 W. R. 603.

7991. ———.]—A trader by his marriage settlement covenanted that if at any time during the marriage he should become possessed or entitled by devise, bequest, purchase, or otherwise, of or to any property, real or personal, he would assign it to the trustees of the settlement. Afterwards he effected certain life & accident policies, one of which contained a clause against assignment.

7986 II. ———.]—Where reasonable doubt exists, the exor. can take out an originating summons for the purpose of obtaining a judicial determination as to the proper construction of the will.—*GIRROIR v. SYMONDS* (1920), 53 D. L. R. 544; 54 N. S. R. 49.—CAN.

7987 I. Questions of fact in dispute.—Application by exors. to obtain the direction of the ct. whether certain claims were preferred claims, & an

order made, to which the representatives of the trust creditors & the non-trust creditors consented, giving leave for the issue of an originating summons for the purpose of obtaining the desired direction. The non-trust creditors entered an unconditional appearance, but on the hearing objected that the matter could not be disposed of on originating summons, there being questions of fact to be tried:—*Held*:

The question of the right to the policy moneys, as between the exors. of the covenantor & the trustees of the settlement, was raised upon a petition in the Palatine Ct., a proceeding analogous to the originating summons under R. S. C., Ord. 55, r. 3, in the High Ct.

Qu.: whether a question between trustees & exors. & adverse claimants can be raised on such proceeding.—*Re TURCAN* (1888), 40 Ch. D. 5; 58 L. J. Ch. 101; 59 L. T. 712; 37 W. R. 70, C. A.

Annotations:—*Distd. Re Royle, Royle v. Hayes* (1889), 43 Ch. D. 18. *Mentd. Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109; *Churston v. Buller* (1897), 77 L. T. 45; *Laurie v. West Hartlepool Steamship Thirds Indemnity Assoon. & David* (1899), 15 T. L. R. 486; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769.

7992. ———.]—Testator directed his trustees to allow his wife to carry on his farming business during widowhood, & to pay to her during widowhood the income of his residuary estate. Four years after his death one of his exors. took out an originating summons under R. S. C., Ord. 55, r. 3, against the other exor. & the widow, asking whether a sum of £171, which testator had handed to his widow shortly before his death, & which stood in her name at a bank, belonged to her or to his estate, & whether she was bound to render to the exors. any account of the farming business. The widow objected to the jurisdiction as to the £171, but the judge overruled the objection, & made an order declaring the sum to be part of testator's estate:—*Held*: there was no jurisdiction on originating summons to decide adversely to the widow that the sum belonged to testator's estate, this not being a matter which could be decided in an administration suit.—*Re ROYLE, ROYLE v. HAYES* (1889), 43 Ch. D. 18; 59 L. J. Ch. 1; 61 L. T. 512; 38 W. R. 17, C. A.

Annotation:—*Reid. Re Staples, Owen v. Owen*, [1916] 1 Ch. 322.

7993. Questions between legal devisees.—(1) Upon an originating summons under R. S. C., Ord. 55, r. 3, there is jurisdiction to determine such questions only as before the existence of that rule could have been determined under a judgment for the administration of an estate or execution of a trust. Consequently, there is no jurisdiction upon an originating summons to decide a question arising between legal beneficial devisees under a will. (2) An objection to the jurisdiction upon an originating summons having been taken by defts. for the first time after the hearing of the summons had been adjourned into ct.:—*Held*: the objection ought to have been taken in chambers, & though the objection was good, & the summons must be dismissed with costs, defts. could not be allowed the costs of the adjournment into ct.—*Re DAVIES, DAVIES v. DAVIES* (1888), 38 Ch. D. 210; 57 L. J. Ch. 759; 58 L. T. 312; 36 W. R. 587.

Annotations:—*Apprvd. Re Royle, Royle v. Hayes* (1889), 43 Ch. D. 18. *Reid. Re Staples, Owen v. Owen*, [1916] 1 Ch. 322.

7994. Questions as to equitable limitations.—H. devised real estate unto & to the use of trustees

having consented to the order & having entered an unconditional appearance to the summons, the representative of the non-trust creditors was not entitled to raise objection, since merely a question of law was involved.—*Re CALDWELL, ESTATE, WESTERN TRUST CO. v. WAH SING & WAH SING & MOOSE JAW SECURITIES, LTD.*, [1921] 1 W. W. R. 272; 14 Sask. L. R. 41; 56 D. L. R. 584.—CAN.

Sect. 3.—What matters may be determined or dealt with: Sub-sect. 2, B. Sect. 4: Sub-sects. 1, 2, 3, 4 & 5, A. & B.]

in fee upon trust to pay the rents to her sister M. for life, then to M.'s children successively for their lives & after the death of M., & her children to her sister E. for life, & then to E.'s children successively for their lives, & after the deaths of M. & E. & all their children to hold the property on such trusts as the longest liver of M., E. & their children should by deed or will appoint & in default of appointment upon trust for the heir of testatrix. M. & E. survived testatrix. The longest liver of M., E., & their children left a will by which she purported to appoint the property. The heir-at-law of H. claimed the property as undisposed of. The trustees of the will of H. took out an originating summons to have it decided to whom they ought to convey the property:—*Held*: the case was within R. S. C., Ord. 55, r. 3, & could be tried on originating summons.—*Re HARGREAVES, MIDGLEY v. TATLEY* (1889), 43 Ch. D. 401; 59 L. J. Ch. 381; 62 L. T. 473; 38 W. R. 470, C. A.

Annotations:—*Reid*. *Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51. *Mentd.* *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Re Fane, Fane v. Fane*, [1913] 1 Ch. 404.

7995. Charge of breach of trust.—If an originating summons had been brought asking me to charge [the trustees] with breaches of trust, the first thing I should have done would have been to dismiss it (KEKEWICK, J.).—*Re WEALL, ANDREWS v. WEALL* (1889), as reported in 37 W. R. 779.

Annotations:—*Mentd.* *Nutter v. Holland* (1894), 7 R. 491; *Re Shilson, Coode*, [1904] 1 Ch. 837; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

7996. —.]—It would not be competent for an applt. on an originating summons to ask for or obtain otherwise than by consent an order founded on breach of trust or inquiries pointing to wilful default (LORD MACNAGHTEN).—*DOWSE v. GORTON*, [1891] A. C. 190; 60 L. J. Ch. 745; 64 L. T. 809; 40 W. R. 17, H. L.; *varying S. C. sub nom. Re GORTON, DOWSE v. GORTON* (1889), 40 Ch. D. 536, C. A.

Annotations:—*Reid*. *Nutter v. Holland* (1894), 71 L. T. 508. *Mentd.* *Re Bach, Walker v. Bach, Lloyds Bank v. Bach*, [1892] W. N. 108; *Re Owen, Frisby, Dyke v. Owen* (1892), 66 L. T. 718; *Re Brooke, Brooke v. Brooke*, [1894] 2 Ch. 600; *Re Kidd, Kidd v. Kidd* (1894), 42 W. R. 571; *Re Millard* (1895), 2 Mans. 56; *Re Raybould, Raybould v. Turner*, [1900] 1 Ch. 199; *Jennings v. Mather*, [1901] 1 K. B. 108; *Re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342; *Re Newland, Bush v. Summers*, [1904] W. N. 181; *Watling v. Lewis*, [1911] 1 Ch. 414; *Re Salmen, Salmen v. Bernstein* (1912), 107 L. T. 108; *Re East London County & Westminster Banking Co. v. East* (1914), 111 L. T. 101; *Re Oxley, Hornby v. Oxley*, [1914] 1 Ch. 604; *Re Reynolds, Ex p. White*, [1915] 2 K. B. 186.

Compare Nos. 7982, 7983, ante.

7997. Accounts on the footing of wilful default.—Accounts & inquiries on the footing of wilful default cannot be directed in proceedings by originating summons notwithstanding that the parties to be charged with such default are plffs. submitting to account (KEKEWICK, J.).—*Re HENGLER, FROWDE v. HENGLER*, [1893] W. N. 37.

7998. Administration of assets already distributed.—This being in effect not a case of simple

7995 i. Charge of breach of trust.—An exor. having retained £1,000, claimed as a *donatio mortis causa*, & the estate being insufficient to pay in full the legacies bequeathed, a legatee whose legacy abated, applied on summons for administration:—*Held*: the question whether the sum retained by the exor. formed part of testator's assets should not be tried

by administration summons.—*NEILAN v. FARRELL* (1891), 29 L. R. Ir. 12.—*IR.*

q. Where no executor appointed.—Where there is no exor. or express trustee under the will creating a trust, the ct. will not decree administration of the trust property upon an originating summons.—*CONNELL v. DUNNE &*

administration but a proceeding for obtaining repayment after the exors. had divided the assets, is improperly made by originating summons, & the case must go into the general paper (KAY, J.).—*Re WARREN, WEADON v. READING*, [1884] W. N. 112.

7999. Setting aside release.—Two legatees having alleged that they had been induced to execute a release, indemnifying the exors. of testator's estate, without having had independent advice:—*Held*: they were entitled to take out an originating summons under R. S. C., Ord. 55, r. 3, to have the release set aside, the question of the validity of the release being one arising in the administration of the estate, & affecting the rights of the legatees within the meaning of that order.—*Re GARNETT, GANDY v. MACAULAY* (1884), 50 L. T. 172; 32 W. R. 474; *on appeal* (1885), 31 Ch. D. 1, C. A.

Annotations:—*Mentd.* *Mason v. Mason* (1886), 2 T. L. R. 266; *Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637; *Wildish v. Fowler* (1888), 5 T. L. R. 113.

8000. —.]—This was an originating summons taken out by two beneficiaries asking that trustees might be ordered to deliver an account notwithstanding a release. The objection was taken that plffs. should have brought an action to set aside the release, as the case was not one to be heard on affidavit evidence:—*Held*: the case was not one to be tried on originating summons, but a writ should issue.—*Re ELLIS, KELSON v. ELLIS* (1888), 59 L. T. 924; 37 W. R. 91.

Compare No. 7981, ante.

SECT. 4.—PRACTICE.

SUB-SECT. 1.—IN GENERAL.

8001. Defence in formâ pauperis—Husband & wife.—Husband & wife allowed to defend an administration suit in formâ pauperis where the wife was sole extrix., & separately interested in the estate.—*EVERSON v. MATTHEW* (1855), 3 W. R. 159.

See, now, R. S. C., Ord. 16.

8002. Setting aside judgment—Appeal.—Where an administration summons is heard & determined by the judge personally, plff. cannot file a bill for the same object in another branch of the ct. of co-ordinate jurisdiction; but if he is dissatisfied he must resort to the appellate tribunal.—*THOMPSON v. THOMPSON* (1863), 8 L. T. 490; 11 W. R. 797.

SUB-SECT. 2.—HOW PROCEEDINGS COMMENCED.

8003. How summons intitled.—*EYRE v. COX*, No. 8366, *post*.

8004. Objection to matters being dealt with by summons—Time for taking.—*Re DAVIES, DAVIES v. DAVIES*, No. 7993, *ante*.

By action.—*See Sect. 3, sub-sect. 1, ante.*

By summons.—*See Sect. 3, sub-sect. 2, ante.*

NUGENT (1913), 47 I. L. T. 136.—*IR.*

PART VIII. SECT. 4, SUB-SECT. 2.

r. Motion—Necessity for production of letters of administration.—In moving for an administration order the letters of administration should be produced.—*Re ISRAEL* (1869), 2 Ch. Ch. 392.—*CAN.*

SUB-SECT. 3.—TIME FOR COMMENCING PROCEEDINGS.

8005. Within year of death.]—The ct. may order administration of an estate before the expiration of a year from the death of testator.—*Re TENNANT, PROSSER v. MOSSOP* (1881), 29 W. R. 439.

8006. Law of Property Amendment Act, 1860 (c. 38), s. 18—Effect of as bar to suit.]—The operation of the above Act is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have accrued" thereby imposed upon claims to recover personal estate of "any person dying intestate, possessed by the legal personal representative of such intestate," is not confined to the case of persons dying intestate after Dec. 31, 1860, the time fixed by the sect. for commencement of the operation of the enactment. Accordingly a claim by next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty-one years from that date; & leave to revive an administration suit relating to the same estate in which no proceeding had been taken since the decree in 1855 was refused. But with respect to assets of the intestate not received by the administrator until 1870, more than twenty years after the death, & within twenty years before the issue of the writ, the claim of the next of kin to administration, limited to such assets was not barred; there being no "present right to receive" on the part of the next of kin until the assets had been actually recovered by the administrator. Part payment by the administrator out of a particular asset which has so fallen in will not revive the right to sue for general administration which was at the time of payment barred by statute.—*Re JOHNSON, SLY v. BLAKE* (1885), 29 Ch. D. 964; 52 L. T. 682; 33 W. R. 502.

Annotations:—Reid. Re Owen, [1894] 3 Ch. 220; *Re Lacy, Royal General Theatrical Fund Asscn. v. Kydd*, [1899] 2 Ch. 149; *Re Richardson, Pole v. Pattenden*, [1919] 2 Ch. 50.

See, also, LIMITATION OF ACTIONS.

Effect of statutes of limitations in creditors' actions.]—See Sect. 6, sub-sect. 6, *post*.

SUB-SECT. 4.—AFFIDAVIT IN SUPPORT.

8007. Need not be made by plaintiff.]—*Re MUNDELL, FENTON v. CUMBERLEGE* (1883), 52 L. J. Ch. 756; 48 L. T. 776.

SUB-SECT. 5.—SERVICE.

A. On Whom.

8008. Of summons—On sole proving executor.]—*Re BERKELEY'S ESTATE, BERKELEY v. MASON*, No. 7977, *ante*.

B. Service out of the Jurisdiction.

See, generally, PRACTICE.

See, now, R. S. C., Ord. 11, rr. 1, 2, 8 a.

8009. Old practice—Effect of Ord. 11, r. 1.]—The old practice as to service out of the jurisdiction is no longer in force. No leave to serve a debt out of the jurisdiction can be given except in the cases specified in R. S. C., Ord. 11, r. 1.—*Re EAGER, EAGER v. JOHNSTONE* (1882), 22 Ch. D. 86; 52 L. J. Ch. 56; 47 L. T. 685; 31 W. R. 33, C. A.

Annotations:—Reid. Speller v. Bristol Steam Navigation Co. (1884), 13 Q. B. D. 96; *Field v. Bennett* (1886), 56 L. J. Q. B. 89; *Re Cliff, Edwards v. Brown*, [1895] 2 Ch. 21; *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283.

8010. — Jurisdiction of Court.]—All the parties to a writ except pltf. are domiciled Scotsmen & the mass of the property is in Scotland but pltf. takes a security on the faith of some property in England from a Scotsman temporarily resident here, such property being vested in exors. by virtue of an English probate. An order is made for service of the copy of the bill upon debt. in Scotland. A motion to discharge such order refused with costs. The ct. has a discretion both in granting & discharging an order for service of a copy of the bill upon debts out of the jurisdiction.—*COOK v. WOOD* (1859), 7 W. R. 424.

8011. — In what cases granted—Concurrent proceedings in Scotland.]—Where Scottish exors. had under an English probate possessed themselves of English assets of a Scottish testatrix, & removed the greater part of them into Scotland, in which country a suit was pending for administration of those assets & of Scottish property comprised in the will:—*Held*: the existence of such a suit was not sufficient ground for refusing leave to serve the exors. who were out of the jurisdiction with a bill filed in the Ct. of Ch. of England for the administration of testatrix's estate.—*INNES v. MITCHELL* (1857), 1 De G. & J. 423; 26 L. J. Ch. 719; 29 L. T. O. S. 273; 3 Jur. N. S. 991; 5 W. R. 748; 44 E. R. 787, L. JJ.

Annotations:—Apld. Cook v. Wood (1859), 7 W. R. 424. *Reid. Cookney v. Anderton* (1862), 7 L. T. 491.

8012. — Assets mainly in Scotland.]—*MEIKLAN v. CAMPBELL*, No. 7793, *ante*.

8013. — Estate partly stocks or shares in public company.]—A creditor filed a bill for the administration of his deceased debtor's estate; but the bill did not state specifically of what the estate consisted. Debt., the extrix., had not proved the will, but had gone abroad. An order was made for serving her with process out of the jurisdiction; after which she entered a conditional appearance, & moved to discharge the order for service as irregular. Pltf., in opposition to the motion, filed an affidavit to show that testator's property consisted of (*inter alia*) shares in a public

PART VIII. SECT. 4, SUB-SECT. 3.

8005 i. Within year of death.]—An order for the administration of an estate of a deceased person was refused, on the ground that twelve months had not elapsed from the death of the deceased, no special circumstances being shown.—*GRANT v. GRANT* (1882), 9 P. R. 211.—CAN.

8005 ii. —.]—An action for administration can be brought against the exors. before the expiration of one year allowed to creditors to put in their claims.—*TOWNSEND v. BROWN* (1890), 22 N. S. R. (10 R. & G.) 432.—CAN.

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8005 iii. —.]—The ct. will not grant to a creditor an order for administration of his debtor's estate, within twelve months after debtor's death, without his first showing some special grounds for granting it, as that the exor. might act improperly, or a reasonable fear of a *devastavit*.—*BARRETT v. HARPER* (1907), 3 E. L. R. 89.—CAN.

s. Effect of Statute of Limitations.]—Daughter of testator, in an action for administration of her father's estate, contended that, as testator died prior to Mar. 4, 1891, all his real & personal estate, notwithstanding the disposition

thereof by his will, devolved upon & became vested in debt. exors., upon trust to pay the debts & legacies, & that in such a case the Statute of Limitations did not apply:—*Held*: this contention was wrong & action was dismissed with costs.—*McKINLEY v. GRAHAM* (1912), 21 O. W. R. 222; 3 O. W. N. 645; 2 D. L. R. 916.—CAN.

PART VIII. SECT. 4, SUB-SECT. 5.—B.

t. In what cases granted.]—The ct. has power to order service of process out of the jurisdiction in suits for the administration of assets which consist

Sect. 4.—Practice: Sub-sect. 5, B.; sub-sects. 6 & 7.]

co.:—*Held*: a motion to discharge an order for service of process on a party out of the jurisdiction requires no affidavit to support it. Although the bill did not show that testator's property comprised shares in a public co., still, as the fact of their existence was made apparent in the suit, & they were clearly within 4 & 5 Will. 4, c. 82, the service effected upon deft. out of the jurisdiction was perfectly regular.—*NATIONAL INSURANCE & INVESTMENT ASSOCN. (OFFICIAL MANAGER) v. CARSTAIRS* (1863), 2 New Rep. 348; 8 L. T. 717; 9 Jur. N. S. 955; 11 W. R. 866.

Annotations:—Reid. Foley v. Mallardet (1864), 9 L. T. 700; *Pike v. Dickinson* (1873), 21 W. R. 862.

8014. R. S. C., Ord. 11, r. 1—Property in England & Scotland—Convenience of administration.]—Testator, domiciled & resident in Scotland, made a will in Scottish form, appointing six exors. & trustees, two of whom were resident in England, & a third occasionally resided there. The whole estate was in Scotland, with the exception of a comparatively small amount of personalty. The trustees duly proved the will in Scotland, & constituted themselves personal representatives in England. An infant legatee brought an administration suit, by his next friend, in the Ch. Div. of the High Ct. of Justice in England. The trustees appeared, & as no action had been commenced in Scotland for administration there, a decree was made in the ordinary form for the administration of the whole estate. The present action was afterwards commenced in the Scottish ct. for the sequestration of the estate, & the appointment of a judicial factor:—*Held*: (1) the Scottish ct. had not exclusive jurisdiction in the matter, & could not prohibit the trustees from accounting to the English ct. in accordance with the decree made in the English suit; (2) the Scottish ct. had jurisdiction to sequester the estate in Scotland, & to appoint a judicial factor, an undertaking being given that pltf. in the English suit should be at liberty to become a party to the Scottish administration.—*EWING v. ORR EWING* (1885), 10 App. Cas. 453; 53 L. T. 826; 1 T. L. R. 645, H. L.

Annotations:—As to (1) *Reid. Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Re De Penny, De Penny v. Christie*, [1891] 2 Ch. 63; *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. 141; *Egbert v. Short*, [1907] 2 Ch. 205; *Re Bonnefoi, Surrey v. Perrin*, [1912] 1 P. 233. *Generally, Mentd. MacIver v. Burns*, [1895] 2 Ch. 630; *Sudeley v. A.-G.* (1896), 66 L. J. Q. B. 21.

8015. — Executors outside jurisdiction.]—Testator died, domiciled in Jersey, leaving a widow & two infant children. By his will he gave the whole of his personal property subject to a certain annuity to his wife, to his children. He died possessed of £13,000 of English consols, & also of certain property in Jersey. The principal part of the latter consisted of a share in the property of a certain partnership, which had since his death become insolvent. His widow & two others were his extris. & exors. A gentleman resident in Jersey was shortly after testator's death appointed "tuteur" of the infant children in accordance with the law of Jersey. The widow

married again, & with the two children came to reside in England. An action was commenced in the Ch. Div. by the infant children for administration of testator's real & personal estate, & for the appointment of guardians. Leave was given for service of the writ out of the jurisdiction on the "tuteur" & exors. in Jersey, but after service, & before appearance, they moved to discharge the order, on the ground that the proceedings were wrongly instituted in this country:—*Held*: inasmuch as pltf. were resident in England & the bulk of the property was in England, there was no reason why the action should not be brought there.—*Re LANE, LANE v. ROBIN* (1886), 55 L. T. 149.

8016. — One executor within jurisdiction.]—Where testatrix resided & was domiciled in Ireland, & died in Ireland, & her will was made & proved in Ireland, & she appointed three exors., two residing in Ireland & one residing & domiciled in England, & the exors. sold some consols & invested the proceeds in the purchase of some Irish land, a beneficiary brought an action against the English exor. in England, claiming that the investment was improper, & the exors. were liable to replace the money. Leave having been given to serve the writ on the two exors. in Ireland:—*Held*: it was a matter of discretion for the judge, & the action having been properly brought against a man within the jurisdiction, the case fell within the above Ord., r. 1 (c), & the motion must be refused.—*HARVEY v. DOUGHERTY* (1887), 56 L. T. 322.

Annotation:—Reid. McCheane v. Gyles, [1902] 1 Ch. 287.

8017. — Service outside jurisdiction of Palatine Court—By order of Court of Appeal—Court of Chancery of Lancaster Act, 1854 (c. 82), s. 8.]—*Re JOHNSON* (No. 2) (1892), 36 Sol. Jo. 411, C. A.

8018. — Order made upon originating summons.]—The ct. has no power under R. S. C., Ord. 11, & Ord. 16, r. 40, to give leave to serve out of the jurisdiction notice of an order for administration made upon originating summons. In such a case the person having the conduct of the proceedings can, without leave, give to the person interested who is out of the jurisdiction notice in writing of the making of the order, & that, if he does not appear & object, the administration will be proceeded with in his absence: & then, if he does not appear, the ct. can, upon proof of the service of such notice, proceed under the order in his absence.—*Re CLIFF, EDWARDS v. BROWN*, [1895] 2 Ch. 21; 64 L. J. Ch. 423; 72 L. T. 440; 43 W. R. 436; 11 T. L. R. 312; 39 Sol. Jo. 362; 13 R. 425, C. A.

Annotations:—Reid. Deutsche National Bank v. Paul, [1898] 1 Ch. 283; *Doulton v. Madras Corpn.*, [1920] W. N. 91.

8019. — Testator domiciled in England.]—Service having been effected in Scotland under C. O. R., 1889, Ord. 51, r. 23, on deft. in an administration action the action was transferred to the High Ct. on the ground that the value of the estate exceeded the limit of the jurisdiction of the county ct. Deft. answered interrogatories in the county ct. but objected to the order for service

partly of land or stock.—*FINLAY v. BARTON, FINLAY v. WESTENRA* (1867), 1 I. R. Eq. 61.—IR.

a. —.]—*NEWLAND v. ARTHUR* (1868), 2 I. R. Eq. 277.—IR.

b. —.]—*STEWART v. STEWART*

(1907), 41 I. L. T. 162.—IR.

c. *Foreigner residing abroad—Service of notice of summons.]—*If it is desired to make a foreigner residing out of the British dominions a party

to proceedings to be commenced by administration summons, he should be served with notice of the summons, & not with the summons itself.—*Re M'LAUGHLIN, ROULSTON v. M'LAUGHLIN* (1890), 21 L. R. Ir. 513.—IR.

both in the county ct. & the High Ct.:—*Held*: though the order for service would have been valid if the action had remained in the county ct., after the transfer, the question depended upon R. S. C., Ord. 11, rr. 1 (d), & 2, & deft. ought to have an opportunity of filing evidence as to the domicile of testator & as to whether there was adequate concurrent jurisdiction in Scotland.—*WOOD v. MIDDLETON*, [1897] 1 Ch. 151; 66 L. J. Ch. 149; 75 L. T. 480; 45 W. R. 184; 41 Sol. Jo. 157.

SUB-SECT. 6.—TRANSFER OF PROCEEDINGS.

See, generally, PRACTICE; R. S. C., Ord. 49, r. 5.

8020. Of what proceedings—Action against executor—Charging devastavit.]—*Re TIMMS*, No. 8075, *post*.

8021. — — — Qua executor only.]—A judge of the Ch. Div. in whose ct. an administration action is pending can order the transfer to himself of such actions only, brought in other divisions against the exor. of the person whose estate is being administered, as are brought against him *qua* exor.—*CHAPMAN v. MASON* (1879), 40 L. T. 678.

8022. — — — —.]—*Re PIMM, MALKIN v. PIMM, STEWARD v. SHARPE* (No. 2) (1916), 60 Sol. Jo. 527, C. A.

8023. — — — Judgment before administration order—Judgment not signed.]—A creditor who has obtained a judgment against the exor. of his deceased debtor before a decree is made for the administration of the debtor's estate has priority over other creditors, & that priority is unaffected by 32 & 33 Vict. c. 46. But where A., a creditor, had obtained in an action in the Exch. Div. an order *nisi* to sign judgment against the extrix. of his debtor, & before judgment had been signed another creditor obtained in the Ch. Div. a decree for the administration of deceased debtor's estate, A. was held to have no priority, & the action in the Exch. Div. was transferred to the Ch. Div., & proceedings therein stayed upon motion, made for that purpose.—*Re STUBBS' ESTATE, HANSON v. STUBBS* (1878), 8 Ch. D. 154; 47 L. J. Ch. 671; 26 W. R. 736.

Annotations:—*Reid. Crowder v. Stewart* (1880), 16 Ch. D. 368; *Re Jones, Calver v. Laxton* (1885), 31 Ch. D. 440.

8024. — — — In nature of administration suit.]—Where an action was brought against the surviving partner & the exor. of a deceased partner of a firm of builders, & the surviving partner had absconded, the judge at *Nisi Prius* transferred the action to the Ch. Div., as being, in substance, an administration suit.—*BANKART v. HADDON* (1876), 2 Char. Pr. Cas. 106.

8025. — — — Action by executor—Administration order obtained by defendant—On counterclaim.]—On an application by deft. in an action to sign judgment according to the terms of the defence & the counterclaim, the master had referred the matter to the judge as he could not transfer to the Ch. Div. of the ct. which he thought was the course that should be taken. The action was brought on a bill of exchange by the exors.; deft. claimed an administration order as next of kin. Order

for administration of intestate estate & transfer to the Ch. Div.—*ANON.* (1876), Bitt. Prac. Cas. 85.

8026. — — — Action to wind up partnership—By surviving partner.]—An action was brought & a decree made in the Ch. Div. for administration of the personal estate of A., & for an inquiry whether his moiety of certain real estate had become assets of his partnership business carried on with B. B., the surviving partner, brought an action for winding up the partnership in another branch of the Ch. Div.:—*Held*: B.'s action ought to be transferred to the judge before whom the action for administration was pending.—*DAVIS v. DAVIS* (1878), 48 L. J. Ch. 40.

8027. — — — Arbitration award—Made rule of court.]—A local board of health served a notice to repair a road on a testator, & as the notice was not complied with, repaired the road themselves. After his death demand was made by the board on the tenant for life under his will & the exor., as statutory owners, for payment of the apportioned part of the expenses of the repairs. The statutory owners disputed the assessment & denied their liability. The matter went to arbitration, which the owners neglected to attend; & the award was subsequently made a rule of ct. in the Q. B. Div. & the costs taxed. Demands were made on the tenant for life & the exors. for payment of the amount found due under the award & the taxed costs. Testator's estate was being administered in the Ch. Div. On a motion by the exors. to transfer all the proceedings to the Ch. Div. & restrain the board from taking any steps to enforce the award:—*Held*: the ct. had jurisdiction under R. S. C., Ord. 51, r. 2A, to transfer all the proceedings.—*WEST v. DOWNMAN* (1879), 39 L. T. 666; 27 W. R. 355; *on appeal*, 27 W. R. 697, C. A.

8028. Application for—How made—Ex parte.]—*FIELD v. FIELD*, [1877] W. N. 98.
Annotation:—*Reid. Re Landore, Siemens Steel Co.* (1879), 40 L. T. 35.

8029. — — — —.]—*WHITAKER v. ROBINSON*, [1877] W. N. 201.
Annotation:—*Reid. Re Landore, Siemens Steel Co.* (1879), 40 L. T. 35.

8030. — — — —.]—*Re SHARPE, SCOTT v. SHARPE*, [1884] W. N. 28.

See, now, R. S. C., Ord. 49, r. 5.

8031. Order of transfer—Not to be made in administration order.]—An order for the transfer to the judge before whom an administration action is pending of actions against the exors. should not be made by the order for administration.—*Re POOLE, POOLE v. POOLE* (1886), 55 L. T. 56.

8032. To what court—From one judge in Chancery—To other judge in Chancery.]—*Re PIMM, MALKIN v. PIMM, STEWARD v. SHARPE* (No. 2) (1916), 60 Sol. Jo. 527, C. A.

— Court of bankruptcy.]—*See BANKRUPTCY*, Vol. V., p. 1017, Nos. 8304–8306.

SUB-SECT. 7.—CONSOLIDATION OF PROCEEDINGS.

See, generally, PRACTICE; R. S. C., Ord. 49, r. 8.

8033. General rule.]—The ct. does not allow the estate of a testator to be torn into pieces by a

PART VIII. SECT. 4, SUB-SECT. 7.

d. What actions consolidated—Same

representatives of two estates—Plain-
tiff beneficiary under both wills.]—
Where ptif. was a beneficiary under the

wills of I. & T., & the estate of I. had
claims upon the estate of T., & the
exors. of I. were the administrators

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multiplicity of decrees, but it makes one decree, & provides for the rights of all the persons who, when the accounts shall have been taken, shall be found to have an interest in the estate of testator. . . . It proceeds in one suit for the administration of the whole estate (SELWYN, L.J.).—FLOCKTON v. BUNNING (1868), 8 Ch. App. 323, n., L. JJ.

8034. What actions consolidated—Actions by creditors.]—Three creditors who were within the terms of a trust created by a will for the payment of debts, bring a bill to carry the trusts of the will into execution; the rest of the creditors brought a second bill for the same purpose, & obtained an order that both bills might be referred to a master to certify which would be most for the creditors' benefit. The ct. discharged the order, being of opinion, it has never been reduced to general rule, that one bill should be depending only where a number of creditors are concerned.—ANON. (1747), 3 Atk. 602; 26 E. R. 1147.

8035. ——— Against separate estates of joint debtors.]—A., B., C. & D. were co-partners. A. & B. died, & soon afterwards C. & D. became bkpt. M., who was a creditor of the firm at the deaths of A. & B. & at the bkpcy., filed a bill, on behalf of himself & all the other creditors of A. & B., against the exors. (who, however, had not proved), & devisees of both A. & B. & the assignees of the bkpts., for the purpose of having the real & personal assets of both A. & B. applied in payment of their joint & separate debts:—*Held*: the administration of the two estates might be comprised in one suit, & therefore a demurrer for multifariousness was overruled. An objection, however, made *ore tenus*, that no properly constituted personal representatives of A. & B. were parties, was allowed; but the ct. did not give pltf. the costs of the demurrer on the record, but merely allowed the demurrer *ore tenus* without costs.—BROWN v. DOUGLAS (1840), 11 Sim. 283; 10 L. J. Ch. 14; 4 Jur. 1200; 59 E. R. 883.

Annotation:—*Reid*. Brown v. Weatherby (1841), 10 L. J. Ch. 190.

8036. ——— Separate suits for administration.]—Where there were two suits for administration, & a motion for a receiver in each suit came upon the same day, the receiver was appointed in both suits, & the ct. gave the carriage of the order to pltf. by whom the first notice of motion for the receiver had been given.—HART v. TULK (1849), 6 Hare, 611; 67 E. R. 1306.

Annotation:—*Mentd*. Newton v. Chorlton (1853), 10 Hare, App. I, xxxi.

8037. ——— By executor & residuary legatee.]
KELK v. ARCHER, ARCHER v. KELK, No. 8047, *post*.

8038. ———.]—If several suits are instituted for the administration of a testator's estate, they may be amalgamated in one decree, & the conduct of the cause will be given to a residuary legatee or other person having an interest in the residue, in preference to a creditor.—PENNY v. FRANCIS, WOODHATCH v. FRANCIS (1860), 30 L. J. Ch. 185; 7 Jur. N. S. 248; 9 W. R. 8.

8039. ———.]—Two suits for the administration of one estate being instituted within five days of each other, & there being no evidence of

unfitness on the part of either pltf., the ct. made a decree in both suits, leaving the question as to which should have the control of the proceedings to be decided with reference to the manner in which each party should conduct the inquiries in chambers.

As an ordinary rule, in the case of two suits with the same object, pltf. in the first suit has the conduct of the proceedings.—NOWALL v. PASCOE, THOMPSON v. PASCOE (1862), 31 L. J. Ch. 456; *sub nom*. NORVALL v. PASCOE, THOMPSON v. PASCOE, 10 W. R. 338.

8040. ———.]—HOSKINS v. CAMPBELL, GIBBON v. CAMPBELL, No. 8086, *post*.

8041. ———.]—Where three actions had been commenced for the administration of the same estate, the ct., notwithstanding the general rule that pltf. in the first action is entitled to the conduct of the proceedings, ordered the three actions to be consolidated, & gave the conduct of the future proceedings in the consolidated causes to pltf. in the second action, on the ground that the parties thereto were the persons chiefly interested, by whom the costs would have to be borne, & consequently, to whose advantage it would be to keep down the expenses.—*Re PRIME'S ESTATE* (1883), 48 L. T. 208.

Conduct of consolidated action—To whom given.]
—See Sub-sect. 9, B. (a), *post*.

SUB-SECT. 8.—STAY OF PROCEEDINGS.**A. Where more than one Action Pending.**

See, now, R. S. C., Ord. 49, r. 8.

8042. Suits other than for administration—Suit by legatees—Plaintiff in administration to apply for stay—Incidence of costs if no application made.]
—Where pending an administration suit a suit is instituted by legatees praying no further relief than might be had in the administration suit, the parties to the administration suit ought to apply to have the proceedings in the legatees' suit stayed; otherwise the costs of the latter suit may be dealt with as costs in the former.—THERREY v. HENDERSON, COSGRAVE v. HENDERSON (1842), 1 Y. & C. Ch. Cas. 481; 2 Coop. temp. Cott. 313; 6 Jur. 386; 62 E. R. 980.

8043. ——— Suit by mortgagee—Against plaintiff in administration.]—C., being exor. of L., mortgaged certain hereditaments which had formed part of the estate of deceased. Pltf., who became mtgee., afterwards sued to recover possession of them from her lessees on the ground of a forfeiture for non-payment of rent. C. obtained leave to defend the action as landlord. A suit had been instituted by C. in the Ch. Div. to administer the estate of L., & an inquiry had been directed as to the mtge. An order was obtained by C. staying the proceedings in the action for the recovery of the hereditaments until the proceedings in the Ch. Div. should have concluded:—*Held* the order was bad, & must be set aside.—CROWLE v. RUSSELL (1878), 4 C. P. D. 186; 48 L. J. Q. B. 76; 39 L. T. 320; 27 W. R. 84, C. A.

8044. ——— Suit by creditor—Relief sought more comprehensive.]—Demurrer of another cause

with the will annexed of the estate of T., an order was granted for the administration of the estate of I., &

proceedings were consolidated those under an order already obtained for the administration of the

estate of T.—*Re ADAMS*, ADAMS v. MUIRHEAD (1875), 6 P. R. 283.—CAN

depending overruled, the cause depending being such as would not be effective, & the present bill making new parties.—*LAW v. RIGBY* (1792), 4 Bro. C. C. 60; 29 E. R. 779; *subsequent proceedings, sub nom. RIGBY v. MACNAMARA, LAW v. RIGBY* (1795), 2 Cox, Eq. Cas. 415, L. C.

8045. ——— Against executor—Administration order before judgment obtained.]—*Re STUBBS' ESTATE, HANSON v. STUBBS*, No. 8023, *ante*.

8046. ——— As executor & assignee.]—*Re PIMM, MALKIN v. PIMM, STEWARD v. SHARPE* (No. 2) (1916), 60 Sol. Jo. 527, C. A.

8047. Concurrent administration suits — By executor & residuary legatee respectively—Suit by executor stayed.]—The tenant for life of the real & personal estate of a testator, who was also extrix. of the will, with a power of appointing part of the personal estate, filed a claim for the administration of the real & personal estate. The residuary devisee & legatee subsequently filed a claim for administration of both estates. The first claim was first set down for hearing, but both having come on to be heard together:—*Held*: one decree should be made in both suits; but the residuary devisee & legatee should have the carriage of it, as having the greatest interest, though the tenant for life had priority both in filing the claim & setting it down for hearing.

Where there are two suits for administration, one by the exor., & the other by the residuary legatee, & the two suits come on to be heard together, the proceedings in the suit by the exor. are stayed. . . . This practice is a wholesome one inasmuch as the residuary legatee has the greatest interest in duly carrying on the suit in such a manner as to cause no unnecessary expense (*per CUR.*).—*KELK v. ARCHER, ARCHER v. KELK* (1852), 19 L. T. O. S. 252; 16 Jur. 605.

Annotation:—*Reid. Re Prime's Estate* (1883), 48 L. T. 208.

8048. ——— Court to be informed of first suit—On application to institute second.]—*HARRIS v. LIGHTFOOT, HARRIS v. HARRIS*, No. 8099, *post*.

8049. ——— On behalf of infants—By stranger & by father respectively—Suit by stranger stayed.]—

Two suits were instituted on behalf of infants against trustees for administration, the first by a stranger to the infants, & the second by their father as next friend. The second bill stated that the object of the first was to stave off inquiries from a defaulting trustee, & prayed relief against him in respect of the breaches of trust, & it was charged in affidavits & not denied that the next friend in the first suit was falsely described & was a friend of the defaulting trustee. The ct. ordered the first suit to be stayed.—*VIRTUE v. MILLER* (1871), 19 W. R. 406.

8050. Administration in county court—Proceedings in High Court—In respect of claims provable in administration—No power to stay.]—Since Jud. Act, 1873 (c. 66), a county ct. before which an administration action is pending has no power to stay proceedings in the High Ct. in respect of claims provable in the administration suit.—*COBBOLD v. PRYKE* (1879), 4 Ex. D. 315; 49 L. J. Q. B. 8; 28 W. R. 259, D. C.

Annotation:—*Mentd. Re Barnett, Ex p. Reynolds* (1885), 15 Q. B. D. 189.

8051. Administration in foreign court—Ireland—Stay of cross action in England refused—Proceedings not vexatious.]—An action having been commenced in the Irish ct. by an exor. of a

testator who died in Ireland, claiming as against persons interested under a voluntary settlement, made by testator, that certain property was not included in it, but was part of his residuary estate, & asking for administration of that estate, defts. to the action commenced a cross action in the English ct. for a declaration that the property in question had been effectually brought into the settlement:—*Held*: the action in England was not vexatious or oppressive, & ought not therefore to be stayed until after the trial of the Irish action.—*CARTER v. HUNGERFORD* (1915), 59 Sol. Jo. 428, C. A.

Annotation:—*Reid. Cohen v. Rothfield*, [1919] 1 K. B. 410.

—*See CONFLICT OF LAWS*, Vol. XI., pp. 482–484, Nos. 1353–1356, 1362–1365.

Revocation of grant of administration.]—*See EXECUTORS*, Vol. XXIII., Part II., Sect. 16, subsect. 4, B.

See, generally, PRACTICE.

B. Where Administration Decree obtained.

(a) In General.

See, now, R. S. C., Ord. 49, r. 5.

8052. Proceedings stayed—Although no proceedings taken under decree.]—There being a decree for payment of debts, etc., on the suit of the trustees, though the parties have not proceeded under that decree, a creditor restrained by injunction [by bill filed for the purpose], from proceeding at law against the exor.—*BROOKS v. REYNOLDS* (1782), 1 Bro. C. C. 183; 2 Dick. 603; 28 E. R. 1071, L. C.

Annotations:—*Mentd. Perry v. Phelps* (1804), 10 Ves. 34; *Lee v. Park* (1836), 1 Keen, 714; *Waller v. Barrett* (1857), 24 Beav. 413.

8053. ———.]—There being two suits to take exors.' accounts, the prosecution of the first suit was, under the circumstances, stayed, & the prosecution of the decree in the second suit was given to pltf. in the first suit.—*HAWKES v. BARRETT, WILLIAMS v. BARRETT* (1820), 5 Madd. 17; 56 E. R. 800.

8054. ———.]—*POTT v. GALLINI*, No. 8079,

8055. ———.]—Where a decree had been obtained in Chancery for the general administration of a testator's assets, a bill previously filed in this ct. [of Exchequer] by an annuitant under the will against the exors. was dismissed; & as the annuitant's bill had been filed with undue haste, she was not allowed the costs of the application to stay proceedings, although she was allowed her costs up to the time of notice of the decree.—*HAYWARD v. CONSTABLE* (1836), 2 Y. & C. Ex. 43; 160 E. R. 304.

8056. ——— Decree made but not drawn up.]—Where a decree had been pronounced, though not drawn up, in the Ct. of Ch. for the general administration of a testator's assets, a bill filed in this ct. by an annuitant under the will against the exors. was dismissed.—*MOORE v. PRIOR* (1836), 2 Y. & C. Ex. 375; 6 L. J. Ex. Eq. 74; 1 Jur. 512; 160 E. R. 442.

Annotation:—*Reid. Thwaites v. Forman* (1846), 7 L. T. O. S. 297.

8057. ——— Decree giving required relief.]—After a decree in a creditors' suit, the ct. will stop a creditor from proceeding in another suit for the recovery of a demand against the estate or

Sect. 4.—Practice: Sub-sect. 8, B. (a).]

testator, if the object can be obtained in the first suit; but *secus* if the creditor would be unable to obtain relief in the first suit.

A suit was instituted against the representatives of testator, in respect of a breach of trust; & a decree was afterwards made in a creditors' suit, against the same representatives, & an account of the debts, etc., was directed to be taken. Pltf. in the first suit established his claim so far as he could in the second suit, & afterwards brought on the first suit for hearing; there then appearing to be a deficiency of assets, he waived further relief, & took the securities on which the trust fund had been improperly invested:—*Held*: pltf. in the first suit was entitled to his costs of the first suit out of the assets in the second.—*COSTERTON v. COSTERTON, CLARKE v. WENN* (1838), 2 Keen, 774; 7 L. J. Ch. 302; 48 E. R. 828.

8058. ———.]—*MENZIES v. CONNOR*, No. 9013, *post*.

8059. ———.]—When an order, under a summons to administer an estate, will effect all that can be directed by a decree in a prior suit instituted by bill or claim for the administration of the same estate, the ct. will, on motion, stay the proceedings in the prior suit on payment of pltf.'s costs.—*RITCHIE v. HUMBERSTONE* (1853), 22 L. J. Ch. 1006; 17 Jur. 756.

8060. ———.]—Suits were instituted for the same matter in the Palatine Ct. & this ct., & a decree made in the former. The ct. refused to stay the proceedings here, as the suits partly involved lands locally situate out of the jurisdiction of the Palatine Ct.

There can be question, but that if the two cts. have co-extensive jurisdiction & the two suits are so constituted that all that is required in one may be obtained under the decree in the other, this ct. will stay the proceedings in the suit in which no decree has been pronounced & will allow the other to proceed (*ROMILLY, M.R.*).—*WYNNE v. HUGHES* (1859), 20 Beav. 377; 28 L. J. Ch. 283; 32 L. T. O. S. 329; 5 Jur. N. S. 165; 7 W. R. 197; 53 E. R. 943; *on appeal*, 28 L. J. Ch. 485, L. JJ.

Annotations:—*Reid. Re Yates, Bradley v. Stelfox* (1862), 3 De G. J. & Sm. 402. *Mentd. Re Allison's Trusts, Re Johnsons* (1878), 38 L. T. 304; *Re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150.

8061. ———.]—A bill was filed by persons interested as residuary legatees under a will against the exors. & the other persons having interests, praying the usual accounts & the administration of the estate. The exors. put in their answer, not, however, setting out the accounts which the bill asked. Afterwards, under an arrangement to which all parties consented, the exors. verified their accounts by affidavit, & the sums thereby appearing to be in their hands were paid into ct. in the cause. Two of defts. then filed a second bill against the exors. & against all the other parties to the former suit, & thereby, in addition to the relief prayed by the first bill, sought to charge the exors. personally, on the ground of fraud & breach of trust. In May, 1835,

a decree by consent was made in the first suit, by which all the accounts & inquiries usual in an administration suit were directed. Pltfs. in the second suit afterwards brought on their suit to a hearing, but wholly abandoned the case of alleged fraud & breach of trust; & a decree was made dismissing their bill, but directing that their costs, up to the date of the decree in the first suit, should be taxed & paid out of the fund in ct. in the first suit.

Upon appeal, this decree was varied by directing that so much of the second bill, as sought to charge the exors. personally, be dismissed, with costs, & that pltfs. pay to all defts. so much of the costs of the rest of the suit as had arisen since the decree in the first suit, and that the residue of the costs of all parties be taxed, with a declaration that the same ought to be paid out of the estate; any of the parties to be at liberty to apply in the first suit relative thereto, & all proceedings in the second suit to be stayed.

The decree involved so much of principle, especially with reference to the dealing with the fund in the first cause, for the purposes of costs in the second, as to render the appeal an exception to the ordinary rule which prohibits appeals merely on the question of costs.—*TAYLOR v. SOUTHGATE* (1839), 4 My. & Cr. 203; 8 L. J. Ch. 137; 3 Jur. 214; 41 E. R. 80, L. C.

Annotations:—*Corrad. Chappell v. Purday* (1847), 16 L. J. Ch. 261. *Mentd. Re Bradford & Thursby & Bradford & Farish* (1883), 48 L. T. 765.

8062. ———.]—To an action by a creditor to recover a debt due upon bond against the heir-at-law of an intestate, deft. pleaded that he had no lands by descent other than those mentioned in his plea, to which pltf. replied that deft. had other lands, whereupon issue was joined. Three weeks previously to the time fixed for the trial of the action, a decree in a creditors' suit for the administration of the intestate's estate was obtained, & on the same day notice of the decree was served upon pltf.'s solicitor, who refused to stay the proceedings in the action. A few days before the trial took place, the deft. moved for an injunction to stay the trial, which motion was refused:—*Held*: on appeal, the injunction ought to have been granted. In the meantime, the trial having been had, & a verdict given for pltf., injunction granted to stay execution, upon payment of pltf.'s costs up to the time when he had notice of the decree.—*ROUSE v. JONES* (1844), 1 Ph. 462; 41 E. R. 708; *sub nom. ROOSE v. JONES*, 14 L. J. Ch. 4; 4 L. T. O. S. 129 a; 8 Jur. 1035, L. C.

8063. ———.]—*BURNETT v. BURNETT*, No. 8324, *post*.

8064. ——— Unless special grounds against stay.]—Where a decree has been obtained for the general administration of a testator's estate, the ct. will not allow a creditor to continue a suit instituted by him, unless he can show some special grounds for so doing. The creditor, having notice of the decree, will not generally be allowed his costs of proceedings taken subsequent to such notice, but the ct. will not make him pay the costs of other parties.—*PORTARLINGTON (EARL) v.*

PART VIII. SECT. 4, SUB-SECT. 8.—
B. (a).

8064 i. *Proceedings stayed—Unless special grounds against stay.*]—A motion by defts., exors., to stay a creditor's action against them, on the ground

that an administration action by a legatee was pending, in which an administration order had been granted, was opposed on the ground of inconvenience to pltf. & generally as to the right to grant a stay in such cases:—*Held*: actions should be stayed against

the estate, unless a fair consideration of the claim cannot be had by the referee.—*BROWN v. McDONALD*, 25 C. L. T. 131.—*CAN.*

o. ——— Attachment of estate property by judgment creditor.]—On

DAMER, LEWIS v. DAMER (1847), 2 Ph. 262; 16 L. J. Ch. 370; 11 Jur. 443; 41 E. R. 943, L. C.

8065. —.]—The answer of the extrix. in a legatee's suit contained no accounts, & the decree did not direct an account of real estate. A creditor proceeding at law, after notice of the decree, restrained, on motion, without being allowed his costs of the application.—BUSH v. WINDEY (1849), 13 Jur. 273.

8066. —.]—A creditor's suit against a personal representative for the administration of a testator's estate proceeded to replication, when a decree was obtained, in another creditor's suit, against the same personal representative for the same object. After deft. had given pltf. in the first suit notice of the decree, pltf. threatened to proceed; & thereupon deft., upon a notice of motion, entitled only in the former cause, asked that the proceedings might be stayed. The ct. made an order in both suits, granting the injunction, & giving the restrained pltf. liberty to tax his costs of the first suit & on the motion, & to go in & prove his debt & such costs in the second suit, but declined to direct that the costs should be paid out of the first assets.—LADBROKE v. SLOANE (1819), 3 De G. & Sm. 291; 64 E. R. 483.

8067. — Inquiries in administration suit—Unnecessary in suit stayed.]—A creditors' suit stayed, on the application of the exors., after a decree in a suit by residuary legatees for the administration of the same estate, notwithstanding there might be inquiries directed in the legatees' suit, which would not have been necessary in the creditors' suit; it being competent to the master to make a separate report, & thereby prevent the payment of the creditors from being delayed by the business of the ultimate administration of the estate.—GOLDER v. GOLDER, LUCAS v. GOLDER (1851), 9 Hare, 276; 22 L. J. Ch. 154; 68 E. R. 507.

8068. —.]—The ct. constantly, in cases of this description, gives the conduct of the cause to the person who has first instituted the suit. . . . Pltf. in the second suit cannot derive to himself priority by means of a proceeding instituted after the other party has got priority, & where, if he gets priority, it is by the consent of the party, who is bound to exercise his duty, equally towards both. . . . I think this order is quite of course. There is a party administrator & devisee in trust for the payment of debts, I take for granted, among other things, who is sued by two parties. I have always thought it was according to the usual course of the ct. in those causes to give to the party who has the first suit the conduct of the cause which has been secondly instituted. I think, therefore, the right order to be made in this case is to stay the proceedings in the first cause (*Wheelhouse v. Calvert*), direct the costs of that suit to be taxed & paid by deft. (he to be allowed them out of the estate), & to give pltf. in the first cause the conduct of the second suit (*TURNER, L.J.*).—*WHEELHOUSE v. CALVERT* (1858), 41 L. J. Ch. 105, n., L. J.J.

8069. —.]—Two concurrent administration suits were instituted by creditors of a testator

against his exor. The exor. paid off pltf. in the first suit, & obtained an order to stay all proceedings in it. A third suit was instituted by another creditor against the exor. The pltf. in the second suit then obtained an order, giving him the carriage of the order to stay proceedings in the first. It was afterwards ordered that the third suit be transferred from the Vice-Chancellor's ct., in which it was commenced, to the ct. of the Master of the Rolls. Pltf. in the second suit moved to stay all proceedings in the third:—*Held*: the order moved for must be made, & the pltf. in the third suit must pay the costs of that motion, & of the order for the transfer of his suit.—*SALTER v. TILDESLEY, TILDESLEY v. TILDESLEY* (1865), 11 L. T. 759; 13 W. R. 376.

8070. — Suits on behalf of infants.]—Two suits had been instituted on behalf of infants for the same purpose, & a decree had been obtained in the second. Upon motion to stay the first suit, the ct. ordered it to be stayed giving liberty to the next friend in the first to apply for the conduct of the second.

I shall direct the costs of the first suit to be costs in the second, & give the next friend in the first suit liberty to go in & ask to be allowed the conduct of the second suit (*ROMILLY, M.R.*).—*KENYON v. KENYON* (1866), 35 Beav. 300; 55 E. R. 911.

8071. —.]—Where an action was brought by an equitable mtgee., seeking in view of a deficiency administration of the estate on behalf of all the creditors & another creditor also brought an action seeking administration, pltf. in the second action got a decree for the usual accounts & inquiries & then the ct. at the instance of deft. in both actions stayed all proceedings in the first action & gave the pltf. in the first action, as being the pltf. mainly interested, the conduct of the decree in the second action.—*WILLYAMS v. MATTHEWS, MATTHEWS v. MATTHEWS* (1876), 45 L. J. Ch. 711; 34 L. T. 718; 2 Char. Pr. Cas. 149.

8072. — Not where sufficiency of assets not in dispute—Suit by legatee.]—Two decrees had been made for the administration of the estate of B., deceased, one in a creditors' suit, & the other in a legatee's suit. A motion, by pltf. in the former, to stay the prosecution of the decree in the latter, so far as it directed an account of deceased's estate & of his debts, was refused, there being no suggestion of a deficiency of assets.—*PLUNKETT v. LEWIS, EVELYN v. LEWIS* (1840), 11 Sim. 379; 59 E. R. 919.

8073. — — —.]—It is no objection to the hearing of a suit for a pecuniary legacy in which assets are admitted that a decree for the administration of the estate of testator has been made at the suit of the residuary legatee; *qu.*: whether the ct. would direct the accounts of the same estate to be taken in both suits.—*SUISSE v. LOWTHER (LORD)* (1843), 2 Hare, 424; 7 Jur. 367; 67 E. R. 175.

Annotations:—*Mentd.* Gloucester Corpn. v. Wood (1844), 14 L. J. Ch. 122; Lee v. Pain (1845), 4 Hare, 201; Bourne v. Hartley, Bourne v. Mahon (1854), 2 Eq. Rep. 910; Wilson v. O'Leary (1871), 40 L. J. Ch. 709.

8074. — — — Whether accounts taken in

July 22, 1886, L. obtained a money-decree against C. On Nov. 5, 1886, C. died; & properties belonging to the estate of C. were attached on Jan. 8 & 12, 1887. On Dec. 21, 1886, S. filed a suit to administer the estate of deceased, & on Jan. 20, 1887, obtained

the usual administration decree. On May 5, 1887, S. applied for an order staying all proceedings taken by L. against the estate of C.:—*Held*: the attachment did not create any interest in or charge upon, the properties in favour of the attaching creditor as

against other creditors, & the order asked for ought to be granted.—*Re SOOBUL CHUNDER LAW, SOOBUL CHUNDER LAW v. RUSSICK LALL MITTER* (1888), 1 L. R. 15 Calc. 202.—*IND.*

Sect. 4.—Practice: Sub-sect. 8, B. (a), (b) & (c), & C.; sub-sect. 9, A.]

both suits.]—SUISSE v. LOWTHER (LORD), No. 8073, ante.

8075. — Not action against executor for devastavit.]—On a summons by an exor. under R. S. C., Ord. 51, r. 2a, for the transfer from the Exch. to the Ch. Div. of an action by a creditor of the estate against the exor. personally, which alleged that the exor. had committed a *devastavit*, but which had been commenced after an order had been made for the administration of testatrix's estate; & for a stay of proceedings in such action after it had been transferred:—*Held*: the exor. was entitled to a transfer of the action; but the ct. refused to stay the proceedings on the ground that an exor. cannot escape liability by reason of an administration order having been made.—*Re TIMMS* (1878), 47 L. J. Ch. 831; 38 L. T. 679; 26 W. R. 692.

8076. Decree in Palatine Court—Whether proceedings in High Court stayed—Subject matter partly in Palatine jurisdiction.]—WYNNE v. HUGHES, No. 8060, ante.

8077. — —.]—*Re WILLIAMS, JONES v. JONES*, [1882] W. N. 6.

—.]—*See, further, COURTS, Vol. XVI., p. 196, Nos. 1009–1014.*

Proceedings in foreign court—Decree therein—Stay of proceedings in England.]—See CONFLICT OF LAWS, Vol. XI., p. 480, No. 1330.

— **Decree in England—Stay of proceedings abroad.]—See CONFLICT OF LAWS, Vol. XI., pp. 483–484, Nos. 1362–1365.**

Subsequent revocation of grant of administration.]—See EXECUTORS, Vol. XXIII., Part II., Sect. 16, sub-sect. 4, B.

See, generally, PRACTICE.

(b) Other Proceedings seeking more Comprehensive Relief.

8078. No stay.]—GWEVERS v. DANBY (EARL) (1688), 3 Rep. Ch. 216; 21 E. R. 771.

8079. — —.]—(1) After a decree for the administration of assets in an amicable suit, a creditor having filed a bill praying for the usual accounts, which had been directed by the former decree, & also to have the assets marshalled, which was not prayed for or decreed in the first suit, the ct. made a second decree, directing the usual accounts & the assets to be marshalled, with liberty to the master to use the accounts taken under the former decree.

(2) If the second suit had been merely for the same objects as the first, the decree in the first suit would have been a bar to it, & the ct., on motion before answer, would have ordered all proceedings in it to be stayed.—*POTT v. GALLINI* (1823), 1 Sim. & St. 206; 57 E. R. 83.

Annotation:—As to (2) Rejd 7. Connor (1851), 18 L. T. O. S. 337.

8080. — —.]—To a creditor's bill, defts. pleaded a decree obtained, by other creditors in a prior overruled: the decree being less to pltf. than they might obtain in their own suit.—*PICKFORD v. HUNTER* (1831), 5 Sim. 122; 58 E. R. 283.

Annotation:—Rejd. Menzies v. Connor (1851), 18 L. T. O. S. 337.

8081. — —.]—*COSTERTON v. COSTERTON, CLARKE v. WENN*, No. 8057, ante.

8082. — —.]—Where a decree for the administration of a testator's estate was obtained in a creditors' suit, which decree did not bind testator's real estate, the ct. refused to prevent a second suit, for the administration of the estate of the same testator, from being prosecuted.—*JONES v. COOKE* (1841), 11 L. J. Ch. 15.

8083. — —.]—Where two suits are instituted for the administration of the same estate, & on a decree being obtained in one of them, an application is made to stay proceedings in the other; the question always is, whether the latter suit asks anything more than can be obtained in the former.—*RIGBY v. STRANGWAYS* (1846), 2 Ph. 175; 10 Jur. 998; 41 E. R. 908, L. C.

Annotation:—Rejd. Whittington v. Edwards (1858), 32 L. T. O. S. 187.

SMITH v. GUY, BRUNWIN v. GUY, No. 8125, post.

8085. — —.]—A bill was filed by a specialty creditor for the administration of an intestate's estate, praying also accounts relative to the carrying on of intestate's business by his administratrix. Soon after, a purely creditor's suit was instituted by another party & a decree obtained. The ct. refused to stay the proceedings in the first suit, holding that it embraced an object not provided for by the decree in the second suit.—*UNDERWOOD v. JEE, SMITH v. JEE* (1849), 1 Mac. & G. 276; 1 H. & Tw. 379; 19 L. J. Ch. 171; 14 L. T. O. S. 123; 41 E. R. 1271, L. C.; *subsequent proceedings* (1850), 15 Jur. 99.

8086. — —.]—Where there are two suits for administration of the same estate, & a decree has been taken in one only, but the relief which can be obtained in that one is not so comprehensive as that which can be had in the other, the second suit will not be stayed, but both suits will be consolidated on such terms as the ct. shall think just.—*HOSKINS v. CAMPBELL, GIBBON v. CAMPBELL* (1864), 2 Hem. & M. 43; 12 W. R. 546; 71 E. R. 375; *sub nom. CAMPBELL v. HOSKINS, GIBSON v. CAMPBELL*, 10 L. T. 93.

8087. — —.]—Pltf. who files a bill for the administration of a testator's estate, charging the trustees & exors. with breaches of trust, may bring his suit to a hearing notwithstanding that the ordinary administration decree has been obtained in a suit subsequently instituted, to which pltf. is not a party. If a second decree is made, both decrees ought to be prosecuted in the same branch of the ct. Where a first suit is stayed by reason of a decree in a second suit, pltf. in the first suit will ordinarily have the carriage of the decree.—*ZAMBACO v. CASSAVETTI* (1871), L. R. 11 Eq. 439; 24 L. T. 770.

Annotations:—Consd. Dowbiggin v. Trotter, Trotter v. Trotter (1872), 20 W. R. 794. *Mentd. Thomson v. S. E. Ry., S. E. Ry. v. Thomson* (1882), 30 W. R. 537.

8088. Partial stay—As to matters common to both actions.]—A creditor's bill was filed, which also prayed other relief. Soon after a purely creditor's suit was instituted by another party, & a decree obtained therein within seven days. The ct. stayed the first suit so far only as it prayed an administration of the assets.—*DRYDEN v. FOSTER, DANSON v. FOSTER* (1843), 6 Beav. 146; 12 L. J. Ch. 189; 49 E. R. 781.

8089. Stay on terms—Undertaking to incorporate

In decree—Relief prayed by stayed suit.]—The common administration decree having been made in a suit by one of the next of kin, a second suit was instituted six months after, by another next of kin, praying additional relief. The ct. stayed the second suit, on deft. in the first undertaking not to object to any additions to the decree which the judge in chambers might think reasonable.

I will stay all further proceedings in the second suit, & make the costs of that suit costs in the the trust (ROMILLY, M.R.).—*GWYER v. PETERSON, PETERSON v. PETERSON* (1858), 26 Beav. 83; 53 E. R. 828.

Annotation:—Folld. Matthews v. Palmer, Pritchard v. Palmer (1863), 11 W. R. 610.

8090. — — — — —.]—Where two suits are instituted for the administration of the same estate, & a decree is made in one for ordinary administration, but in the other suit the prayer extends to other matters, the ct. will stay proceedings in the suit in which no decree has been made, on the undertaking of all parties in the other suit to introduce into their decree the extra matter prayed by that bill.—*MATTHEWS v. PALMER, PRITCHARD v. PALMER* (1863), 11 W. R. 610.

8091. — — — — —.]—A judgment creditor of deft. brought an action in the ct. of the County Palatine of Lancaster to obtain a declaration that he had a charge upon certain lands of deft. comprised in a certain deed of settlement, & to carry into effect the trusts of the settlement. He obtained judgment for a declaration of his charge, & for administration, inquiries & a receiver. Afterwards one of the beneficiaries under the settlement brought an action in the High Ct. to carry into effect the trusts of the settlement, & charging the trustees with a breach of trust. Judgment was obtained & inquiries directed, including one as to the breach of trust:—*Held*: pltf. in the Palatine action was not a stranger to the action in the High Ct., & was entitled to the conduct of that action; & he undertaking to add the inquiry as to the breach of trust to the inquiry in the Palatine action, the Ct. stayed all proceedings in the action in the High Ct.—*TOWNSEND v. TOWNSEND* (1883), 23 Ch. D. 100; 48 L. T. 694; 31 W. R. 735, C. A.

(c) *Decree Unfairly obtained.*

See, generally, PRACTICE.

8092. General rule.]—The rule, that when two suits are instituted for the administration of the same estate that shall be prosecuted in which the earlier decree has been obtained, does not apply where it has not been obtained fairly; & the ct. held this to have been the case, where, on the same day of which notice had been given to an exor. to appear to an administration summons, he appeared of his own accord at an earlier hour in the chambers of another judge, & consented to a decree on a summons then & not previously applied for by another pltf.—*HARRIS v. GANDY, WILLS v. GANDY* (1859), 1 De G. F. & J. 13; 29 L. J. Ch. 38; 8 W. R. 32; 45 E. R. 263, L. C. & L. JJ.

8093. Decree obtained for purpose of staying concurrent action.]—*HARRIS v. GANDY, WILLS v. GANDY*, No. 8092, ante.

8094. — — — — — Special directions as to proceeds of sale.]—Where a decree had been made in a creditor's suit to take the usual accounts of an intestate's estate a short time after the bill filed, & as alleged, with a view to prevent another creditor who had

also filed his bill for the same purpose, the ct., on an application to stay the proceedings in the second suit, will give special directions that that part of the real estate which it was alleged the administratrix was about to dispose of should be sold in the usual way, & the proceeds brought into ct. to abide further directions with reference to the debt due to the second creditor.—*LANKESTER v. WOOD, CROSSMAN v. WOOD* (1866), 14 L. T. 512.

8095. Collusive proceeding by friendly creditor.]—A trader in the city of London against whom proceedings in bkpcy. were pending, died insolvent before adjudication, leaving all his property to his wife appointing her his extrix. A creditor immediately filed his bill for a receiver until a personal representative should be constituted. The wife proved the will before a receiver had been appointed, & the creditor thereupon amended his bill, praying administration of the estate & a receiver. On the day on which the amended bill was served, a bill for administration was filed by another creditor in the Mayor's Ct., a decree taken by consent for administration, & a receiver appointed. The creditor in that suit was a friend of testator, who had just before testator's death supported a proposal made by him for a composition with his creditors. Part of the assets was out of the jurisdiction of the Mayor's Ct.:—*Held*: although the ct. will not generally interfere with the proceedings of another ct. which has power to do complete justice, yet, in the peculiar circumstances of the case, it was right to appoint a receiver in the Chancery suit.—*NOTHARD v. PROCTOR* (1875), 1 Ch. D. 4; 45 L. J. Ch. 302; 33 L. T. 709; 24 W. R. 34, C. A.

Annotation:—Mentd. Vickers v. Stevens & La Conception Gold Mining Co. (1881), 44 L. T. 679.

C. Costs.

See Sect. 8, sub-sect. 7, post.

SUB-SECT. 9.—CONDUCT OF THE ACTION.

A. In General.

8096. Within discretion of court—No appeal entertained.]—The conduct of a suit is a matter entirely within the discretion of the judge in whose ct. the suit has been instituted, and the Ct. of Appeal will not entertain an appeal on such a matter.—*DOWBIGGIN v. TROTTER, TROTTER v. TROTTER* (1872), 27 L. T. 731, 20 W. R. 1024, L. JJ.

8097. — — — — — By what circumstances court guided—Action by creditors.]—Where two creditors' suits have been instituted for the administration of the same estate, the question who is to have the conduct of the proceedings is purely a matter for the discretion of the judge, to be exercised in chambers; & in exercising his discretion, the judge will have regard to whether the creditor, who has first obtained a decree, has conducted his suit with perfect fairness, & to the nature & amount of his interest in the estate.

A creditor took out a summons to administer the estate of a testator. The summons was dismissed by the chief clerk, as the will had not then been proved, but adjourned to be heard before the judge in chambers. After the will had been proved, another creditor filed a bill for the administration of the same estate, & obtained the usual

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decree. While the second suit was pending, pltf. in the summons, who had had no notice of the institution of the second suit, abandoned his adjourned summons, & took out a second summons for the administration of the estate. An order was then made, at chambers, staying all proceedings in the second summons, & giving pltf. in the summons the conduct of the second suit. Pltf. in the suit now moved to discharge this order:—*Held*: as pltf. in the summons was the first in point of time, was the larger creditor, & had had no notice of the second suit, he must have the conduct of the proceedings.—*HARVEY v. COXWELL, WILSON v. COXWELL* (1875), 32 L. T. 52.

8098. — Interest of plaintiff seeking conduct.]—The general rule that where two actions have been commenced for the administration of the same estate the conduct of the proceedings will be given to pltf. in the first action, although the decree in the second has been obtained first, applies to actions commenced in the Palatine Ct. of Lancaster, as well as to those commenced in the High Ct. of Justice. In considering whether the rule ought to be applied, the ct. will have regard to the special circumstances, & will take into account the amount of the interest of pltf. in the first action, & his object in bringing his action. Where pltf., being a stranger to the family, had bought up the reversionary interests of some of the residuary legatees:—*Held*: not a sufficient reason for not giving him the conduct of the proceedings, although his purchase of some of the shares was disputed on the ground of inadequacy of consideration & undue influence.—*Re SWIRE, MELLOR v. SWIRE* (1882), 21 Ch. D. 647; 46 L. T. 437; 30 W. R. 525, C. A.
Annotations:—*Distd.* *Re Ross, Wingfield v. Blair*, [1907] 1 Ch. 482. *Mentd.* *Re Connolly, Wood v. Connolly*, [1911] 1 Ch. 731.

8099. Suits on behalf of infants—Preferential claim of mother of infants—Against more remote relatives.]—(1) Upon the question as to which of two administration suits, relating to the same estate, should proceed, the ct. will prefer the mother of infants, as next friend, although in humble life, supposing she is respectable, & direct her suit to proceed, although a decree has been made in the other suit. The appointment of a next friend is quite distinct from that of a guardian, the latter relating to the education, whereas the former only applies to the property.

(2) Where a second administration suit is instituted, the fact of there being already another bill filed with the same object should be stated to the ct., upon the general principle, that in all *ex p.* applications taken as unopposed nothing should be kept back.—*HARRIS v. LIGHTFOOT, HARRIS v. HARRIS* (1861), 10 W. R. 31.

B. To Whom given.

(a) On Consolidation of Actions.

8100. Party first in time.]—*HART v. TULK*, No. 8036, *ante*.

8101. —.]—*NOWALL v. PASCOE, THOMPSON v. PASCOE*, No. 8039, *ante*.

8102. —.]—*Re PRIME'S ESTATE*, No. 8041, *ante*.

8103. Party most interested in keeping down costs

—Residuary legatee.]—*KELK v. ARCHER, ARCHER v. KELK*, No. 8047, *ante*.

8104. —.]—*PENNY v. FRANCIS, WOOD-HATCH v. FRANCIS*, No. 8038, *ante*.

8105. —.]—*Re PRIME'S ESTATE*, No. 8041, *ante*.

(b) Where First Suit Stayed on Decree obtained in Subsequent Suit.

8106. Plaintiff in first suit.]—*HAWKES v. BARRETT, WILLIAMS v. BARRETT*, No. 8053, *ante*.

8107. —.]—*WHEELHOUSE v. CALVERT*, No. 8068, *ante*.

8108. —.]—Two suits were instituted to administer the same estate. Pltf. in the first suit, was not a party to the second. A decree having been obtained in the second suit, the proceedings in the first suit were stayed. The conduct of the cause was given to pltf. in the first suit.—*BELCHER v. BELCHER* (1865), 2 Drew. & Sm. 444; 6 New Rep. 314; 12 L. T. 792; 13 W. R. 913; 62 E. R. 689.

8109. —.]—*KENYON v. KENYON*, No. 8070, *ante*.

8110. —.]—*ZAMBACO v. CASSAVETTI*, No. 8087, *ante*.

8111. —.]—*WILLIAMS v. MATTHEWS, MATTHEWS v. MATTHEWS*, No. 8071, *ante*.

8112. — Unless in special circumstances.]—*Re SWIRE, MELLOR v. SWIRE*, No. 8098, *ante*.

8113. — Second suit improperly instituted.]—Two suits were instituted in the name of infants against an extrix., for administration; the second suit being instituted in collusion with the extrix.; a decree was made by consent in the second suit so as to defeat the first suit. The ct. gave the conduct of the decree to the next friend in the first suit.—*FROST v. WARD* (1864), 2 De G. J. & Sm. 70; 3 New Rep. 348; 9 L. T. 668; 12 W. R. 285; 46 E. R. 301, L. J.

Annotation:—*Consd.* *Harvey v. Coxwell, Wilson v. Coxwell* (1875), 32 L. T. 52.

8114. — Unfair advantage obtained by second suit.]—A creditor took out a summons for the administration of testator's personal estate only, which was insufficient. On the day following the hearing of the summons, another creditor, appearing by the solrs., who appeared for defts. to the summons, filed a bill for the administration of the personal estate, which bill he afterwards amended by making the heir-at-law a party, & praying for administration of both the real & personal estate, which together were sufficient. In the suit the same solrs. appeared for all parties. A decree having been obtained in the suit, the first creditor applied for leave to have the conduct of the cause:—*Held*: pltf. in the suit could not retain the advantage which had been unfairly obtained by him, & pltf. in the summons must have the conduct of the cause.—*RHODES v. BARRET, Ex p. SINGLETON* (1871), L. R. 12 Eq. 479; 24 L. T. 654; 19 W. R. 871; *sub nom.* *RHODES v. BARRET, SINGLETON v. BARRET*, 41 L. J. Ch. 103.

8115. — First suit commenced in Palatine Court—Decree in High Court.]—*Re SWIRE, MELLOR v. SWIRE*, No. 8098, *ante*.

8116. —.]—*TOWNSEND v. TOWNSEND*, No. 8091, *ante*.

8117. — Not if relief sought imperfect.]—A

creditor issued a writ for the administration of the personal estate of S., & subsequently obtained leave to amend his writ so as to include the real estate. Before any further steps were taken the exors. of S. filed a writ & obtained a full administration decree, & then applied for the stay of proceedings in the creditor's action:—*Held*: the creditor's action must be stayed, & pltf. in the exors.' action was entitled to the conduct of the administration.—*Re SMITH'S ESTATE, McMURRAY v. MATHEW, MATHEW v. MATHEW* (1876), 33 L. T. 804.

8118. — Not a suit improperly instituted—Action by joint creditor—Administration of estate of deceased partner only.]—A creditor of a partnership firm brought an administration action against the exor. of a deceased partner. Afterwards a separate creditor of the same partner brought an administration action against the exor. & obtained judgment. On an application by pltf. in the first action for the conduct of the proceedings in the second action:—*Held*: a joint creditor of a firm could not maintain a simple action for the administration of the estate of a deceased partner, & the first action was not properly constituted. The application of pltf. was consequently refused.—*Re MCRAE, FORSTER v. DAVIS, NORDEN v. MCRAE* (1883), 25 Ch. D. 16; 53 L. J. Ch. 1132; 49 L. T. 544; 32 W. R. 304, C. A.

8119. — Not if claim *bonâ fide* disputed.]—The general rule that where there are concurrent actions for administration the conduct of proceedings under an order made in either action will be given to pltf. in the action first commenced does not apply where that pltf. is a creditor whose claim is *bonâ fide* disputed.—*Re ROSS, WINGFIELD v. BLAIR*, [1907] 1 Ch. 482; 76 L. J. Ch. 302; 96 L. T. 814.

C. Loss of Right to Conduct.

See, generally, PRACTICE.

8120. Delay—Conduct transferred to creditor.]—*BOWEN v. WEBB* (1794), 2 Fowler's Exchequer Practice 178.

8121. — — — From next of kin.]—In case of unreasonable delay in prosecuting a decree in a suit by next of kin against an administratrix, the ct. will give leave to a creditor to prosecute a decree which has been so neglected.—*SIMS v. RIDGE* (1817), 3 Mer. 458; 36 E. R. 176, L. C.

Annotation:—*Consd. ALVANLEY v. KINNAIRD* (1843), 13 L. J. Ch. 65.

8122. — — —.]—Leave to prosecute a suit, given to a creditor, a decree made some years before, not having been prosecuted.—*POWELL v. WALLWORTH* (1817), 2 Madd. 183; 56 E. R. 302.

8123. — — —.]—Leave given to a creditor to prosecute a suit.

As he [the creditor] must abide by this suit, it is surely reasonable that he should be at liberty to prosecute it when the proper parties for that purpose are guilty of delay (LEACH, V.-C.).—*FLEMING v. PRIOR* (1820), 5 Madd. 423; 56 E. R. 957.

8124. Want of diligence—Bulk of assets in Ireland—Where another action proceeding.]—The assets, excepting a small part not realised, were situated in Ireland, where another creditors' suit for the administration of the same estate, was being actively prosecuted:—*Held*: pltf., in a creditors' suit in this country, was bound to proceed with

proper diligence; & not having done so, the conduct of the cause was given to another creditor applying for the same, who had proved his debt under the decree.—*DRISWELL v. KING* (1839), 8 L. J. Ch. 158.

8125. Irregularity in decree—Collusion suggested.]—(1) The ct. will not, on the ground of irregularity in a decree in a creditor's suit, take the conduct of the suit from pltf. & give it to another creditor, though collusion be suggested.

(2) Where there are two creditors' suits the second suit seeking more extensive relief than the first, the ct. will not, at the instance of pltf. in the first, stay proceedings in the second suit.—*SMITH v. GUY, BRUNWIN v. GUY* (1846), 2 Ph. 159; 2 Coop. temp. Cott. 289; 8 L. T. O. S. 289; 41 E. R. 902, L. C.

8126. Bankruptcy of plaintiff.]—Order, in the nature of a supplemental decree, for a creditor who had proved his debt to carry on a creditor's suit, where the original pltf. had been bkpt.—*ENGLISH v. HAYMAN* (1853), 9 Hare, App. II, lxxxviii; 68 E. R. 808.

8127. Conduct of sale under decree—Plaintiff a stranger to family & to property.]—Where a sale has been decreed in one of two concurrent suits, the fact of the party to whom has been given the conduct of the cause being an entire stranger to the family & to the property, is a sufficient reason for taking away from him the conduct of the sale, & giving it to the trustee & testamentary guardian of the infants.—*Re GARMESON'S ESTATE, GARMESON v. SHARROD, GARMESON v. SHARROD* (1872), 21 W. R. 98.

8128. Effect of loss of conduct—Papers in possession of former plaintiff—Right of new plaintiff—To inspection & copies.]—The prosecution of a decree in a creditors' suit having been taken from the pltf. & committed to another creditor, pltf.'s solr. was ordered to allow that other creditor's solr. to inspect & take copies of all the papers in the cause, in his possession.—*BENNETT v. BAXTER* (1840), 10 Sim. 417; 9 L. J. Ch. 137; 4 Jur. 50; 59 E. R. 676.

Annotations:—*Consd. SIMMONDS v. G.E. Rty.* (1868), 3 Ch. App. 797; *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.

8129. — — — Former plaintiff deprived of costs—Subsequent to removal—Attendance at chambers.]—Pltf., deprived of the conduct of an administration suit, who attended the taking of the accounts in chambers:—*Held*: not entitled to his costs.—*ARMSTRONG v. ARMSTRONG* (1871), L. R. 12 Eq. 614; 25 L. T. 199; 19 W. R. 971.

Annotations:—*Folld. JOSEPH v. GOODE, JOSEPH v. GOODE, FISHER v. GOODE* (1875), 23 W. R. 225. *Mentd. Re Watson, Turner v. Watson*, [1896] 1 Ch. 925; *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806.

8130. — — —.]—*JOSEPH v. GOODE, JOSEPH v. GOODE, FISHER v. GOODE*, No. 8900, *post*.

8131. — — — Except hearing on further consideration—Application for costs already due.]—*JOSEPH v. GOODE, JOSEPH v. GOODE, FISHER v. GOODE*, No. 8900, *post*.

SUB-SECT 10.—PROOF OF WILL.

8132. Whether proof of will necessary.]—*MARRIOTT v. MARRIOTT*, No. 7884, *ante*.

ct. to order a general administration, & the Vice-Chancellor was right in refusing the common accounts & inquiries in a case where, having regard to the period elapsed since testator's death, it was uncertain whether a general administration order would be found at the hearing to be desirable & where if pltf. at the hearing established a case of breach of trust, accounts & inquiries would have to be directed, going over in part the same ground as the common accounts & inquiries.—*Re GYHON, ALLEN v. TAYLOR* (1885), 29 Ch. D. 834; 54 L. J. Ch. 945; 53 L. T. 539; 33 W. R. 620, C. A.

8139. — Where infant beneficiaries concerned.]—Infants were entitled under a will to legacies amounting together to £35,000, & they were also together entitled in remainder, subject to the life interests therein of four persons, to seven-elevenths of the residuary estate. An originating summons was taken out under R. S. C., Ord. 55, r. 4, by one of the tenants for life & the infants, asking for the administration of testator's estate. The summons was supported by one of the trustees, but was opposed by the other trustees & all the beneficiaries other than pltf.s. — *Held*: notwithstanding the discretion given to the ct. by R. S. C., Ord. 55, r. 10, the infants were entitled to an order for administration, but the ct. had power to direct only such accounts & inquiries to be taken & made as were absolutely necessary for their protection.—*Re WILSON, ALEXANDER v. CALDER* (1885), 28 Ch. D. 457; 54 L. J. Ch. 487; 33 W. R. 579.

Annotation:—*Consd. Re Blake, Pughe-Jones v. Blake* (1885), 53 L. T. 302.

To make order provisional—Requiring leave for proceeding under order.]—*See* R. S. C., Ord. 55, r. 10A.

8140. Partial administration—Power to order.]—Case of a decree for the purpose of carrying into effect an arrangement as to a part of the estate of testator, without administering the estate or executing the trusts of the will generally.—*PRENTICE v. PRENTICE* (1853), 10 Hare, App. I, xxii; 68 E. R. 1126.

8141. — — —.]—*Re BLAKE, JONES v. BLAKE,*

8142. Assets in England & Scotland—Probate obtained in England—Whether decree limited to assets in England—Testator domiciled in Scotland.]—Where the Probate Div. of the High Ct. of Justice has granted a general probate of the will of testator domiciled in Scotland, the Ch. Div. will make the ordinary decree for the administration of the personal estate of testator without limiting it to the English assets, & notwithstanding the opposition of a majority of the exors.—*Re MAXWELL, STIRLING-MAXWELL v. CARTWRIGHT* (1879), 11 Ch. D. 522; 48 L. J. Ch. 562; 40 L. T. 669; 27 W. R. 850, C. A.

Annotations:—*Consd. Ewing v. Orr Ewing* (1883), 9 App. Cas. 34. *Reid. Ewing v. Orr Ewing* (1885), 10 App. Cas. 460, n.

a year has passed since the death of testator; & when the exors. are doing their best to realise the assets & are in no default, the application should be refused.—*Re O'CONNOR, O'CONNOR v. FAHEY* (1898), 12 Man. L. R. 325.—CAN.

m. — *Widow of intestate entitled to fund—Only matter in dispute.]*—Order for administration refused where the widow of intestate was clearly entitled to a fund which was the only

matter in dispute.—*Re RYAN* (1900), 32 O. R. 224.—CAN.

n. — *]*—The making of an administration decree is a question of procedure which lies in the discretion of the ct.—*MACFARLANE v. BROWN*, [1919] N. Z. L. R. 218.—N.Z.

o. *Executor-creditor likely to consider his own interests—More than interests of other creditors.]*—Where an exor. had not probated the will for a very considerable time & his con-

8143. Right of creditors to administration—Of assets employed in trade—Under direction in will.]—Testator directed his exors. to continue his business, & authorised them to apply the capital employed therein in carrying on the business, & to employ therein any money, part of his general estate.

A. on behalf of himself & other trade creditors filed a bill for administration of the personal estate on the ground that the exors. had carried on the business which had since testator's death become indebted to him & others on trade debts. The exors. had not employed in the business any part of the estate beyond that which testator employed therein at his death. They admitted assets to pay all trade debts:—*Held*: A. ought to have proceeded against the exors. by action at law, & had no right to administration.—*OWEN v. DELAMERE* (1872), L. R. 15 Eq. 134; 42 L. J. Ch. 232; 27 L. T. 647; 21 W. R. 218.

Annotations:—*Consd. Fairland v. Percy* (1875), L. R. 3 P. & D. 217; *Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548. *Reid. Strickland v. Symons* (1883), 22 Ch. D. 666.

See, further, Part V., ante.

SUB-SECT. 2.—FORM AND AMENDMENT. *See* JUDGMENTS.

SUB-SECT. 3.—PROCEEDINGS UNDER.

A. In General.

8144. Service of decree—When & on whom necessary—Discretion of judge.]—Where a decree is made in an administration suit the judge in chambers will dispense with service of it on such parties as he considers properly may be omitted to be served, & will there direct service on such as he thinks it proper should be served.—*DE BALINHARD v. BULLOCK* (1852), 9 Hare, App. I, xiii; 20 L. T. O. S. 189; 68 E. R. 762.

8145. — — — Whether notice sufficient instead.]—*LEE v. STURROCK*, [1876] W. N. 226.

8146. Application to vary decree—To whom made.]—An application on the part of a resp., who does not challenge any part of a decree, to vary it as to the administration of the estate, should be made to the Ct. of Ch., not to the House of Lords.—*YATES v. UNIVERSITY COLLEGE, LONDON* (1875), L. R. 7 H. L. 438; 45 L. J. Ch. 137; 32 L. T. 43; 23 W. R. 408, H. L.

Annotation:—*Mentd. Re Williams-Taylor v. University of Wales* (1908), 24 T. L. R. 716.

Compare No. 7921, *ante*, Nos. 8295, 8297, *post*.

8147. Appeal against decree—Containing declaration as to future rights—Whether sufficient ground for appeal.]—Testator gave after the death of his

duct generally impressed the ct. that he was likely, in the discharge of his duty as exor., to consider his own interests as creditor more than the interests of the other creditors, an order was made for the administration of the estate in the Supreme Ct.—*POWER v. MUNRO* (1912), 11 E. L. R. 508.—CAN.

p. *Entire assets claimed by widow.]*—*FREELY v. FREELY* (1900), 35 I. L. T. 71.—IR.

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Sub-sect. 3, A., B. (a) & (b), C., D. & E.]

wife, a legacy to his son E. for life, & after his death to his children, & if he died without issue it was to be divided among testator's "surviving children." Six other legacies were given in a similar way. All the seven children survived testator. A suit for administration was instituted to which all were parties. In 1836 an order on further consideration was made, at which time six of the children were living, & it was declared, that on the death of the widow, E. would become entitled to the interest on the legacy for life, that on his death it would be divisible among his children then living, but if he died without leaving issue, then among the children of testator who were living at testator's decease. Testator's widow died in 1838 & E. died in 1881 without ever having had a child. At this time one child only of testator was living & he applied for leave to appeal against the order of 1836, on the ground that it was irregular in making a prospective declaration as to future rights:—*Held*: leave to appeal ought not to be granted, the fact that a declaration was made as to future rights being no sufficient reason for giving such leave in a case where all parties who could in any event be interested were before the ct. & adult when the declaration was made.—*CURTIS v. SHEFFIELD* (1882), 21 Ch. D. 1; 51 L. J. Ch. 535; 46 L. T. 177; 30 W. R. 581, C. A.

Annotations:—*Consd. Re Staples, Owen v. Owen*, [1916] 1 Ch. 322. *Reid. Fussell v. Dowding* (1884), 27 Ch. D. 237; *Re Frome's Contract*, [1895] 2 Ch. 256. *Mentd. Peareth v. Marriott* (1882), 22 Ch. D. 182.

See, generally, PRACTICE; JUDGMENTS.

8148. Delay in prosecution of decree—Effect of—On right to have conduct of cause.]—Where great delay has occurred in the prosecution of a decree for the administration of assets, a creditor may apply to have the conduct of the cause, though it has become abated by the death of a deft.—*COOK v. BOLTON* (1828), 5 Russ. 282; 38 E. R. 1033, L. C.

8149. — — — — —.]—*INGLIS v. BROMLEY* (1844), 4 L. T. O. S. 153.

8150. — — — — —.]—Where the prosecution of an administration suit had been neglected for several years the conduct of it was given to parties who had been proved to be creditors, until further order.—*BEALE v. SYMONDS* (1850), 2 H. & Tw. 374; 47 E. R. 1727, L. C.

8151. — — — — —.]—Where a decree was made in an administration suit, directing the usual accounts & inquiries, & pltf. took no steps to prosecute the decree:—*Held*: deft. was not entitled to move to dismiss for want of prosecution, but ought to apply to obtain the conduct of the cause.—*SIMONS v. BAGNELL* (1870), 19 W. R. 217.

8152. Who entitled to attend—Person not a party—Having interest in residue.]—Person interested, but not a party to the suit permitted to appear.— — — *v. TUCKER* (1844), 2 L. T. O. S. 494.

8153. — — — — —.]—**Creditor—After claim established.]**—Where a decree has been made in a creditor's suit for administration, leave to attend the proceedings will not be given to a creditor until his claim has been admitted.—*LACEY v. HILL, LENNEY v. HILL, DE ZOETE v. HILL* (1870), 23 L. T. 582; 19 W. R. 174.

of judge.]—An order had

been made in a creditor's action for accounts & inquiries & the administration of the estate of S. A creditor whose debt had been admitted for £10,000 applied for leave to attend the proceedings at his own expense, or that he might at his own expense be supplied by defts.' solrs. with a copy of the list of claims lodged in the action & copies of affidavits relating thereto & defts. might be directed to give him notice of all proceedings to be taken under the order in reference to claims against the estate:—*Held*: there was no power under the rules to give leave; this was a matter for the discretion of the ct. under the general power of the judge to manage the business in his own chambers; general leave to attend the proceedings would impede the progress of business in chambers & ought not to be given; appct. might, if he desired to do so, make a further application for leave to contest any particular claim; & he ought to be supplied by defts. with copies of the affidavits & the list of claims at his own expense.—*Re SCHWABACHER, STERN v. SCHWABACHER*, [1907] 1 Ch. 719; 76 L. J. Ch. 399; 96 L. T. 564; 51 Sol. Jo. 326.

— *On claim against estate.]*—*See R. S. C., Ord. 16, r. 47.*

8155. Pending against representative—At time decree made—Appropriation of assets for purposes of claim.]—There were two suits brought against the representatives of testator, one a creditors' suit, & the other for a breach of trust. The accounts were taken in the first suit, & the debts, etc., ascertained, but the assets were insufficient to pay the debts in full, if pltf. in the second suit succeeded. The second cause not having been heard, the ct. ordered a part of the assets to be set apart to answer the claims of pltf. in the second suit with the costs, & the residue was apportioned & paid to the creditors in the first suit.—*ILLINGWORTH v. NELSON, SWAN v. NELSON* (1830), 2 Keen, 776, n.; 7 L. J. Ch. 163; 48 E. R. 829.

Annotation:—*Apprvd. Costerton v. Costerton, Clarke v. Wenn* (1838), 7 L. J. Ch. 302.

8156. Representation of next of kin—By the representative—Sufficiency of.]—An order made in one suit giving liberty to prove in another suit for an amount to be certified by the chief ct., & a certificate made in pursuance of such order, are not alone sufficient to establish the debt in the other suit.

When a fund has been brought into court in an administration suit, the next of kin are properly represented after decree by the personal representative until the fund has been distributed.

When a decree has been made against an exor., & the estate of deceased exor., to make good a breach of trust, payment by the surviving exor. of the whole amount due is a complete discharge of deceased exor.'s estate, & it is not competent for ct. to enforce payment against deceased exor.'s estate in order to establish contribution.—*MICKLETHWAIT v. WINSTANLEY* (1864), 5 New Rep. 204; 34 L. J. Ch. 281; 11 L. T. 582; 13 W. R. 210, L. JJ.

8157. Authorisation of lease—On counsel's certificate—Without referring back to master.]—In an administration suit, the ct. upon the certificate of counsel, will authorise a lease without a reference back to the master to settle it.—*DAY v. CROFT* (1851), 14 Beav. 219; 51 E. R. 270.

8158. Admitting life tenant into possession—Of settled land & heirlooms—Whether security.

required.]—It is not now the practice, upon an order on further consideration in an administration action in ordinary cases, to require the tenant for life to give security before being let into possession of settled land & heirlooms, but he is only required to sign an inventory of the latter.—*TEMPLE v. THRING* (1887), 56 L. J. Ch. 767; 56 L. T. 283.

Proceedings affecting infants.]—See, generally, INFANTS.

Proceedings affecting lunatics.]—See, generally, LUNATICS.

B. Payment into Court.

(a) By Representative.

On admission of assets.]—See Part VI., Sect. 5, sub-sect. 4, B., ante.

Misconduct relating to assets.]—See Part VI., Sect. 2, sub-sect. 4, A., ante.

(b) By Other Persons.

8159. Assets claimed as donatio mortis causa—Whether order for payment made—Upon motion.]—PEACHAM v. DAW (1821), 6 Madd. 98; 56 E. R. 1029.

8160. ———.]—In a suit for the administration of testator's estate, the ct. refused, upon motion, to order the payment into ct. of a fund which was claimed as a *donatio mortis causa*, & which was admitted by the answer of the party claiming it to be in her possession.—CUTTING v. RAND (1836), 5 L. J. Ch. 213.

8161. Person claiming as creditor—In possession of estate money—Payment condition precedent to hearing of claim.]—A person who has received money belonging to an estate, against which he seeks to prove as a creditor, must, if his claim be disputed, pay into ct. what he admits having received before his claim can be heard (ROMILLY, M.R.).—STEVENSON v. MARRIOTT (1870), 39 L. J. Ch. 568.

8162. Misappropriation by agent—Of sums received for payment in—Liability of principal to recoup—Negligence.]—M., having by an order in an administration action been appointed salaried manager of a colliery forming part of the estate, paid from time to time the proceeds of the colliery to his solr. for payment into ct. to the credit of the action. The sums were misappropriated by the solr.:—Held: M. although justified in employing a solr. to make the payments into ct., was, notwithstanding, liable to make good all sums misappropriated, inasmuch as the whole circumstances of the case showed negligence.—Re MITCHELL, MITCHELL v. MITCHELL (1884), 54 L. J. Ch. 342; 52 L. T. 178; 1 T. L. R. 153.

8163. Defendant leaving jurisdiction—After non-compliance with order—Variation of order—For payment direct to plaintiff.]—By order on further consideration deft. was ordered to pay money into ct., which was then to be carried to the credit of an action for administering the estate of testator, whose extrix. was pltf. in the present action. Deft. went abroad without complying with the order. On appeal, the order was varied by ordering deft. to pay the money to pltf., who was then to pay it into ct. in the administration action, such an order being capable of being better enforced against deft.'s property than the order as originally

framed.—DE LA POLE (LADY) v. DICK (1885), as reported in 29 Ch. D. 351, C. A.

Annotations:—Reid. *Robinson v. Gallard* (1889), 60 L. T. 697. **Mentd.** *R. v. Oxfordshire JJ.*, [1893] 2 Q. B. 149; *Re Greer, Napper v. Fanshawe*, [1895] 2 Ch. 217; *Bagley v. Maple* (1911), 27 T. L. R. 284.

C. Appointment of Receiver.

See RECEIVERS.

D. Accounts.

See Part VI., Sect. 4, ante.

E. Inquiries.

See R. S. C., Ord. 33, r. 2; Ord. 55, r. 15A.

Inquiry on footing of wilful default.]—See Part VI., Sect. 6, sub-sect. 2, B., ante.

Who entitled to prosecute.]—See R. S. C., Ord. 16, r. 39; Ord. 55, r. 9, & Sub-sect. 3, A., ante.

8164. Discretion to order—Decree never made nor suit revived—Though commenced hundred years previously—Special circumstances.]—BALLARD v. MILNER (1895), 39 Sol. Jo. 217.

8165. Objection to inquiry—Time for making.]—If an order directing inquiries be deemed unnecessary, the party objecting should promptly apply to the ct. to discharge it; as a ct. of appeal would not listen to objections taken after the delay & expense of the inquiries were incurred, & if it did it would reject the information so obtained.—ROWLEY v. ADAMS (1849), 2 H. L. Cas. 725; 9 E. R. 1267, H. L.

Annotation:—Mentd. *Paddon v. Richardson* (1855), 7 De G. M. & G. 563.

8166. Matters to which inquiries directed—Accounts—Special ground to be shown.]—SADLER v. LUSHINGTON (circa 1790), cited 13 Ves. 263; 33 E. R. 293.

Annotation:—Reid. *Simmons v. Gutteridge* (1806), 13 Ves. 262.

8167. ——— Property in name of deceased's wife—Alleged to be separate estate.]—In a suit against defts., who were the personal representatives both of testatrix, who died during coverture, & of her husband, praying an account of her separate estate, & a declaration that certain sums of stock, which stood, & always had stood, in her name, constituted part of that estate, although the husband & his exors., during a long period of years, had uniformly acknowledged these sums to be, & dealt with them as being, part of her separate property; & although strong evidence was adduced by pltf., which was not met by any evidence on the other side; yet the ct. refused to make the declaration at the original hearing, & only referred it to the master to take the account generally, with special inquiries founded upon the

Where an inquiry as to debts has been directed before decree, & the master has reported that there are no debts, the decree at the original hearing must nevertheless direct an account of debts.—HORNBY v. HUNTER (1826), 1 Russ. 89; 38 E. R. 35; *affd.* (1828), 5 Russ. 149, L. C.

Annotation:—Consd. *Tomlin v. Tomlin* (1841), 1 Hare, 236.

8168. ——— Proposed management of estate—In creditor's suit.]—Inquiries of the propriety of the proceedings proposed to be taken for the beneficial management & realisation of the estate of testator or intestate will not be directed in a creditor's

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suit.—*COLLINSON v. BALLARD* (1842), 2 Hare, 119; 67 E. R. 49.

8169. — Legacies held on trust for religious purposes—Whether directed under common decree.]—Upon a claim filed by some of the residuary devisees, under the will of testatrix who had given various legacies to Roman Catholic priests & charities, for the administration of her estate, a reference to the master was asked, to inquire whether any of the legacies so given by the will were held upon any secret trusts for the performance of pious acts connected with the Roman Catholic religion:—*Held*: these inquiries could not be directed upon a claim. If pl'tfs. wanted more than the common administration decree they must file a bill for the purpose.—*GILPIN v. MAGEE* (1851), 20 L. J. Ch. 639; 17 L. T. O. S. 293.

8170. — Propriety of infant's maintenance.]—In an administration suit an inquiry as to the propriety of maintenance to an infant may be directed by the decree at the hearing.—*CROSS v. BEAVAN* (1851), 3 Sim. N. S. 53; 15 Jur. 663; 61 E. R. 260.

8171. — Leases made by trustee of will.]—Inasmuch as, by the new practice, a suitor may have an estate administered without formal pleadings, ample power is given under Ord. 20 of Oct. 16, 1852, to the judge, upon any reasonable suggestion, or any fact reasonably apparent on the proceedings, without the expense of formal evidence or of discussing formal evidence, to direct any further account or inquiry that may seem to him to be necessary.

Therefore, where a trustee under a will had leased testator's estate, consisting of freehold houses, for sums considerably less than the houses let for during testator's lifetime, the expenses of repairing which, were heavy, falling upon the lessees, inquiries as to the leases were directed, on the application of a residuary legatee who had obtained an order in chambers for administration of the estate.—*MUTTER v. HUDSON, HURFORD v. HUDSON* (1855), 26 L. T. O. S. 116; 2 Jur. N. S. 34.

8172. — Infant's state of mind.]—In a suit to administer the estate of testator, a devisee infant being incapable of managing his affairs a motion made for a decree under 15 & 16 Vict. c. 86, s. 16, for a reference to chambers to inquire into the devisee's state of mind. Motion refused, & no order made.—*ADAMS v. SMYTH* (1853), 22 L. J. Ch. 968; 1 W. R. 475.

See, generally, INFANTS; LUNATICS.

8173. — Whether breach of trust by testator.]—In a suit for the administration of the estate of a deceased trustee which was instituted by persons claiming to be his creditors by virtue of a breach of trust, against his exor. & devisee in trust, subject to the payment of debts, & the persons beneficially interested under his will, & in which the exor. & devisee in trust by answer admitted his testator's breach of trust, but the persons beneficially interested by answer denied it, & in which no evidence was entered into on the part of pl'tfs. the common administration decree in a creditor's suit was made, without any special direction, for inquiry respecting the breach of

trust.—*TEAGUE v. FISHER* (1855), 1 Jur. N. S. 1037; 3 W. R. 587.

8174. — Propriety of sale of real estate.]—*Re MILLS, MILLS v. MILLS*, [1884] W. N. 21.

See, further, Sub-sect. 3, G., post, & generally, SALE OF LAND.

8175. — Propriety of investments.]—An action was commenced by originating summons & on Mar. 25, 1893, it was declared that the trusts of a will ought to be performed under the direction of the ct., & certain inquiries were directed, among others as to the value of the mtge. securities & whether they were sufficient, & whether they should be called in or retained, & in case they were insufficient "under what circumstances & by whom the moneys owing thereon were advanced, & what valuations were taken by the persons advancing such moneys, & whether such investments were proper." On Nov. 5, 1894, further inquiries & accounts were directed, & among others, an account of the personal estate not specifically bequeathed of testator's estate. The chief clerk certified on Mar. 26, 1896, that the investments were to a certain extent improper, & as to one of them that it was made on no sufficient valuation, & found that debts. were liable thereon. A summons was then taken out by them asking that this might be varied, & it was so varied on the grounds that it was beyond the scope of the inquiry & not borne out by the evidence. The question now arose, the summons to vary coming on with the further consideration, what further relief there was, if any, as it lay in respect of a breach of trust, & could not presumably be given on originating summons:—*Held*: the words of inquiry above set out went too far, & if objection had been taken to it at the time, it would not have been proceeded with, but not having been objected to it was now binding on the ct. That being so, it would be idle to send app'nts. to commence another action, & as the account asked for was one upon which debts., if the case had occurred prior to Jud. Acts, might have been held liable on the common account, the beneficiaries were entitled to have it taken. At the same time there was no intention of getting rid of the rule by a side wind which prevented contested cases being decided on originating summons, & if, therefore, it appeared on taking the account that it involved *viva voce* evidence, application should be made for directing the issue to be dealt with in the proper mode.—*Re STUART, SMITH v. STUART* (1896), 74 L. T. 546; *subsequent proceedings*, [1897] 2 Ch. 583.

Annotation:—*Fold. Re Newland, Bush v. Summers* (1904), 49 Sol. Jo. 14.

Compare No. 7279, ante.

8176. — Class entitled—Scope of inquiry—Heir.]—Under a direction, in a decree or order, to inquire who is the heir-at-law of a deceased person, it is not the practice to inquire who is the customary heir, although it appears that deceased was entitled to land of copyhold tenure.—*FREEMAN v. ROBERTS* (1841), 10 L. J. Ch. 315.

8177. — — — Family.]—*WOOD v. WOOD* (1843), 3 Hare, 65; 1 L. T. O. S. 76; 8 Jur. 206; 67 E. R. 298.

Annotations:—*Reid. Re Parkinson's Trust, Ex p. Thompson* (1851), 1 Sim. N. S. 242; *Pigg v. Clarke* (1876), 45 L. J. Ch. 849. *Mentd. Webb v. Woolls* (1852), 21 L. J. Ch. 625.

8178. — — — .]—After a decree been made on the construction of a will & for the administration of testator's estate in accordance

therewith, a will of later date was found duly executed & almost an exact counterpart of the earlier will. Questions having arisen as to the effect of the new will on certain legacies, named in both wills, which by the decree had been held to be superseded, the ct., on the application of the trustees, directed an inquiry as to who were the persons interested in setting up the alleged new will, & that notice should be given to such persons that, unless they, within a limited time took steps to recall the existing probate, & to prove the new will, the ct. would proceed to administer the estate on the will as proved.—*HARRISON v. EVERY* (1876), 34 L. T. 238.

8179. ———. ———.]—Where testator has left his residuary estate to a number of persons by various class descriptions, the more convenient course in an ordinary administration action is to insert in the judgment a general inquiry as to who are entitled to the estate, & in what shares & proportions, instead of putting in numerous inquiries as to the various classes.—*Re FOOKS, BROWN v. STONE* (1882), 30 W. R. 923.

See, generally, WILLS.

8180. ———. ———. Before accounts ordered.]—In a suit to administer an estate where inquiries are necessary to ascertain a class of persons beneficially interested the regular course is to direct the inquiry as to such persons in the first instance, & not, until that inquiry is answered, to order the master to proceed to take the accounts. It is only where the circumstances of the case are such as to satisfy the ct. that the persons interested are parties to the suit that the ct. will, at the hearing, direct the master to proceed to take the accounts, if he should find the persons interested are parties.—*BAKER v. HARWOOD, FENWICK v. BAKER* (1842), 1 Hare, 327; 6 Jur. 552; 66 E. R. 1058.

F. Getting in Assets.

8181. Assets abroad—Appointment by master of person abroad—To transmit property to England.]—*DREWRY v. DARWIN* (1765), cited 24 L. J. Ch. 121. *Annotation* :—*Folld. Hinton v. Galli* (1854), 24 L. J. Ch. 121.

8182. Refusal of executor to recover—Account directed against debtor.]—There may be circumstances under which the ct. will, at the suit of universal legatees under a will, direct an account against a debtor to testator's estate, without collusion being established between debtor & the personal representative, or any evidence of insolvency on the part of the latter, or of his refusal to sue debtor other than his omission to institute proceedings for a considerable period. *Qu.* : whether an honest refusal by an exor. to institute a suit against a solvent person reasonably alleged to be equitably indebted to testator is sufficient of itself to enable the universal legatee of testator to sue the debtor in equity, making the exor. a party.—*BARKER v. BIRCH* (1847), 1 De G. & Sm. 376; 10 L. T. O. S. 66; 11 Jur. 881; 63 E. R. 1112.

Annotations :—*Consd. Bolton v. Powell* (1851), 14 Beav. 275. *Reid. Wilson v. Short* (1848), 6 Hare, 366; *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430; *Stainton v. Carron Co.* (1854), 18 Beav. 146.

8183. ———. Against bankrupt firm—Legatees allowed to prove in bankruptcy.]—Where the exor. under the will of a creditor of a bkpt. firm, declines to make proof against the estate of bkpts., on the ground that he is ignorant of the circumstances under which the debt accrued, the ct. will allow

proof by the residuary legatees under the will, subject to a direction for payment of the dividend to the exor.—*Re STRAHAN, PAUL & BATES, Ex p. CALDWELL* (1865), 13 W. R. 952.

8184. Debt due to estate—By executor refusing to act—Payment into court.]—A. & B. were appointed trustees, & A., B. & C. exors. of a will. A. & C. alone proved. B., in his answer, said he declined to act in the trusts; but it appeared that B. & his partner were indebted to testatrix at her death, that her exor. had lent them part of the assets, & that they had paid some of her debts. The ct., on motion, ordered B. to pay into ct. the balance due from him & his partner, who was not a party to the suit.—*WHITE v. BARTON* (1854), 18 Beav. 192; 52 E. R. 76.

8185. Where debtor to estate insolvent—& party to suit.]—It is the proper course in an administration suit, where a debtor to the estate is insolvent, to direct an inquiry as to the best course to be pursued, where the debtor is not a party to the suit; but if a party, to direct him to bring the money into ct. immediately.—*WALKER v. SIMPSON* (1855), as reported in 1 Jur. N. S. 675.

G. Sale of Real Estate.

See, generally, SALE OF LAND.

8186. Jurisdiction to order—To pay costs of suit—Where personalty available.]—Real estate was devised & vested in trustees in trust for certain persons, amongst whom were an infant & persons not *in esse*. Debts & legacies were paid out of the personal estate, before any provision was made for payment of the costs of suit. While there was personal estate remaining, & before the facts had been so ascertained as to make a sale of the real estate proper, a decree was made for sale of the real estate for payment of the costs:—*Held* : although the decree was not such as would have been pronounced on due consideration & would have been varied on a re-hearing, yet a purchaser under it was not entitled to be discharged from his purchase, on the ground of irregularity, there being no want of jurisdiction or parties.—*BAKER v. SOWTER* (1847), 10 Beav. 343; 16 L. J. Ch. 333; 9 L. T. O. S. 530; 50 E. R. 614.

8187. ———. In suit by beneficiary.]—The ct. has jurisdiction to order the real estates of deceased debtor to be sold for payment of his debts in a suit instituted, not by a creditor of deceased, but by a person interested in his estates under his will.—*RODNEY v. RODNEY* (1848), 16 Sim. 307; 11 L. T. O. S. 532; 12 Jur. 665; 60 E. R. 892.

Annotation :—*Reid. Kinderley v. Jervis* (1856), 22 Beav. 1.

8188. ———. Without mortgagee's consent—Sale ordered subject to mortgage.]—*WICKENDEN v. RAYSON*, No. 8198, *post*.

8189. ———. Notwithstanding restrictions in will—Direction to postpone sale.]—Testator devised & bequeathed all his real & personal estate to trustees upon trust as soon as conveniently might be after his death, to sell his real estate, excepting only his estate at B. as to which it was his will that the same should not be sold until after the expiration of five years from his death, unless in the meantime a certain price could be obtained for it:—*Held* : a decree made on summons for administration of the real & personal estate under 15 & 16 Vict. c. 86, s. 47, was properly made, notwithstanding the restriction on the trust for sale.—*DE*

Sect. 5.—Judgment or order for administration:
Sub-sect. 3, G.]

LA SALLE v. MOORAT, MOORAT v. MOORAT (1870), L. R. 11 Eq. 8; 40 L. J. Ch. 44; 23 L. T. 479; 19 W. R. 88.

8190. — Of land taken under writ of sequestration—For non-compliance with order of court.]—Deft. in an administration suit failed to comply with an order, which had been registered, directing him to pay two sums of money into ct. to the credit of the cause. Sequestrators, under a writ issued by plffs., having entered into possession of deft.'s real estate, a petition was presented by plffs. under 27 & 28 Vict. c. 112, praying that such real estate might be sold & the proceeds applied in payment of the moneys due from deft. :—*Held* : plffs. were not creditors to whom the real estate of their debtor had been delivered in execution, & petition dismissed accordingly.—*JOHNSON v. BURGESS* (1873), L. R. 15 Eq. 398; 42 L. J. Ch. 400; 28 L. T. 188; 21 W. R. 453, L. J.

Annotation:—Reid. Re Hastings, Ex p. Brown (1892), 61 L. J. Q. B. 654.

See, further, EXECUTION, Vol. XXI., pp. 591 et seq.

8191. — To raise legacies.]—M. had three daughters, & in the case of two of them, D. & R., he secured by bond or covenant on their respective marriages the payment of a portion of £5,000 after his death to the trustees of their marriage settlements, & an annuity until the £5,000 became payable. By his will N. gave to his third daughter E., then unmarried, an annuity for life, & in case she should marry he gave a portion of £5,000 for her children attaining twenty-one, & he charged all the three sums of £5,000 on his real estate. The real estate was settled by the will. In 1880 the tenant for life, who was also legal personal representative of M., commenced an action to get the real estate cleared of the charges. Defts. to that action were the remaindermen. The two portions given to D. & E. were then raisable, & an order was made that those portions should be raised by a mtgee. of the estate to be settled by the judge, together with a sum paid for the enfranchisement of certain copyholds, part of the estate. The annuitant R. & the portioners were served with notice of the judgment. The mtgee. was executed, & the money paid into ct. & distributed amongst the persons entitled. The mtgee. was made by the tenant for life, who was appointed to execute the mtgee. for the purpose of conveying the interests of the remaindermen. It contained a recital of the proceedings in the action, & was expressed to be without prejudice to any charge subsisting in the mtged. property under the will. The mtgee. brought an action for a declaration that his mtgee. took priority over the third portion :—*Held* : treating the action as an action for the administration of the unadministered estate of M., & the annuitant & portioners as legatees whose legacies were payable out of the real estate solely, the ct. had jurisdiction to direct the two portions to be raised & to give the mtgee. a title free from the third portion, but the *onus* was on the mtgee. to show that what was originally a *pari passu* charge had been postponed, & he had not done so.

In this view the ct. had jurisdiction to direct the two legacies to be raised by mtgee. or sale (*COZENS HARDY, M.R.*).—*NIGHTINGALE v. REYNOLDS*, [1903] 2 Ch. 236; 72 L. J. Ch. 564; 88 L. T. 654; 52 W. R. 1, C. A.

8192. Matters preliminary to order—Inquiry as to fitness & propriety of sale.]—Testator directed his trustees to apply his personalty in paying debts & legacies, contemplating that there might be a surplus, & he directed the application of the rents of the realty on payment of such of his debts, except his mtge. debts, & legacies as his personalty should be insufficient to pay. A suit was instituted to administer his estate, & the personalty being insufficient to pay the debts & legacies, mtge. debts created by testator remained unpaid, & no direction was given in the suit respecting them. The two first tenants for life & a remainderman concurred in a petition for a sale of such part of the realty as should be sufficient to pay off the mtges. & for an account :—*Held* : there ought to be an inquiry what part of the real estate it would be fit & proper to sell to pay off the mtges. & for an account the ct. having power after decree to direct a sale.—*COOKE v. CHOLMONDELEY* (1857), 4 Drew. 244; 5 W. R. 835; 62 E. R. 94.

8193. — —.]—*Re MILLS, MILLS v. MILLS*, [1884] W. N. 21.

8194. — Appointment of person to execute conveyance—On refusal of devisees.]—In a creditor's suit a decree was made that the equity of redemption in estates of testator devised by him, subject to certain mtge. & incumbrances, should be conveyed to such of the respective mtgees. as should be willing to release testator's estate from their respective debts. The devisees under the will, two of them being married women, refused to execute a deed of such conveyance, tendered to them by a mtgee., & approved by the master. On the petition of the mtgee., presented under 11 Geo. 4 & 1 Will. 4, c. 60, a person was appointed by the ct. to execute the conveyance in the place of the devisees.—*HOOD v. HALL* (1850), 19 L. J. Ch. 312; 14 Jur. 127.

8195. — Delivery of title deeds—From person not a party.]—The ct. has no jurisdiction in an ordinary administration action to make an order against a person who is not a party to the action but has obtained leave to attend the proceedings, for delivery up of title deeds relating to the estate.—*Re PARKES, SIMPSON v. PARKES* (1892), 66 L. T. 151; 36 Sol. Jo. 217.

8196. — Accounts of personal estate—Infant interested in real estate.]—In a suit for administering the property of a person deceased, if an infant deft. is interested in the real estates, the ct. will not direct those estates to be sold, until the accounts of the personal estate have been taken & the cause heard for further directions.—*BAILLIE v. JACKSON* (1839), 10 Sim. 167; 59 E. R. 576.

8197. Form of order.]—*BRIDGEN v. LANDER* (1787), 3 Russ. 346, n.; 38 E. R. 606.

8198. — When subject to mortgage.]—In a creditor's suit for the administration of real estate subject to a mtge. having priority to the claims of creditors, a sale of the estate free from the mtge. cannot be directed without the consent of the mtgee. whether he is a party to the suit or not.

If, however, the mtgee. is a party to the suit, the direction will not be made in the common alternative form, namely, that the property shall be sold free from his security if he concurs in the sale & subject to it if he does not concur; but the ct. will require the mtgee. to elect at once whether he will concur or not.—*WICKENDEN v. RAYSON*

(1855), 6 De G. M. & G. 210; 26 L. T. O. S. 192; 4 W. R. 39; 43 E. R. 1213, L. C.

8199. Grounds for ordering—Payment of debts.]—A. by will subjected both his real & personal estate to the payment of his debts. Decreed that the heir should pay the debts by such a time, or in default thereof the real estate to be sold & liberty given to the heir to sue for the personal estate.—*STYDOLPH v. LANGHAM* (1705), 2 Eq. Cas. Abr. 506; 22 E. R. 428.

8200. ———.]—*RODNEY v. RODNEY*, No. 8187, *ante*.

8201. ——— Payment of costs—Whether proper where personalty available.]—*BAKER v. SOWTER*, No. 8186, *ante*.

8202. ——— Resulting benefit to infant—Whether sufficient.]—An estate descended to an infant heir cannot be sold at the suit of creditors, on the ground that, from the circumstances of the property, a sale will be beneficial to the infant.—*BROOKFIELD v. BRADLEY* (1822), Jac. 632; 37 E. R. 989.

8203. Effect of order—Conversion into personalty.]—*FLANAGAN v. FLANAGAN* (1768), cited 1 Bro. C. C. 500; 28 E. R. 1261, L. C.

*Annotations:—*Consd. *Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497; *Oxenden v. Compton* (1792), 2 Ves. 69; *Walker v. Denne* (1793), 2 Ves. 170; *Johnson v. Webster* (1854), 4 De G. M. & G. 474. *Appld.* *Crowther v. Bradney* (1873), 28 L. T. 464. *Follid.* *Steed v. Preece* (1874), L. R. 18 Eq. 192. *Refd.* *Burgess v. Booth* (1908), 99 L. T. 677.

8204. ———.]—Testator gave the residue of his real & personal estate to his three sisters as tenants in common & empowered his exor. to sell all or any part of his real estate & to stand possessed of the clear proceeds upon trust to pay his debts, funeral & testamentary expenses & legacies & to hold the residue in trust for his three sisters as tenants in common & to pay & divide the same accordingly. A portion of the real estate was sold under an order of the ct. with the concurrence of testator's sisters for the purpose of paying off a mtge. on another part of the estate. The purchase-money was paid into ct. The mtge. did not exhaust the proceeds of sale:—*Held*: the conversion was absolute & the surplus was personal estate.—*CROWTHER v. BRADNEY* (1873), 28 L. T. 464.

8205. ——— From date of order.]—An absolute order for sale made within the jurisdiction of the ct. in an administration suit operates as a conversion from the date of the order & before any sale has taken place.—*HYETT v. MEKIN* (1884), 25 Ch. D. 735; 53 L. J. Ch. 241; 50 L. T. 54; 32 W. R. 513.

*Annotations:—**Appld.* *Hartley v. Pendarves*, [1901] 2 Ch. 498. *Follid.* *Burgess v. Booth*, [1908] 2 Ch. 648; *Re Dodson, Yates v. Morton*, [1908] 2 Ch. 638; *Fauntleroy v. Beebe*, [1911] 2 Ch. 257. *Refd.* *Herbert v. Herbert*, [1912] 2 Ch. 268; *Hopkinson v. Richardson*, [1913] 1 Ch. 284. *Mentd.* *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Re Appleby, Walker v. Lever, Re Appleby, Walker v. Nisbet* (1903), 88 L. T. 219; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345.

8206. ———.]—An absolute order for sale within the jurisdiction of the ct. in an administration action operates as a conversion from the date of the order.—*FAUNTLEROY v. BEEBE*, [1911] 2 Ch. 257; 80 L. J. Ch. 654; 104 L. T. 704; 55 Sol. Jo. 497, C. A.

*Annotation:—**Refd.* *Herbert v. Herbert*, [1912] 2 Ch. 268.

See, further, EQUITY, Vol. XX., pp. 335 *et seq.*

8207. Time of sale—Before decree—Under special circumstances.]—*ASHTON v. HAZLEHURST* (1843), 1 L. T. O. S. 106.

8208. ——— Discretion of trustees—Whether court will interfere.]—*Re BLAKE, JONES v. BLAKE*, No. 8135, *ante*.

8209. Place of sale—Action commenced in district registry.]—An application for a decree, with liberty to adopt the proceedings in the district registry was refused, but the usual administration decree was made, with a direction that the accounts & inquiries should be taken & made in the district registry, & that the sale of the real estate should take place in London under the supervision of the judge in chambers.—*IRLAM v. IRLAM* (1876), 2 Ch. D. 608; 24 W. R. 292; 3 Char. Pr. Cas. 263.

*Annotation:—**Follid.* *Re Smith, Hutchinson v. Ward* (1877), 6 Ch. D. 692.

8210. Sale subject to contingent charge—Direction as to application of proceeds—Objection by purchaser—Payment of price into court.]—An order being made by consent in an administration suit for sale, out of ct. of the real estate, which was made subject to debts, & after discharging all debts & liabilities thereon, to pay the surplus into ct., & a purchaser of one lot, on which there was a contingent charge, objecting to the application of the moneys as directed, but being willing to pay the whole into ct., an order was made, on affidavit stating the ground of departure from the decree, without a petition, that the purchaser should pay all his purchase-money into ct.—*BELLAMY v. BELLAMY* (1847), 10 L. T. O. S. 262.

8211. Master's order confirming conditional sale—Time from which binding.]—An order made by a master in chambers is not complete, & binding on the parties until it is passed & entered. Although the settled practice in chambers is that an adjournment of a summons to be heard by the judge will not be granted unless an application is made to the master, at the time when the summons is heard by him, either for an adjournment or for time to consider whether an adjournment shall be asked for, yet the master or the judge has jurisdiction at any time before the master's order becomes finally binding on the parties by being passed & entered to adjourn the summons to be heard by the judge.

In a creditors' action to administer intestate's estate the usual judgment had been pronounced directing, amongst other things, a sale of the real estate in case the personal estate should be insufficient for the payment of the debts. A conditional contract had been entered into for the sale of the real estate, which on a summons taken

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8199 i. Grounds for ordering—Payment of debts.]—C. died leaving personal property & real estate. An action was brought against the extrix. of C. by the exors. of a deceased brother claiming an interest in the real estate, & an accounting for rents & profits. The suit was defended by the extrix. of C.,

but resulted in establishing pliffs.' right. The personalty being insufficient to pay costs & other claims against the estate, an order was made for the sale of the real estate:—*Held*: the order was within the terms of Probate Act, lt. 8. (c. 100), s. 26, as amended by 1888 Act (c. 26).—*Re CLARKE'S ESTATE* (1892), 24 N. S. R. (12 R. & G.) 289.—CAN.

g. Application by creditor—Parties interested in realty—Sufficiently represented by executors—Devises.]—On application by a creditor in an administration suit for the sale of real estate of testator, the exors., to whom part of the real estate was devised, were held sufficiently to represent the parties interested in the real estate, for the purposes of the motion; &

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out by the plaintiff had been confirmed by the master in chambers, but the order had not been passed & entered. On applications by creditors for liberty to attend the proceedings under the administration judgment on the ground that the sale was at an undervalue, & by the purchaser that the order confirming the sale might be forthwith passed & entered & the sale carried into effect:—*Held*: the master's order not having been passed & entered, the matter was still open, & the proper course was to treat the summons to confirm the sale as adjourned to the judge.—*Re THOMAS, BARTLEY v. THOMAS*, [1911] 2 Ch. 389; 80 L. J. Ch. 617; 105 L. T. 59; 55 Sol. Jo. 567.

H. Claims Against the Estate.

(a) In General.

See R. S. C., Ord. 55, rr. 44–61.

8212. Advertisement for claims—Whether limited to creditors.]—Legatees are not to be excluded from the benefit of a decree under, a will, by the advertisement for creditors & legatees, if the latter do not appear & claim. That notice should be confined to the case of creditors. The claims of legatees, & their extent, being known, a sufficient fund must be set apart to satisfy them. The reason of advertising for creditors does not apply to legatees.—*ANON.* (1821), 9 Price, 210; 147 E. R. 70.

8213. — Whether necessary after decree—Where previously issued by representative.]—*(UTHBERT v. WHARMBY*, [1869] W. N. 12.

8214. — Sufficiency of—Under Law of Property Amendment Act, 1859, c. 35, s. 29.]—The exors. of testator, whose estate was liable to replace trust money in consequence of a breach of trust:—*Held*: not protected from liability under above sect., they having only issued notices for claims against testator's estate, to be sent in within three weeks, by advertisement in local newspapers in the neighbourhood where testator resided, & not in the *London Gazette*.

In this ct. we never allow an estate to be distributed without notice being inserted in the *London Gazette*, & generally we require an advertisement to be inserted in the *Times*. When an estate is administered of a testator in the country, the notice is also inserted in some newspaper having a local circulation in the neighbourhood (*LORD ROMILLY, M.R.*).—*WOOD v. WEIGHTMAN* (1872), L. R. 13 Eq. 434; 26 L. T. 385; 20 W. R. 459.

Annotation:—Consd. Re Bracken, Doughty v. Townson (1889), 43 Ch. D. 1.

See, further, Part IV., Sect. 1, sub-sect. 4, *ante*.

8215. Claim for statute-barred debt—Whether provable.]—(1) In an administration action commenced in Dec. 1878, by one exor. of a testator,

who was also a creditor of his testator, against his co-exor., the usual judgment in a creditor's action was pronounced in Dec. 1879, & some time afterwards a claim was brought in by a creditor against the estate upon a promissory note of testator dated in Nov. 1873:—*Held*: the claim was barred by Stat. Limitations.

(2) It is no longer the practice so far as personal estate is concerned to bring an action by one creditor on behalf of others. It is no longer necessary . . . excepting in cases relating to real estate . . . unless it has been ordered to be sold or there is a trust or power of sale (*JESSEL, M.R.*).—*Re GREAVES, BRAY v. TOFIELD* (1881), 18 Ch. D. 551; 50 L. J. Ch. 817; 45 L. T. 404; 30 W. R. 55.

Conflict of English & foreign law.]—

See CONFLICT OF LAWS, Vol. XI., pp. 487, 488, Nos. 1391, 1394.

See, generally, LIMITATION OF ACTIONS.

Liability of deceased—As member of banking company.]—*See* BANKERS, Vol. III., pp. 139, 150, Nos. 117, 190.

— **On unpaid premiums on policy.]—***See* COMPANIES, Vol. X., p. 1076, No. 7523.

8216. Claim by beneficiary—Entitled to share of residue—How proved after rejection by master—Pending liquidation of residue.]—(1) Persons [residuary legatees] who claim specific portions of property in the possession of another [exor. of deceased person] at the time of his death are not necessary parties to a suit for administration of the estate of the deceased person.

(2) In a suit for administering the estate of one who had been personal representative of another, the party entitled to a share of the residuary estate of such other person carried in a claim for such share, as a debt, before the master; but the master disallowed the claim, on the ground that such residuary share could not be allowed as a debt, unless it appeared that the clear residue, after payment of debts, etc., had been ascertained:—*Held*: in such a case claimant ought to have forthwith applied to the ct. for a direction to the master to receive the claim, or to be examined *pro interesse suo*, or for leave to file a bill for the administration of the estate in question, or take some such proceeding, & to stay the distribution of the estate of the representative in the meantime; & he ought not to have delayed his claim until after the master's report, & the order on further directions.—*BARKER v. ROGERS, ROGERS v. ROGERS* (1849), 7 Hare, 19; 68 E. R. 8.

Annotation:—As to (2) *Apld. Thomas v. Griffith* (1860), 2 De G. F. & J. 555.

8217. Liability of beneficiaries to refund—Legatees paid before creditors.]—Testator leaves assets sufficient to pay all debts & legacies; the legatees receive payment, which the creditors might also have had if they had demanded it in time; they lie by for eleven years, & the estate

the order asked for was granted.—*STEWART v. HUNTER* (1867), 14 Gr. 132.—*CAN.*

r. Time for sale—Discretion of executors.]—The exors. of a will were directed to sell land with full discretion as to the time when they should sell. At the end of a period of more than three years the exors. had not sold, & one of the beneficiaries applied for an administration order. The exors. had good reason for believing that a better price could be obtained if they

waited a little longer: & the ct. refused to interfere.—*Re SIEVERT* (1921), 51 O. L. R. 305; 67 D. L. R. 199.—*CAN.*

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H. (a).

s. Claim by beneficiary—Small estate.]—The facts, that an estate is small, that no imputation is made against the exors., & that it is inadvisable to incur legal expenses, are

no answer to a motion by a legatee against the exors., for the usual administration order.—*Re FALCONER* (1860), 1 Ch. Ch. 273.—*CAN.*

t. Filing of petition—Effect of.]—The filing of a petition by a creditor in the Probate Ct. under R. S. (5th series), c. 100, s. 57 has the effect of the bringing of an action in preventing the running of the statute in reference to claims brought in under the decree.—*Re MORRIS'S ESTATE* (1895), 28 N. S. R. (16 R. & G.) 20.—*CAN.*

is wasted; yet the legatees shall refund.—*HARDWICK v. MYND* (1792), 1 Anst. 109; 145 E. R. 815.

(b) *Claims by Creditors.*

See R. S. C., Ord. 55, rr. 44–61.

8218. Time for making—While assets in court.]—Creditors let in at any time, while the fund is in ct.; though the time has elapsed.—*LASHLEY v. HOGG* (1805), 11 Ves. 602; 32 E. R. 1222, L. C.

8219. ———.]—In an administration suit a creditor's claim was admitted as a claim only by the master's report, to which the creditor did not except. Shortly afterwards the result of a suit tended to establish his debt; after more than a year the creditor petitioned to be admitted as a creditor against the estate:—*Held*: he might be admitted, without being charged with the costs, which had not been increased by the delay.—*LEE v. FLOOD, Ex p. LOTT* (1854), 2 Sm. & G. 250; 2 W. R. 348; 65 E. R. 386.

8220. ——— Though partly distributed.]—Where a decree had been made in an administration suit, & the assets had been appropriated & partly distributed, claimants against the estate in a foreign suit, which was commenced after the decree, were allowed to come in & prove their claim, & further distribution was delayed, in order that regular notice might be given of the intended distribution.—*BRETT v. CARMICHAEL* (1866), 35 Beav. 340; 35 L. J. Ch. 369; 14 L. T. 247; 14 W. R. 507; 55 E. R. 927.

8221. ———.]—M. was the exor. of J., who had been the exor. of A. A decree having been made for the administration of the estates of A. & J., a sum of £496 was found due from the estate of J. to that of A., & on further consideration directions were given for raising it out of J.'s real estate. The account had been taken on the footing that at A.'s death nothing was due to him from J. for interest. Before anything further had been done, M. found a small book in the handwriting of J., by which he admitted himself to owe to A. at A.'s death £70 for interest on the principal moneys due from him to A. This book contained a reference to a page in a larger account book which had been used in making out the accounts; & this page contained an entry to the same effect. The book had no index, & the page in question was at the end of the book, & separated by a number of blank pages from what went before, so that it had never been observed. M. petitioned to have the amount to be raised out of J.'s estate increased by allowing this interest:—*Held*: the case fell within the ordinary rule, that a creditor may come in as long as there are assets undistributed, & the additional amount ought to be raised.—*Re METCALFE, HICKS v. MAY* (1879), 13 Ch. D. 236; 49 L. J. Ch. 192; 42 L. T. 383; 41 L. T. 572; 28 W. R. 499, C. A.
Annotation:—*Refd. Re McMurdo, Penfold v. McMurdo*, 1 Ch. 684.

8222. ——— Subject to terms.]—(1) Where in an administration suit there is a fund in ct., a creditor for a debt at law, though the appointed time for coming in has long elapsed, is by well-established practice allowed to prove against the general estate, subject to terms as to costs & as to payments already made.

(2) When the Ct. of Ch. had taken into its own hands the administration of an estate, it restrained creditors from pursuing their legal remedy against the exors. The ct. made a decree for the administration of the estate which operated as a judgment for all the creditors, & as it precluded the creditors from asserting their legal remedies, it provided other means for them to obtain payment of their debts. The ct. was bound to see that the creditors whom it restrained from pursuing their legal remedies were not deprived of the means of having the assets of testator applied to the payment of their debts. It is an entire fallacy, but I think a very common one, to suppose that because the debt had to be proved, or the payment of the debt had to be enforced through the medium of the Ct. of Ch., it became an equitable demand & ceased to be a legal demand. Its character was not altered one whit; it remained a legal demand, & the right of the creditor who came in to prove under an administration decree remained a legal right & the debt which was recoverable was a legal debt; the only difference made was in the remedy by which the debt could be recovered (*LORD DAVEY*).—*HARRISON v. KIRK*, [1904] A. C. 1; 73 L. J. P. C. 35; 89 L. T. 566, H. L.

Annotation:—*Generally, Mentd. Re Bruce, Lawford v. Bruce*, [1908] 2 Ch. 682.

8223. ——— Claim under mortgage deed—Construction of deed.]—A surety joined in a covenant to repay the principal of a mtge. debt "on demand" & interest thereon in the meantime from the date of the mtge.:—*Held*: until demand was made no cause of action accrued against the surety within Stat. Limitations so as to bar the mtgee's action against him as the covenant.—*Re BROWN'S ESTATE, BROWN v. BROWN*, [1893] 2 Ch. 300; 62 L. J. Ch. 695; 69 L. T. 12; 41 W. R. 440; 37 Sol. Jo. 354; 3 R. 463.

Annotations:—*Consd. Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833. *Refd. Edwards v. Walters*, [1896] 2 Ch. 157.

8224. Plaintiff creditor's right to contribution—Time for asserting—Before debts proved.]—If, in a creditor's suit, pltf. does not call for contribution, according to the decree, before a creditor is admitted to prove, he waives all claim to contribution.—*SHORTLEY v. SELBY* (1820), 5 Madd. 447; 56 E. R. 966.

Annotation:—*Refd. Stanton v. Hatfield* (1836), 1 Keen, 358.

8225. Claims of involved nature—Trial by official referee.]—The expression "questions of account" in Jud. Act, 1873 (c. 66), s. 57, will receive a large construction. A claim made in an administration suit by a dealer in works of art against the estate of testator for £19,000 the

PART VIII. SECT. 5, SUB-SECT. 3.—
H. (b).

a. *Delay by creditor.]*—A creditor who had not come in pursuant to advertisement, was allowed to do so after the master had reported as to the debts, & after a decree on further directions, but he was required to pay all costs of his application.—*ANDREWS v. MAULSON* (1860), 1 Ch. Ch. 316.—*CAN.*

b. ——— *Secured creditor.]*—In an administration suit, there being an unallocated fund in ct., a secured creditor was allowed to prove against the general estate, subject to terms as to costs, although the time for making claims & moving to vary the chief clerk's certificate had long elapsed, & the order on further consideration had been made some years previously.—*BROWNE v. BROWNE*, [1919] 1 I. R. 251.—*IR.*

c. *Failure by creditor to establish claim—Fresh evidence.]*—Where in an administration suit an alleged creditor was examined, but failed to establish his demand, the ct. refused a reference back in order to afford the party an opportunity of calling other evidence.—*Re RITCHIE, SEWERY v. RITCHIE* (1876), 23 Gr. 66.—*CAN.*

d. *Costs incurred by representative.]*—In proceeding under an order

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aggregate prices of twenty-hour items, consisting of pictures & articles of vertu supplied to testator in his lifetime, & specified in an account delivered to his exor., was, on the application of the exor. under that sect., order to be tried before the official referee.—*Re LEIGH, ROWCLIFFE v. LEIGH* (1876), 3 Ch. D. 292; 24 W. R. 782; 2 Char. Pr. Cas. 128.

8226. What claims provable—Breach of trust—Whether as debt.]—BRIDGES v. HINCKSMAN (undated), cited in 5 W. R. at p. 34.

Annotation:—*Reid. Alexander v. Foster* (1856), 5 W. R. 33.

8227. ——— Mortgage to secure repayment for breach—Whether specialty debt.]—A trustee of a will who had committed a breach of trust, gave to his *cestui que trust* a mtge. to secure repayment of part of the misapplied trust fund. This mtge. deed contained a recital that the trustee had in his hands £1,582 part of the trust fund, & the mtge. was expressed to be made in consideration of the sum of £1,582 then in the hands of the trustee, which he thereby admitted to have received as purchase-money for property sold under the will of testator. There was a proviso for redemption & a power of sale but no covenant to pay the mtge. debt. Interest was duly paid on the mtge. debt up to the death of the trustee. The mtged. property having proved insufficient to pay the debt, the *cestui que trust* in a suit to administer the trustee's estate, claimed to prove the amount due from him under the mtge. deed as a specialty debt:—**Held:** the debt had not become a specialty debt.—*ISAACSON v. HARWOOD, BROOK v. HARWOOD* (1868), 3 Ch. App. 225; 37 L. J. Ch. 209; 18 L. T. 622; 32 J. P. 279; 16 W. R. 410, L. J.

Annotations:—*Reid. Holland v. Holland* (1869), 4 Ch. App. 449; *Kidd v. Boone* (1871), L. R. 12 Eq. 89. **Mentd.** *Firth v. Slingsby* (1888), 58 L. T. 481.

8228. ——— Mortgage debt—Sale of security not satisfying debt—Whether balance provable.]—In the case of a mtge. of an estate, accompanied by the mtgor's. bond & covenant to pay the amount advanced, the mtgee., after absolute foreclosure & subsequent sale by him of the estate for less than the amount due to him, will not be permitted to go in under a decree for administering deceased mtgor's estate, & prove for the deficiency.—*LOCKHART v. HARDY* (1846), 9 Beav. 349; 15 L. J. Ch. 347; 10 Jur. 532; 50 E. R. 378.

Annotations:—*Mentd. Re Kelday, Ex p. Meston* (1888), 36 W. R. 585; *Kinnaird v. Trollope* (1888), 39 Ch. D. 636; *Huntington v. I. R. Comrs.*, [1896] 1 Q. B. 422; *Re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179; *Ellis's Trustee v. Dixon-Johnson*, [1924] 1 Ch. 342.

See, generally, MORTGAGE.

8229. ——— Advances on behalf of estate—After distribution.]—T. brought in a claim under a decree for the administration of the estate of G., a deceased person, for the balance of an account. The chief clerk disallowed part of the demand. After the assets had been distributed, T. had to advance money on behalf of G.'s estate, & filed a bill against G.'s residuary legatees for an account of what was still due to him in respect of his original claim, & of what he had since advanced:—

for partition or sale of the estate of deceased the master advertised for creditors, & M. & M. sent in a claim for obtaining letters of administration, & for defending an action brought by W. M., a debt. in this suit, & entitled to a share of the estate, against the administratrix:—**Held:** the administratrix was justified in defending the

suit, & claim allowed.—*McKAY v. McKAY* (1880), 8 P. R. 334.—CAN.

e. Doubtful claim.]—In an administration matter pltf. claimed to be a creditor of the estate, by reason of the support & maintenance by him of testator's wife during testator's lifetime:—**Held:** the pltf.'s claim

Held: T. was entitled to an account for his subsequent advances.—*THOMAS v. GRIFFITH* (1860), 2 De G. F. & J. 555; 30 L. J. Ch. 465; 3 L. T. 761; 7 Jur. N. S. 293; 45 E. R. 736; *sub nom. GRIFFITH v. THOMAS*, 9 W. R. 293, L. C. & L. JJ.

8230. ——— Not claim by local authority—Liability to contribute towards expenses of road paving.]—Notices to sewer & pave roads having been in 1872 served by a board of health on an owner, he took no notice during his lifetime, & the works having been executed by the board, notices to pay apportionments were on July 30, 1875, served on the tenant for life under the will of the owner, & on the exors., who within the statutory three months served counter-notices on the board, disputing the amount of the apportionments, & alleging that the roads were public roads. The board then commenced proceedings by arbn., which the owners refused to attend, & in their absence an award was made in favour of the board on Aug. 9, 1877. On Jan. 19, 1878, the award was made a rule of the Q. B. Div. On Feb. 12, notices of demand were served by the board on the owners, & on July 9, 1878, proceedings in the Q. B. Div. to enforce the award were commenced & subsequently abandoned. On Aug. 1, 1878 proceedings were taken in the Q. B. Div. with reference to the costs of the award & these on Jan. 23, 1879 were transferred to the Ch. Div., in which an administration action was pending:—**Held:** a summons by the board for leave to prove in the administration action for the amount awarded must be refused, on the ground that the remedy of the board was by a summary proceeding before justices & had become barred by Summary Jurisdiction Act, 1847 (c. 43), s. 11.—*WEST v. DOWNMAN* (1880), 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6, C. A.

Annotations:—*Folld. Re Boor, Boor v. Hopkins* (1889), 40 Ch. D. 572. **Mentd.** *Lea v. Abergavenny Improvement Comrs.* (1885), 16 Q. B. D. 18; *Re Bettesworth & Richer* (1888), 37 Ch. D. 535; *Hornsey L. B. v. Monarch Investment Bldg. Soc.* (1889), 23 Q. B. D. 149; *Sandgate District L. B. of Health v. Keene*, [1892] 1 Q. B. 831; *Re Willesden L. B. & Wright*, [1896] 2 Q. B. 412; *Millard v. Balby-with-Hexthorpe U. D. C.* (1904), 90 L. T. 489.

8231. ——— ———.]—By the leases, in 1875 & 1877, of two houses abutting on a private road, the lessee covenanted to pay all rates & taxes & to keep up the road. In 1882 the lessee executed a deed of gift of the two houses to his son upon trust for the father for life, he paying "all outgoing & performing the covenants in the leases," & after his death upon trust for the son absolutely. In July, 1884, the local board served notices on the father under Public Health Act, 1875 (c. 55), s. 150, requiring him to make up the portions of the road on which the houses abutted; but the notice was not complied with, & the board themselves did the work, which was completed in Feb. 1885. In June, 1885, the father died, & the son entered into possession of the houses. In Sept. 1886, the son was served by the board with notices assessing a sum on each house for the proportion of expenses of making up the road, & in Feb. 1887, he was served with demands & orders for payment of the assessed amounts by instalments, with interest. In an action by the

should be supported by *viva voce* evidence, & an action was directed to be entered.—*GROOM v. DARLINGTON* (1882), 9 P. R. 298.—CAN.

f. Who is a creditor—Administrator removed from office—Having claim against estate.]—B., who had been removed from the office of adminis-

son claiming payment of the assessed expenses out of the father's estate:—*Held*: the expenses were not a debt due from the father's estate, inasmuch as the relation of debtor & creditor was not created by above Act, between the board & an owner of property for expenses incurred by the board.—*Re BOOR, BOOR v. HOPKINS* (1889), 40 Ch. D. 572; 58 L. J. Ch. 285; 60 L. T. 412; 53 J. P. 467; 37 W. R. 349.

Annotations:—*Mentd.* *Hornsey L. B. v. Monarch Investment Bldg. Soc.* (1889), 23 Q. B. D. 149; *Tubbs v. Wynne*, [1897] 1 Q. B. 74; *Stock v. Meakin*, [1899] 2 Ch. 496; *Re Waterhouse's Contract* (1900), 44 Sol. Jo. 645; *Re Allen & Driscoll's Contract*, [1904] 2 Ch. 226.

8232. — Effect of acquiescence in void sale—Executor purchasing estate property.—Where the creditors of testator knew that a sale of his estate by the exor. to himself was impeachable in equity, but took no steps to set it aside, & received dividends on their claims out of the purchase money:—*Held*: on the purchase being set aside, they were not estopped from claiming what was due to them, after giving credit for the dividends received, in priority to a legatee of debtor.—*BENINGFIELD v. BAXTER* (1886), 12 App. Cas. 167; 56 L. J. P. C. 13; 56 L. T. 127, P. C.

Annotations:—*Mentd.* *Hiddings, Helms v. Denysen*, *Hiddings v. Denysen, Denysen v. Hiddings* (1887), 12 App. Cas. 624; *Meldrum v. Scorer* (1887), 56 L. T. 471.

8233. — Undisclosed compromise in bankruptcy—Bankruptcy subsequently annulled.—Bkpt., desiring to obtain the annulment of his bkpcy., induced some of his creditors to sell their debts to two trustees, who were provided with funds for the purpose, & who were as assignees of the debts to consent to the annulment. The trustees obtained assignments of the several debts on various terms, including an assignment of a debt of £25,000 in consideration of £2,000 paid by them to the creditor. This assignment was made in pursuance of an agreement between the creditor & bkpt., whereby bkpt. agreed to pay to the creditor a further sum of £6,000 at a future time. The bkpcy. was annulled on the petition of bkpt., with the consent of the creditors or their assignees. The agreement to pay the £6,000 was not disclosed to the ct. or to the other creditors:—*Held*: there was no duty to disclose the agreement to the ct., inasmuch as the function of the ct. was merely to ascertain whether the proper parties consented; nor to the other creditors, inasmuch as there was no common basis of consent, & the agreement was valid.—*Re MCHENRY, McDERMOTT v. BOYD, LEVITA'S CLAIM*, [1894] 3 Ch. 365; 64 L. J. Ch. 13; 71 L. T. 502; 10 T. L. R. 614; 38 Sol. Jo. 667; 7 R. 532, C. A.

8234. Joint & separate creditors of partners—Joint estate insolvent—Rights against separate estate.—Under a decree obtained by a separate creditor for satisfaction out of assets, the surviving partner a bkpt., & the joint estate insolvent, the joint creditors not entitled *pari passu* with the separate creditors to the separate estate; but can only claim the surplus after satisfaction of the separate debts.—*GRAY v. CHISWELL* (1803), 9 Ves. 118; 32 E. R. 547, L. C.

Annotations:—*Consd.* *Cowell v. Sikes* (1827), 2 Russ. 191;

trator of the estate of M., had claims against the estate for moneys expended, personal services, etc.:—*Held*: B. was a "creditor" or "person interested," & entitled to have accounts taken.—*Re MCHENRY'S ESTATE* (1895), 29 N. S. R. (16 R. & G.) 20.—CAN.

g. — Servant.—A person engaged & employed by deceased in

her lifetime as a housemaid & nurse is a creditor within C. S. N. B., 1903, c. 118, s. 26.—*ROCKWELL v. PARSONS & HALL* (1913), 12 E. L. R. 180.—CAN.

h. What claims provable—Medical services rendered.—Where a claim made by pltf., for medical services rendered to a deceased person, was objected to because pltf. had failed

Brown v. Douglas (1840), 11 Sim. 283. *Folld. Lee v. Flood* (1853), 2 W. R. 26; *Ridgway v. Clare* (1854), 19 Beav. 111; *Lodge v. Prichard* (1863), 1 De G. J. & Sm. 610. *Refd.* *Bowles v. York* (1823), 1 L. J. O. S. Ch. 134; *Devaynes v. Noble* (1831), 2 Russ. & M. 495; *Thorpe v. Jackson* (1837), 2 Y. & C. Ex. 553; *Re White, Ex p. Dear* (1876), 1 Ch. D. 514; *Kendall v. Hamilton* (1879), 4 App. Cas. 504. *Mentd.* *Re Barrow & Geddes, Ex p. Moul* (1832), 1 Deac. & Ch. 44.

8235. — — — — —.—Where a partnership debt is by the form of obligation joint & several, the creditor is entitled to be paid out of the assets of deceased partner *pari passu* with the separate creditors; joint creditors are entitled only out of the surplus after the separate creditors have been satisfied.—*LEE v. FLOOD* (1853), 2 W. R. 26.

8236. — — — — —.—(1) Of two partners, one died possessed of large property, & the survivor became bkpt. A creditor of the partnership proved his debt under the bkpcy. & received a dividend & the whole of the bkpt's estate being thereupon exhausted:—*Held*: the joint creditor was entitled, under an administration decree, to come in upon the estate of the solvent partner, for the balance of his debt, only after the separate creditors had been paid & not *pari passu* with them.

(2) Where a joint creditor comes in to take the benefit of a decree to administer a separate estate, unless under extraordinary circumstances the exor. is entitled to his costs before the joint creditor has anything. But where a creditor, suing for his own debt against exors. who deny assets, obtains a decree to pay his debt & costs & assets are found, the creditor is entitled to costs in priority to the exors.—*LODGE v. PRITCHARD* (1863), 4 Giff. 294; 1 New Rep. 534; 32 L. J. Ch. 775; 8 L. T. 722; 9 Jur. N. S. 982; 11 W. R. 532; 66 E. R. 717; *affd.*, 1 De G. J. & Sm. 610, L. JJ.

Annotations:—*Generally, Mentd.* *Re Bamed's Banking Co., Kellock's Case, Re Xeres Wine Shipping Co., Ex p. Alliance Bank* (1868), 3 Ch. App. 769; *Re Budgett, Cooper v. Adams*, [1894] 2 Ch. 557.

8237. Appeal from disallowance—Whether master's certificate necessary.—Where a claim has been made by a creditor in an administration action, & the judge has disallowed the claim, the creditor may at once appeal from the decision, without obtaining a separate certificate of the chief clerk, or waiting for the chief clerk's certificate in the action.—*Re CLAGETT, FORDHAM v. CLAGETT* (1882), 20 Ch. D. 134; 51 L. J. Ch. 461; 46 L. T. 70; 30 W. R. 374, C. A.

8238. Suspension of payment to creditors—Pending adjustment of joint debtor's rights.—*MICKLETHWAIT v. WINSTANLEY*, No. 8156, *ante*.

8239. — Pending settlement of landlord's claim.—*Re FRANCE, FRANCE v. CLERKE*, [1886] W. N. 167.

(c) Claims arising after Distribution.

8240. Refund of money distributed—By persons erroneously found next of kin—On subsequent proof of claim by sole next of kin.—Where an intestate's estate has been distributed, under a

to prove registration, the ct. permitted such evidence to be given, there being admittedly about one month's services unpaid for, but made an order striking out improper charges & allowing pltf. to rank against the estate only for the balance due.—*BARNABY v. O'DONNELL* (1916), 49 N. S. R. 386; 25 D. L. R. 739.—CAN.

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decree in an administration suit, among persons found by the report to be his next of kin, a person claiming to be the sole next of kin of the intestate is not precluded from filing a bill against the persons alleged to have been erroneously found to be the next of kin, for the purpose of obtaining restitution of the fund so distributed; & if the right of pltf. so claiming shall be established, the persons among whom the fund has been distributed will be compelled to repay it to pltf. but pltf. will be bound by the accounts taken in the administration suit.

If a creditor does not happen to discover the proceedings in the ct. until after the distribution has been actually made amongst the parties having an apparent title . . . the ct. will upon proof of no wilful default on the part of such creditor & no want of reasonable diligence on his part compel the parties to restore to the creditor that which of right belongs to him (LEACH, M.R.).—DAVID v. FROWD (1833), 1 My. & K. 200; 2 L. J. Ch. 68; 39 E. R. 657.

*Annotations:—*Consd. Sawyer v. Birchmore (1836), 1 Keen, 391; Thomas v. Griffith (1860), 3 Giff. 504. *Refd.* Waller v. Barrett (1857), 24 Beav. 413; *Re* McMurdo, Penfield v. McMurdo, [1902] 2 Ch. 684. *Mentd.* Holloway v. Clarkson (1842), 6 Jur. 923; Mohan v. Broughton, [1899] P. 211.

8241. — Subsequent claimant with equal title —Proportional repayment.]—The circumstance that intestate's personal estate has been distributed, in a suit, among the persons appearing to be his sole next of kin, does not necessarily preclude other persons having an equal title to that character, from afterwards instituting a new suit against the next of kin who have been thus overpaid, & compelling them to refund a proportion of their shares.—SAWYER v. BIRCHMORE (1837), 2 My. & Cr. 611; 1 Keen, 825; 6 L. J. Ch. 277; 40 E. R. 773, L. C.

*Annotations:—*Expld. Thomas v. Griffith (1860), 3 Giff. 504. *Mentd.* March v. Russell (1837), 3 My. & Cr. 31; Desborough v. Rawlins (1838), 3 My. & Cr. 515; Walsingham v. Goodricke (1843), 3 Hare, 122; Ford v. Tennant (No. 2) (1863), 32 Beav. 162; Kennedy v. Lyell (1883), 23 Ch. D. 387; Mohan v. Broughton, [1899] P. 211.

8242. — By simple contract creditors—Distribution without providing for mortgage debt.]—Under the decree in a creditor's suit for the administration of the estate of H., deceased, his real estates were sold. It appeared by the conditions of sale that a part of the property was subject to a mortgage for £1,000 to T. The conveyances to the purchasers were executed by T. at the instigation of J., who acted as his solr. & also as solr. for the purchasers, in consideration of the purchase-money being paid into ct. J. was also a specialty creditor of testator, & proved a claim for a bond debt of £1,000, with interest & costs. This debt was paid in full, & the residue of the assets, amounting to about £600, distributed among the simple contract creditors, without any provision being made for the payment of the mtge. debt. The mtge. deed remained in the possession of the mtgee., who died shortly after the execution of the con-

veyances. Upon a bill filed by the extrix. of T. against the surviving partner & personal representatives of J., against G. & G., the solrs. who had the conduct of the suit, the simple contract creditors & the purchasers of the real estate in mtge.:—*Held*: (1) the simple contract creditors were liable to refund the whole of what had been received by them; (2) G. & G. were liable to make good all such sums as had been received by the simple contract creditors, & by reason of insolvency or otherwise had become irrecoverable from them; (3) the representatives of J. were liable to refund the difference between the sums received by the simple contract creditors & the amount of the mtge. debt & interest.—TODD v. STUDHOLME (1857), 3 K. & J. 324; 26 L. J. Ch. 271; 29 L. T. O. S. 24; 5 W. R. 277; 69 E. R. 1132.

*Annotations:—*As to (1) Consd. *Re* Dangar's Trusts (1889), 41 Ch. D. 178. As to (2) Consd. *Re* Dangar's Trusts (1889), 41 Ch. D. 178. *Refd.* Marsh v. Joseph, [1897] 1 Ch. 213.

(d) Evidence in .

See, also, EVIDENCE, Vol. XXII., pp. 492 et seq.

8243. Sufficiency of evidence—After long delay.]—After a long delay, the ct. requires more than the ordinary proof of a debt in the master's office.

In 1817, a trust deed was executed by B. for the benefit of his creditors. The deed was established by the decree in 1842, & an account of debts was directed. Petitioner, in 1846, came in under the decree, & claimed in respect of promissory notes dated in 1816, given by B. to his father, who died in 1828. He produced the notes & proved the signature, but gave no proof of the consideration, or of anything being then due:—*Held*: his claim had been properly rejected by the master, for after the great lapse of time the notes could not be admitted upon the ordinary proof.—HARTWELL v. COLVIN (1852), 16 Beav. 140; 51 E. R. 731.

8244. — Corroboration—Whether necessary.]—HILL v. WILSON, No. 7506, *ante*.

8245. — — — — —.]—Testator gave all his real & personal estate upon trust for sale, & directed his trustees to stand possessed of his trust property as to £1,000, part thereof, to invest the same, & pay the interest, as the same should arise, to his wife during her life. The widow, previously to her marriage, had carried on a small farm, & after the marriage it was arranged, as she alleged, that she should carry it on as before, & that the stock & capital should be her separate estate. The farming stock was sold, & the proceeds were received by testator, & invested, as the widow alleged, by him for her use. The widow claimed administration as a creditor in respect of the proceeds of sale of the farm, & for other sums which she alleged that she had lent testator out of her separate estate. She also claimed delivery up of a piano & other chattels given her by testator:—*Held*: in the absence of proof of a clear & unequivocal intention on the part of the husband to constitute himself a trustee for his wife, the ct., though morally certain that

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H. (d).

8244 i. Sufficiency of evidence — Corroboration—Whether necessary.]—Whilst the evidence of a claimant against the estate of a deceased person should be clear & convincing &, if not corroborated, will not be readily acted on, there is no absolute rule of law requir-

such corroboration in this province. *DOIDGE v. MIMMS* (1900), 13 Man. L. R. 48.—CAN.

8244 ii. — — — — —.]—In proving claims against the estate of a deceased person where the contract or liability depends upon parol evidence, & where the evidence of deceased would have been most important, the parol

evidence of claimant must be supported by some attendant circumstances, or some facts established *aliunde* which corroborate the claim.—MCKINNON v. SHANKS (1916), 34 W. L. R. 761; 10 W. W. R. 895; 26 Man. L. R. 427; 28 D. L. R. 77.—CAN.

k. Entries in executor's books.]—A claim by the next of kin of a deceased

the money had been lent, could not admit the uncorroborated testimony of pltf. as against testator's estate, pltf. was, however, entitled to the usual order for administration, & to have the piano restored to her.—*Re WHITTAKER, WHITTAKER v. WHITTAKER* (1882), 21 Ch. D. 657; 51 L. J. Ch. 737; 46 L. T. 802; 30 W. R. 787.

8246. — — — —.]—The rule that a claim upon the estate of a deceased person cannot be maintained upon the unsupported testimony of claimant applies to cases of alleged debt as well as to cases of alleged gift. An English widow lady residing in Paris in a house which belonged to her for her separate use, married an English gentleman, & by the marriage settlement certain plate which formerly belonged to her first husband was settled to her separate use. After the marriage, her husband having family plate of his own, sent it to his wife's house in Paris, & she then sent her own plate to her son by her first marriage. Upon the death of the husband his family plate, & also a marble bust of himself, was in his wife's house at Paris. In a suit for the administration of his estate his wife claimed the plate as having been given her in exchange for her own plate, & the bust as having been presented to her by her husband:—*Held*: the surrounding circumstances did not furnish corroborative evidence in support of the claim by the wife to the plate & bust, & as the claim rested on her unsupported testimony it could not be allowed.—*Re FINCH, FINCH v. FINCH* (1883), 23 Ch. D. 267; *sub nom. Re WYNNE-FINCH, WYNNE-FINCH v. WYNNE-FINCH*, 48 L. T. 129; 31 W. R. 526, C. A.

Annotations:—*Refd.* Wildish v. Fowler (1888), 5 T. L. R. 113; Rawlinson v. Scholes (1898), 79 L. T. 350.

8247. — — — —.]—It is said on behalf of defts. that in the case of a conflict of evidence between living & dead persons, there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it (SIR J. HANNEN).—*Re HODGSON, BECKETT v. RAMSDALE* (1885), 31 Ch. D. 177; 55 L. J. Ch. 241; 54 L. T. 222; 34 W. R. 127; 2 T. L. R. 73, C. A.

Annotations:—*Consd.* Wildish v. Fowler (1888), 5 T. L. R. 113. *Fold.* Rawlinson v. Scholes (1898), 79 L. T. 350. *Refd.* *Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637. *Mentd.* Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337; Moore v. Knight, [1891] 1 Ch. 547; Wegg-Prosser v. Evans (1894), 64 L. J. Q. B. 1; McLeod v. Power, [1898] 2 Ch. 295; Isaacs v. Salbstein, [1916] 2 K. B. 139.

8248. — — — —.]—A release to a trustee set aside after the lapse of more than twenty years, & after the death of the trustee, on evidence of pltf., corroborated by the tenor of the deed that it was executed in error. In such a case it is not necessary to prove fraud. There is no rule that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous suspicion.

Testator bequeathed one-half of his residuary

personal estate to his sister & one quarter thereof to each of his two nieces; he appointed his sister trustee & extrix. of his will, & died in the year 1855. The residuary personal estate consisted principally of railway shares & stocks, & at the time of passing the residuary account it was valued at £42,000. The nieces lived with their aunt, who had brought them up from childhood. In 1859, the nieces executed a release of all suits & causes of action in favour of their aunt in consideration of the payment of £10,500 to each. At the time of the execution of the release, the railway shares & stocks had increased in value, & the share of each of the nieces was worth much more than £10,500. The release was drawn up by the aunt's solr. & the nieces had no independent advice & executed it in error, but no fraud was imputed. In 1879, the aunt died. In 1883, an action was commenced by one of the nieces to set aside the release:—*Held*: the release was invalid & must be set aside.—*Re GARNETT, GANDY v. MACAULAY* (1885), 31 Ch. D. 1, C. A.; *previous proceedings* (1884), 50 L. T. 172.

Annotations:—*Refd.* *Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637; Wildish v. Fowler (1888), 5 T. L. R. 113. *Mentd.* Mason v. Mason (1886), 2 T. L. R. 266.

8249. — — — —.]—There is no rule that the ct. must necessarily reject a claim against deceased person's estate merely because it is supported only by the uncorroborated evidence of claimant.

Such uncorroborated evidence should be examined with care, & even with suspicion, but if in the result it convinces the ct. that the claim should be allowed, the ct. should allow the claim.—*RAWLINSON v. SCHOLES* (1898), 79 L. T. 350; 15 T. L. R. 8, D. C.

8250. — — — —.]—There is no absolute rule as to corroboration being necessary in the case of a claim against the estate of deceased person.—*Re GRIFFIN, GRIFFIN v. GRIFFIN*, [1899] 1 Ch. 408; 68 L. J. Ch. 220; 79 L. T. 442; 15 T. L. R. 78; 43 Sol. Jo. 96.

Annotations:—*Mentd.* *Re Smith, Bull v. Smith* (1901), 84 L. T. 835; *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104.

8251. — — — —.]—In 1902 their father told pltf.s., his two unmarried daughters, that they would be entitled on his death to the proceeds of certain policies of insurance effected on his life, & on many subsequent occasions he repeated this statement & told them how they would be able to obtain the money after his death. The father had made his will in 1897, but it contained no mention of the policies, nor were they mentioned in a codicil which he executed in 1906. After their father's death pltf.s. claimed the proceeds of the policies:—*Held*: action failed on the ground that being a claim against the estate of a deceased person, pltf.s.' testimony required corroboration, & there was no such corroboration. A joint claim by two persons against the estate of a deceased person cannot be maintained unless there is independent corroboration in addition to what is supplied by each of claimants giving the same testimony as the other.—*VAVASSEUR v. VAVASSEUR* (1909), 25 T. L. R. 250.

Annotation:—*Mentd.* *Re Innes, Innes v. Innes*, [1910] 1 Ch. 188.

legatee cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the exor.'s

books giving credit to such next of kin, for portions of such deceased legatee's share:—*Held*: such entries were evidence of the relationship of

debtor & creditor between such exor. & next of kin.—*Re KIRKPATRICK, KIRKPATRICK v. STEVENSON* (1883), 10 P. R. 4.—CAN.

Sect. 5.—Judgment or order for administration:
Sub-sect. 3, H. (d) & (e), & I.]

8252. ——— Claim by debtor of release of debt.]—When the only evidence in support of a claim against a dead man is the uncorroborated evidence of the debtor, it has to be examined with scrupulous care (SARGANT, J.).—*Re GOFF, FEATHERSTONEHAUGH v. MURPHY* (1914), 111 L. T. 34; 58 Sol. Jo. 535.

(c) *Interest on Claims.*

See R. S. C., Ord. 55, rr. 62–64, & generally, MONEY & MONEY-LENDING.

Interest or legacies.]—*See Part IV., Sect. 5, sub-sect. 5, ante.*

I. Payment out of Court.

See, generally, PRACTICE.

Provision for legacy duty—Before legacies paid.]
—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 74, No. 495; p. 128, No. 947.

8253. Provision for indemnifying representative—On covenants in lease—Whether made before distribution.]—*Re SANFORD'S TRUST, BENNETT v. LYTON*, No. 8301, *post*.

8254. ———.]—Testator was the original lessee of certain leasehold property. In a suit to administer the estate the usual advertisement for creditors was made, but the landlord made no claim in respect of any breaches of the covenants. Subsequently he gave notice to the exors. of such claim. The ct. refused to distribute the estate without an inquiry in reference thereto, & making a provision for the indemnity of the exors.—*HUGHES v. YOUNG* (1864), 4 New Rep. 17.

Annotation:—Mentd. Re Hughes's Settlement. Trusts (1865), 2 Hem. & M. 695.

See, further, Part V., Sect. 7, ante.

8255. Notice to personal representatives of plaintiffs—Of suit revived after hundred years—By creditor seeking payment under decree then made—Whether notice dispensed with.]—*MICKLETHWAITE v. VAVASOUR* (1893), 9 T. L. R. 376; 37 Sol. Jo. 386.

8256. For costs of defence—Of issue directed to be tried—Defendants joined by order of court.]—Persons, who were found by the master to be the next of kin of intestate, & were named by the ct. to be defts. in an issue directed to try the rights of other persons, who claimed also to be next of kin, were allowed a sum of £500 [for costs] out of the estate of the intestate, on giving security to account for it.—*GREGG v. TAYLOR* (1828), 4 Russ. 279; 38 E. R. 810; *subsequent proceedings*, 5 Russ. 19.

Annotations:—Consd. Johnston v. Todd (1841), 3 Beav. 218. *Mentd. Coombs v. Brookes* (1849), 13 Jur. 784.

8257. ——— Of successful party—Though appeal pending.]—The Crown takes possession of intestate's estate & certain parties succeed in establishing their claim to it, & successfully defend a suit by another claimant. The Crown then appeals upon the whole case to the House of Lords, & the decree having directed taxation & payment of costs out of the fund, which, subject to such payment, was to be carried over to other suits in the same matter, the successful claimants move for payment of such costs pending the appeal. The A.-G. also moves that the fund may not be parted

with till the appeal is heard:—*Held*: inasmuch as this was a case of great doubt & difficulty, there being also a new question decided for the first time by this ct., these were sufficiently special circumstances to warrant the retention of the fund until the appeal was heard, but the costs of successfully defending the suit by another claimant must be paid at once.—*BAUER v. MITFORD* (1860), 3 L. T. 575; 9 W. R. 135; *previous proceedings* (1859), 29 L. J. Ch. 268.

See, generally, Sect. 8, post.

8258. Payment to persons entitled—Residuary legatee—Where liable to account.]—Where the ct. can be satisfied, that the fund is clear, an allowance for maintenance will be allowed, pending the account, to the residuary legatee; not, if an accounting party.—*WARTER v. ———* (1806), 13 Ves. 92; 33 E. R. 229, L. C.

Annotation:—Reid. Digby v. Boycott (1845), 4 Haro. 444.

8259. ——— Temporary abatement of legacies—To secure creditor's claims.]—(1) If in a suit to administer testator's assets, it clearly appears that a surplus will remain after discharging all his debts & liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the ct. will by anticipation direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors.

(2) Principles on which such anticipated payments are to be applied in reduction of the claims of the legatees.—*THOMAS v. MONTGOMERY* (1830), 1 Russ. & M. 729; 39 E. R. 279, L. C.

8260. ——— Married woman abroad—Payment to bankers abroad—On security given.]—(1) In the administration of the estate of testator, who had, by covenant, granted two life annuities, they were directed to be provided for by the purchase of government annuities.

(2) A legacy given to a married woman to be settled on her in Italy, was ordered to be paid to a banker in Italy, on his giving security that it should be settled, according to the law of Italy, on the wife, for her separate use.—*BROWN v. TATNALL* (1837), 6 L. J. Ch. 371.

8261. ——— On security to refund—Special circumstances.]—A. went abroad in Sept. 1830. His father died in Sept. 1833. About twenty months previous to that time A. was heard of for the last time.

The ct. ordered a share of the father's residue bequeathed to A. to be transferred to his brother, as the sole next of kin of the father living at the father's death, on the brother giving security to refund it, in case A. should be living or should have died after his father.—*DOWLEY v. WINFIELD* (1844), 14 Sim. 277; 8 Jur. 972; 60 E. R. 365.

Annotations:—Reid. Re Benham's Trust (1867), L. R. 4 Eq. 416; *Re Phené's Trusts* (1870), 5 Ch. App. 139.

8262. ——— Under deed of assignment—Whether separate suit necessary.]—An administration suit having been instituted by the several persons beneficially interested in testator's personal estate one of whom was a married woman, against the widow of testator, who was entitled to a life interest therein, & the exor., the ct. on a petition presented in the cause by the same parties, the widow & exor. consenting thereto, & the widow having previously executed an assignment to the married woman & her husband, of her life interest in such part of the personal estate as would be

payable on her death to the married woman or her husband in her right, declined to order any part of the funds to be paid to the married woman or her husband in her right.

Semble: in such a case a bill is necessary to enable the parties to carry the deed of assignment into effect.—*STORY v. TONGE* (1844), 7 Beav. 91; 13 L. J. Ch. 191; 3 L. T. O. S. 71; 8 Jur. 566; 49 E. R. 997.

Annotations:—*Reid. Hall v. Hugonin* (1846), 10 Jur. 940. *Mentd. Whittle v. Henning* (1848), 11 Beav. 222.

8263. — — — — —.]—A fund of small amount was paid out to persons entitled, subject to the contingency of a female of advanced age having after born children, upon the undertaking of each party to refund in case of that event happening.—*BROWN v. PRINGLE* (1845), 4 Hare, 124; 14 L. J. Ch. 121; 8 Jur. 1113; 67 E. R. 587.

8264. — — — *Creditors—Funds insufficient—Abatement.*]—*BEAR v. SMITH*, No. 9010, *post*.

8265. — — — *On master's findings—Without referring back to master.*]—The master having found that certain persons were entitled to testator's personal estate, which consisted of mtges. the ct., without referring it back to the master for a division, directed that the money, when received from the mtges. should be divided among the parties declared to be entitled.—*BULLIVANT v. BELLAIRS* (1851), 20 L. J. Ch. 549; 18 L. T. O. S. 24.

8266. — — — *Assignee of married woman—Not party to suit.*]—A married woman assigned her share in a reversionary fund, bequeathed to her for separate use, & went to reside with her husband out of her jurisdiction. A suit was afterwards instituted for the administration of the estate, & the fund paid into ct. On the fund coming into possession:—*Held*: the share could be paid to the assignee, though the married woman & her husband, being out of the jurisdiction, were not parties to the suit.—*HALL v. LYS* (1853), 2 Eq. Rep. 42.

8267. — — — *Widow of convicted felon—Whether consent of Crown necessary.*]—Where money stands to the separate account of a married woman under a will, her husband having been convicted of felony prior to the death of testatrix, an order was made for its payment out of ct. without the consent of the Crown.—*ATLEE v. HOOK* (1854), 2 Eq. Rep. 638; 23 L. J. Ch. 776; 2 W. R. 511.

See, also, DESCENT & DISTRIBUTION, Vol. XVIII., p. 33, Nos. 326–328, & Forfeiture Act, 1870 (c. 23).

8268. — — — *Infants attaining majority.*]—Sixteen years after a decree for the administration of testator's estate under which the amount in the hands of the exors. had been paid into Ct., & the decree no further prosecuted, the residuary legatees, being infants, on attaining twenty-one petitioned to have the fund paid out to them, according to the trusts of the will; & upon the affidavit of the exors. that there were no outstanding demands upon the estate, the ct. ordered the amount to be paid to petitioners.—*HARRISON v. LANE* (1854), 2 Sm. & Gr. 249; 22 L. T. O. S. 328; 2 W. R. 310; 65 E. R. 386.

8269. — — — *Personal representative—Transfer of sutor's fund.*]—On the death of an usher of the ct. in 1702, a large sum, for which as usher he was accountable, was due from him; in a suit instituted for the administration of his estate more than sufficient was realised to liquidate the amount & all sums actually claimed were paid; in 1719 the ct. ordered a fund sufficient to answer the unclaimed sums to be invested & directed the interest to be paid to the representative of the deceased usher until further order; similar orders for payment of the interest were from time to time down to 1833 made on the application of the existing representative of the usher, & in 1854 a petition was presented for the same purpose by the then representative. On a full discussion of the case & on the petition being amended, an order was made for the transfer to him of the principal fund.—*TREVOR v. BLUCKE* (1854), 6 De G. M. & G. 170; 26 L. T. O. S. 97; 1 Jur. N. S. 1077; 43 E. R. 1196, L. C. & L. JJ.

8270. — — — *Of residuary legatee—Whether made.*]—In an administration suit the ct. refused to allow the share of A., a deceased residuary legatee, to be paid out to her sole exor., for immediate distribution amongst the legatees named in her will, but directed such share to be carried to the separate account of A., with liberty to apply at chambers.—*GOULDSMITH v. LUNTLEY* (1875), 32 L. T. 535.

8271. — — — *Under Fatal Accidents Act, 1846 (c. 93)—Power of court to settle distribution.*]—A sum of money was received from a railway co. by way of compensation by the exors. of a person whose death had resulted from injuries received in an accident on the railway, no action having been brought under above Act. The exors. brought an action in the Ch. Div. to which all the relatives of deceased referred to in above Act, sect. 2, were parties asking for a declaration as to the persons entitled to the money:—*Held*: the ct. could distribute the fund amongst such of the relatives of deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under the Act.—*BULMER v. BULMER* (1883), 25 Ch. D. 409; 53 L. J. Ch. 402; 32 W. R. 380.

8272. — — — *Under foreign law—Father of infant—Circumstances justifying payments.*]—Where infants who were French subjects & domiciled in France had become absolutely entitled to a fund in ct., & it appeared that by the law of France their father was their legal guardian was entitled to receive & give legal discharges for all moneys coming to them during minority:—*Held*: the ct. was not bound to pay out the fund to the father as of right, but evidence ought to be adduced showing that the fund would be applied for the benefit of the infants.—*Re CHATARD'S SETTLEMENT*, [1899] 1 Ch. 712; 68 L. J. Ch. 350; 80 L. T. 645; 47 W. R. 515.

Annotation:—*Distd. Thiery v. Chalmers, Guthrie*, [1900] 1 Ch. 80.

8273. — — — *Representative as next of kin—Liable for loss by agent—Replacement of amount lost condition precedent.*]—Deft., P., was administratrix

PART VIII. SECT. 5, SUB-SECT. 3.—1.

8264 1. *Payment to persons entitled—Creditors—Funds insufficient—Abatement.*]—A decree for administration was made, at the suit of a creditor, & the master's report found that he held an amount of proceeds of the

estate, less than the amount claimed by the creditor. Upon motion by the creditor for payment thereof to him:—*Held*: as no other creditor had proved & as extrix. was not entitled to her costs the creditor was entitled to the order, upon the terms of its concluding the case.—*MARTIN v. KEANE* (1879),

5 V. L. R. 290.—AUS.

1. — — — — —.]—A legatee gave to a creditor an order on the exors. for payment of her share of the estate & certain payments were made on account. The exors. denied having funds in their hands sufficient for the

*Sect. 5.—Judgment or order for administration:
Sub-sect. 3, I. & J.; sub-sect. 4, A. & B.]*

of H., & as one of the next of kin of intestate was entitled, after payment of debts, to one moiety of the residue, which amounted to £20,000. In 1869, before the death of H., P. settled all her property by a covenant to settle after acquired property. The money was misappropriated by the solrs. of P., & in an action to administer the estate of H. the chief clerk found that P. must replace the balance of the money so lost, part of it having been recovered. Pltf., S. was entitled to the other moiety of the residue. She, in 1879, had settled her share by a covenant to settle after acquired property. A summons taken out by P., to vary the chief clerk's certificate was dismissed with costs. On the same summons:—*Held*: P., as one of the next of kin of H., could take nothing out of the personal estate until the amount which she was liable as administratrix to replace had been made good by her.—*Re HERVEY, SHORT v. PARRATT* (1889), 61 L. T. 429.

— *Infants.*—*See, generally, INFANTS.*

8274. Payment of executor not in jurisdiction—For distribution among legatees abroad—Whether made.—*WEATHERBY v. ST. GIORGIO*, No. 7930, *ante*.

8275. ————.—*Testator, domiciled in New York, died in England leaving assets & creditors both in England & America. Administration proceedings were taken in both countries. In the English administration after payment of all creditors, there was a surplus available for beneficiaries. In the American proceedings the assets were exhausted leaving unpaid certain creditors whose debts were statute barred by the law of England, but not so by the law of New York. The English Ct. gave the American creditors a limited time in which to prove their debts, but they did not do so. Upon a claim by the American administrator to have the surplus English assets transferred to him for distribution among the American creditors:—Held: the English Ct., having exercised its discretion, was not bound to order the surplus assets to be transferred to America.*—*Re LORILLARD, GRIFFITHS v. CATFORTH*, [1922] 2 Ch. 638; 92 L. J. Ch. 148; 127 L. T. 613; 38 T. L. R. 666, C. A.

8276. ————.—*Payment direct to legatees—To save costs.*—Where an estate sold under a decree is reported by the master insufficient to pay the legacies charged on it, & the amount of those legacies is found, the ct., upon petition, will alter the decree, & order the purchase-money to be paid directly to the legatees, in order to save the costs of payment into ct. in pursuance of the decree.—*ZIMMER v. ZIMMER* (1845), 5 L. T. O. S. 388.

8277. Amounts less than £10—Whether paid direct to persons entitled.—The ct. will not order payment out of ct. to the solr. of a legatee, of any sum exceeding £10.—*HAWKINS v. DOD* (1841), 1 Hare, 146; 11 L. J. Ch. 97; 5 Jur. 1130; 66 E. R. 983.

8278. ————.—*BEAR v. SMITH*, No. 9010, *post*.

8279. ————.—*Re BELL, BELL v. BELL*, [1894] W. N. 9.

payment of the order & properly applicable thereto, but on taking the accounts in ct. it appeared that since

1860 the exors. had had sufficient funds for that purpose. On a petition filed by the creditor, the ct., under these

8280. Payment to defendant representative—Before decree in creditor's action—On arrangement with creditors.—*Ex p. BURDETT, BURDETT v. RAWSON* (1845), 5 L. T. O. S. 142; 0 Jur. 341.

J. Provisions for Annuities.

See, generally, RENT CHARGES & ANNUITIES.

8281. How provided for—Setting aside fund.—One by will gives an annuity out of his personal estate; if the exor. has misbehaved himself, the ct. will order part of the personal estate to be set aside to secure this annuity.—*BATTEN v. EARNLEY* (1723), 2 P. Wms. 163; 2 Eq. Cas. Abr. 456; 24 E. R. 683.

Annotation:—Mentd. Re Hiscoe, Hiscoe v. Waite (1902), 71 L. J. Ch. 347.

8282. ————.—*Purchase of government annuities.*—*BROWN v. TATNALL*, No. 8260, *ante*.

8283. ————.—*Declaration of lien on real estate.*—Testator, previous to the marriage of his daughter, gave to the trustee of her settlement a bond, whereby he bound himself, his heirs, exors. & administrators, in the sum of £3,000 the condition of the bond to become void upon payment of an annuity of £200 for the benefit of his daughter. Testator appointed another daughter his sole devisee. The annuity was duly paid. Upon bill by the daughter alleging that there were grounds for believing that the real estate of testator was being wasted, & praying to have the annuity secured:—*Held*: the daughter was entitled to a decree declaring that she had a lien on testator's real estate to the amount of the value of the annuity in the event of its falling into arrear, but that she must pay the costs of all parties to the cause.—*NORMAN v. JOHNSON* (1860), 29 Beav. 77; 2 L. T. 759; 0 Jur. N. S. 905; 8 W. R. 300; 54 E. R. 555.

Annotations:—Folld. Burrell v. Delevante (1862), 30 Beav. 550. *Refd. Woolaston v. Woolaston* (1877), 37 L. T. 631. *Mentd. Fane v. Fane* (1879), 13 Ch. D. 228; *Blackett v. Blackett* (1884), 51 L. T. 427.

8284. ————.—*Testator gave his real & personal estate to trustees, in trust to convert his personal estate, except his leaseholds, & out of the produce "to appropriate a sufficient portion" to pay an annuity which he had agreed to pay on the marriage of his daughter. He gave his trustees a discretionary power to sell his real & leasehold estates, & they were to hold the produce in the manner directed concerning the money arising from his residuary personal estate. The debts exhausted the personal estate, but the realty & leaseholds were sufficient to pay the annuity. A bill having been filed, before the annuity was in arrear, to have a fund set apart to secure it:—Held: the trustees were not bound to sell, & the ct. only made a declaration that the annuity constituted a charge on the whole estate, & made plffs. pay the costs up to the hearing.*—*BURRELL v. DELEVANTE* (1862), 30 Beav. 550; 31 L. J. Ch. 365; 8 Jur. N. S. 204; 10 W. R. 362; 54 E. R. 1003.

Annotations:—Consd. Woolaston v. Woolaston (1877), 37 L. T. 631; *Fane v. Fane* (1879), 13 Ch. D. 228.

8285. Making up deficiency — Procedure.—Testator having directed an annuity to be paid out of his personal estate, a sum of 5 per cent.

circumstances, ordered the amount in ct. to be paid out to him.—*SOVEREIGN v. FREEMAN* (1878), 25 Gr. 525.—*CAN.*

stock was, in the course of the cause, ordered to be set apart to answer the annuity.

This fund having become insufficient for the purpose, by the conversion of the 5 per cents. into 4 per cents. the deficiency was directed to be supplied out of another fund, to which other persons interested in the residue had been declared to be entitled.—*DAVIES v. WATTIER* (1823), 1 Sim. & St. 463; 57 E. R. 184.

Annotations:—*Distd.* *Kendall v. Russell* (1830), 3 Sim. 424; *Innes v. Mitchell* (1846), 1 Ph. 710. *Refd.* *Stelfox v. Sugden* (1859), John. 234. *Mentd.* *Arundell v. Arundell* (1833), Coop. temp. Brough. 139.

8286. ———.]—*ATKINSON v. BOYS* (1845), 5 L. T. O. S. 345.

SUB-SECT. 4.—EFFECT OF JUDGMENT OR ORDER.

A. In General.

See, generally, JUDGMENTS.

8287. Operation in favour of creditors.]—*YORK v. WHITE* (1846), 7 L. T. O. S. 108; 10 Jur. 168.

8288. ———.]—(1) A bill filed by one creditor on behalf of himself & the others will prevent the Stat. Limitation from running against any of the creditors who come in under the decree.

(2) A., the widow & administratrix of B., continued B.'s trade after his decease. B. at his death was indebted to C. on balance of account. A. continued to receive goods from, & to make payments to C. as B. had done, & she was charged in account by C. with the debt. The payments made by her to C. exceeded the debt: but a balance was ultimately due to C.:—*Held*: B.'s debt was discharged by A.'s payments, & the ultimate balance could not be proved as a debt against B.'s estate.

I entertain no doubt that every creditor has after filing of the bill an inchoate interest in the suit (*HART, V.-C.*).—*STERNDALÉ v. HANKINSON* (1827), 1 Sim. 393; 57 E. R. 625.

Annotations:—*As to* (1) *Consd.* *Re Greaves, Bray v. Toffield* (1881), 18 Ch. D. 551. *Refd.* *Borrington v. Evans* (1835), 1 Y. & C. Ex. 434; *St. John v. Boughton* (1838), 9 Sim. 219; *Watson v. Birch* (1847), 15 Sim. 523; *Bennett v. Bernard* (1848), 11 L. T. O. S. 375; *Manby v. Manby* (1876), 3 Ch. D. 101. *As to* (2) *Consd.* *Woodgate v. Field* (1842), 2 Hare, 211. *Refd.* *Thomas v. Griffith* (1860), 2 De G. F. & J. 555.

8289. ——— *Time from which Statute of Limitations runs.]*—An ordinary administration decree in a legatee's suit operates as a judgment in favour of creditors; so that time under the Stat. Limitations begins to run from the date of decree.—*FINCH v. FINCH* (1876), 45 L. J. Ch. 816; 35 L. T. 235.

8290. ——— & of estate—*To prevent Statute of Limitations running against set-off.]*—*Re BALLARD, LOVELL v. FORESTER*, [1890] W. N. 64.

See, further, LIMITATION OF ACTIONS.

PART VIII. SECT. 5, SUB-SECT. 4.—A.

m. Power of court to sanction compromise of administration action—After judgment—Where infants interested.]—*SCHOLES v. DOUGLAS*, [1911] S. R. Q. 183.—*AUS.*

PART VIII. SECT. 5, SUB-SECT. 4.—B.

8291. Whether on parties only.]—The ct. ordered the sale, for payment of debts of deceased of a portion of lands

which deceased held in common with J. Prior to the sale the devisees of J. had recovered judgment against the devisees of the interest of deceased & recorded the same to bind lands:—*Held*: the judgment so recorded was not binding as against pltf. who purchased the land sold under order of the ct., the subject of the sale being the interest of deceased.—*PHINNEY v. CLARKE* (1895), 27 N. S. R. (15 R. & G.) 384.—*CAN.*

8291. Rights of creditors—How affected.]—*HARRISON v. KIRK*, No. 8222, *ante*.

—— *To charge on real estate—Under Administration of Estates Act, 1833, c. 104.]*—*See* Part IV., Sect. 2, sub-sect. 1, D., *ante*.

B. On Whom Binding.

8292. Whether on parties only.]—*ANON.* (1677), 2 Cas. in Ch. 232; 22 E. R. 923, L. C.

8293. ———.]—*BLOUNT v. WINTERTON* (EARL) (1785), Rom. 169.

Annotation:—*Refd.* *Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31.

8294. ———.]—Legatees & annuitants are bound by the proceedings in a suit for administration between the exors. & residuary legatees & devisees; although there may be a question as to the debts being primarily charged on the real estate, & which may incidentally affect them. Therefore, after decree in such a suit, legatees cannot sustain an administration suit against the exors.—*JENNINGS v. PATERSON* (1851), 15 Beav. 28; 18 L. T. O. S. 82; 51 E. R. 446.

8295. ——— *Effect of service of decree.]*—Testator invested certain moneys in the name of his sister, & made a will giving her an annuity, & appointing pltf. his residuary legatees. Pltf. then obtained the ordinary administration decree against the exors., served it on testator's sister, & moved for an injunction to restrain her from dealing with the fund invested in her name by testator, which she claimed as her own:—*Held*: the question between testator's estate & his sister could not be tried in this way, but required the institution of a distinct suit.—*WALKER v. SELIGMANN* (1871), L. R. 12 Eq. 152; 40 L. J. Ch. 601; 25 L. T. 294.

Annotation:—*Apld.* *Re Parkes, Simpson v. Parkes* (1892), 66 L. T. 151.

8296. ———.]—*MAY v. NEWTON*, No. 7921, *ante*.

8297. ——— *Whether service necessary—Under R. S. C., Ord. 16, r. 40.]*—D. the residuary legatee of Y. brought her action for administration of Y.'s estate against R. the surviving exor. Y. had been the surviving extrix. of her husband. V., one of the residuary legatees of the husband, shortly afterwards, brought her action against R., as sole debt., for administration of the husband's estate, alleging breaches of trust by Y. & asking administration of her estate if R. as her representative, did not admit assets to pay what should be found due from her estate to the husband's estate. On Feb. 28, 1885, V. moved for judgment. There was no evidence before the ct. that Y. was indebted to her husband's estate, or that she had been guilty of wilful neglect & default. R. by his counsel admitted that she was so indebted, & he submitted to a judgment directing an account of personal estate of the husband which she had received, or but for her wilful neglect or default might have

8292 ii. ———.]—Legatees entitled to a share of the residue of an estate are not bound by the accounts & proceedings in an administration action instituted by other residuary legatees in which they have not been added as parties, & of which they have received no notice.—*UFFNER v. LEWIS, BOYS' HOME v. LEWIS* (1903), 20 C. L. T. 296; 27 A. R. 242.—*CAN.*

8292 iii. ———.]—*HARDMAN v. LERCH* (1874), 8 L. R. Eq. 400.—*IR.*

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received, with an inquiry as to balances in her hands, & directing administration R. had received. It appeared that, from information R. had received, he felt sure that Y. would be found a debtor to her husband's estate, & that wilful default would be established against her, & that it was not advisable to incur the expense of contesting these points at the hearing. D., on June 26, 1885, moved under above rule, to discharge or vary the judgment of Feb. 1885. This motion was refused on the ground that D. had not been served with the judgment. D. appealed from this refusal & also applied for leave to appeal from the judgment:—**Held:** (1) leave could not be given to a residuary legatee to appeal from a decree made against the exor. at the suit of a creditor, as the exor. completely represented the estate for the purposes of such a suit, & the residuary legatee could not be made a party to a suit, & the case was quite different from one where leave to appeal was applied for by a person, who, though not according to the present practice a necessary party to the suit, would have been a proper party to it; (2) the application of June, 1885, to vary the judgment was not supported by above rule, the case not falling within that rule, which only applied to cases where service of an order was necessary in order to make it binding, whereas here the order was binding without service, & D. was not a proper person to be served; (3) although R. might have acted injudiciously in submitting in Feb. 1885, to an order which went further than any order that could have been made adversely on the materials before the ct., the order could not be discharged unless the ct. was satisfied that R. had submitted to it fraudulently in collusion with V., & in this case the ct. was satisfied that R. had acted *bond fide*.—*Re YOUNGS, DOGGETT v. REVETT, Re YOUNGS, VOLLUM v. REVETT* (1885), 30 Ch. D. 421; 53 L. T. 682; 33 W. R. 880. C. A.

Annotation:—Generally, Mentd. The Millwall, [1905] P. 155.

8298. Breach of trust discovered after decree—Whether supplemental relief granted—Breach not discoverable at date of decree.]—Under a decree in a legatee's suit to take the usual accounts, A. went in & claimed the residue, which the master found him entitled to; but the residue was not then ascertained & no order was made in respect of it:—**Held:** A. was not precluded from afterwards asking relief against the exor. in respect of an alleged breach of trust, in a suit of his own, he not having, in the first suit, been in a situation to investigate the accounts of the exor, or to claim the relief which he asked in the second.—*GUIDICI v. KINTON* (1843), 6 Beav. 517; 49 E. R. 926.

8299. ———.]—A common administration decree having been made & an infant interested in the estate some years afterwards having presented a petition by her next friend for leave to file a supplemental bill, with the object of charging a trustee of the estate with a breach of trust, which she alleged had been discovered since the date of the decree, the ct. granted leave accordingly, without requiring an affidavit by the next friend that the alleged breach of trust could not with reasonable diligence have been discovered at the date of the decree.

PART VIII. SECT. 5, SUB-SECT. 4.—C.

8300 1. Protection against claims on estate.]—Ct. of Equity have established in a series of cases, that exors. will be

protected in distributing assets under the direction of the ct. if they fairly give it all the information they p—
v. HULL (1876), 2 V. L. R.

18.—AUS.

n. *Whether powers of representative affected.]—LONERGAN v. HOBAN*, [1896] 11. R. 401.—IR.

Semble: in such a case, the object being to obtain an addition to a decree already made, the proper mode of applying for leave is by petition.—*Re HOGHTON, HOGHTON v. FIDDEY* (1874), L. R. 18 Eq. 573; 43 L. J. Ch. 758; 22 W. R. 854.

C. On Position of Representative.

8300. Protection against claims on estate.]—An estate was administered under the ct., & all claims being provided for, the devisee was let into possession. A further claim was afterwards made against the estate:—**Held:** the trustees of the will were not justified, of their own authority, in taking possession to provide for it.

Where the ct. administers the assets, the trustees are protected against all claims on testator's estate, but legatees still remain liable in respect of their beneficial interest.—*UNDERWOOD v. HATTON* (1842), 5 Beav. 36; 49 E. R. 490.

8301. ———.]—(1) Exors. bringing facts plainly before the ct. & distributing the assets under its direction are absolutely protected against any future claims; & the only remedy of a creditor, on covenant or otherwise, is against the legatees.

(2) Where part of the estate had consisted of leaseholds held at a profit rent, the estate ordered to be distributed without retaining assets to indemnify the exors. against liability on the covenants.—*Re SANFORD'S TRUST, BENNETT v. LYTTON* (1880), 1 John. & H. 155; 70 E. R. 1010.

Annotations:—As to (1) Reid. Williams v. Headland (1864), 4 Giff. 505. *As to (2) Foll. Ross v. Tatham* (1869), 38 L. J. Ch. 577.

8302. ——— For property held by testator as executor.]—A decree in an administration suit practically indemnifies exors. against any claim in respect of property of which their testator was the surviving trustee & exor.

A bill was filed for the administration of the estate of L., who was the surviving trustee & exor. of the will of C. A decree was made, & subsequently a claim was sent in by persons beneficially interested under the will of C. On motion by the exor. for leave to take proceedings to administer the estate of C.:—**Held:** the exors. were practically indemnified by the decree, & the motion was dismissed.—*LOWNDES v. WILLIAMS* (1871), 24 L. T. 465.

8303. Power to deal with assets—How restricted—Control by court.]—The principle acted upon by former Chancellors is that after a decree, an exor. cannot deal with the assets for the purpose of investment without the leave of the ct. That permission, will, only on special ground be extended to the laying out of money on mtge. (*LORD ELDON, C.*)—*WIDDOWSON v. DUCK* (1817), 2 Mer. 494; 35 E. R. 1029, L. C.

8304. ———.]—The effect of an order in an administration suit, that a personal representative shall get in the outstanding personal estate, & within a certain date, pay the proceeds into the Bank to the credit of the cause, is to earmark the outstanding personal estate, & to disable the personal representative from dealing with such proceeds otherwise than by paying them as directed.—*HARRIES v. REES* (1867), 37 L. J. Ch. 102; 17 L. T. 418; 16 W. R. 91, L. JJ.

Annotation:—Mentd. Re Blundell, Blundell v. Blundell (1888), 40 Ch. D. 370.

8305. — — —.]—After an administration decree has been made all powers of management of the estate which may be vested in trustees are subject to the control of the ct. ; & the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees. Trustees having power to invest certain moneys belonging to testator's estate at their discretion, & having also power to continue or change securities from time to time as to the majority should seem meet, applied to the ct. in a suit for the administration of the trust estate for liberty to invest the moneys in & to convert securities into American funds or railway stocks. Infants were interested in the trust estate:—*Held*: if the trustees had the discretion they claimed, which was doubtful, the ct. ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed.—*BETHELL v. ABRAHAM* (1873), L. R. 17 Eq. 24 ; 43 L. J. Ch. 180 ; 29 L. T. 715 ; 22 W. R. 179.

Annotation:—*Reid. Tempest v. Camoys* (1882), 21 Ch. D. 571.

8306. — — — Where no injunction granted—Nor receiver appointed.]—A decree was made in a creditor's suit for the administration of the personal estate of testator, but no receiver was appointed nor any injunction granted to restrain the extrix. from dealing with the assets. More than two years after the decree, & nearly three years after the death of testator, his extrix. who was also his sole legatee, opened an account with a bank, headed "E. G. extrix. of B. G." In the following year, the account being overdrawn, she deposited with the bank a picture belonging to testator's estate to secure the balance then due & further advances. It appeared that the bankers did not know of the suit, & had not notice of any breach of duty on the part of the extrix.:—*Held*: the bank had a valid security on the picture, for the doctrine of *lis pendens* had no application, a decree for administration without any injunction or appointment of a receiver not taking away the power of the extrix. to deal with the assets.—*BERRY v. GIBBONS* (1873), 8 Ch. App. 747 ; 29 L. T. 88 ; 38 J. P. 4 ; 21 W. R. 754, L. J.

Annotations:—*Reid. Price v. Price* (1887), 35 Ch. D. 297 ; *Wigram v. Buckley*, [1894] 3 Ch. 483. *Mentd. Re Morgan, Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93.

8307. Power to bind estate—By acknowledgment of statute barred debt.—After an administration decree, an exor. has no right, as against the parties interested in the estate, to give an acknowledgment to take a debt barred by the Stat. Limitations out of its operation.—*PHILLIPS v. BEAL* (No. 2) (1863), 32 Beav. 26 ; 55 E. R. 10.

Annotation:—*Reid. Re Fleetwood & District Electric Light & Power Syndicate*, [1915] 1 Ch. 486.

8308. Power to bind estate—By admissions.—Earls A., B. & C., being successive tenants in tail of property held under an inalienable Parliamentary title, & B. having, after the death of A., entered into possession of the entailed estates, & together with them, of certain leaseholds formerly in the possession of A., the exors. of A. brought an action of ejectment against B. to recover possession of the leaseholds as part of A.'s estate. B. having died before trial of the action, another action was

brought against C., the successor in title. C., who was also exor. of B., compromised the action on terms of giving judgment & buying the leaseholds at a certain price, with a further stipulation that £4,000 should be allowed as a debt from B.'s estate in respect of rents received by B. Before the compromise a creditor's suit was instituted & a decree made for the administration of B.'s estate, which was insolvent. On a summons by A.'s exors. to prove against B.'s estate for the amount of the rents actually received by him:—*Held*: the judgment given in the action against C. was not evidence of wrongful possession by B., which could serve as a foundation for the claim & the admission by the exor. as to mesne profits in the compromise was inoperative, being made after the decree.—*TALBOT v. SHREWSBURY (EARL)* (1872), L. R. 14 Eq. 503 ; 20 W. R. 854.

8309. Power to prefer creditors.—Exor. may pay debts of a higher nature after a decree *quod computet*, not after final.—*MASON v. WILLIAMS* (1699), 2 Salk. 507 ; 91 E. R. 433, L. C.

8310. — — — Order for account only under R. S. C., Ord. 45, r. 1.]—An order in an administration action under Ord. 45, r. 1 merely for an account by an extrix., & reserving further consideration, does not affect the right of creditors to sue her, or her right to prefer creditors. Therefore where an extrix. who, after such an order had been made against her was appointed trustee of a settlement, & entitled as such trustee to a debt due from her testator's estate:—*Held*: she might apply the balance of testator's estate in part satisfaction of such debt, though other debts were unpaid.

Before the order [to account] was made she clearly could have paid the trustee the whole of the assets, for she would have had the right to prefer one creditor to another. Did the making of that order make any difference? I do not think it did, for I find no decree for administration. If there had been such a decree, it would have put an end to her power of preference (*NORTH, J.*).—*Re BARRETT, WHITAKER v. BARRETT* (1889), 43 Ch. D. 70 ; 59 L. J. Ch. 218 ; 38 W. R. 59.

Annotation:—*Reid. Re Harris, Davis v. Harris*, [1914] 2 Ch. 395.

8311. Power to alter relative rights of creditors—By refusing to plead Statute of Limitations.—After a decree in a suit for the administration of assets, an exor. is not at liberty to do any act which affects the relative rights of creditors [in this case refusal to plead above statute].—*SHEWEN v. VANDERHORST* (1830), 2 Russ. & M. 75 ; 39 E. R. 323 ; *on appeal* (1831), 1 Russ. & M. 347, L. C.

Annotations:—*Folld. Phillips v. Beal* (No. 2) (1863), 32 Beav. 26. *Reid. Briggs v. Wilson* (1853), 5 De G. M. & G. 12 ; *Fuller v. Redman* (No. 2) (1850), 26 Beav. 614 ; *Trevor v. Hutchins*, [1896] 1 Ch. 844 ; *Re Fleetwood & District Electric Light & Power Syndicate*, [1915] 1 Ch. 486. *Mentd. Tomlin v. Tomlin* (1841), 1 Hare, 236 ; *Beeching v. Morphey* (1850), 8 Hare, 129.

D. As Stay of Proceedings.

See, generally, PRACTICE.

8312. General rule.—(1) Principles upon which the ct. acts in restraining proceedings at law, after a decree, with reference to the priority of the decree or judgment at law & other circumstances.

PART VIII. SECT. 5, SUB-SECT. 4.—D.

o. Action pending at time decree made.—An administration order was granted by a local master while a suit

was pending for the construction of the will of testator, in which administration was asked, & in which the exors. were charged with misconduct, & before a year had elapsed since the

death of testator. Upon appeal, proceedings before the master were stayed.—*HEYWOOD v. SIVEWRIGHT* (1879), 8 P. R. 79.—*CAN.*

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(2) Motion to restrain a creditor, after a decree from issuing execution on a judgment obtained from decree *de bonis testatoris, et si non de bonis propriis*, as to costs refused under the circumstances.

It has been argued that in cases of this nature the ct. pays no regard to the question, whether the decree or judgment has priority in time, but considers only the quality of the judgment, & that, the judgment in this case being a judgment to recover *de bonis testatoris*, the exors. are, as of course, entitled to restrain the judgment creditors from issuing execution. I do not accede to that argument. The jurisdiction in these cases was first established upon questions which arose between judgments at law, & decrees in equity, for payment of ascertained debts out of the assets. It was determined that such decrees & such judgments were, in the administration of legal assets, to be considered of equal value, & that the one which was prior in time, whether decree or judgment, should be first satisfied out of the assets. In the beginning, a judgment, obtained after a decree *quod computet*, not being a decree for pay-

the jurisdiction on this, that, the ct. having decreed an account of debts & assets, & ordered payment in a due course of administration, must be considered to have taken the fund into its own hands, & could not suffer its decree to be rendered nugatory by altering the course of administration, but ought to protect the exor. in obeying its decrees; & he, therefore, granted injunctions to restrain proceedings at law after a decree *quod computet*, & as it was the practice, in creditors' suits, for pltf. suing for himself & others to prove his own debt prior to the hearing, there was, perhaps, not much difficulty in considering a decree for the administration of assets, in such a suit, as in the nature of a judgment for all the creditors; but LORD THURLOW, acting on the principle to which he attributed the jurisdiction, gave the like authority to a decree *quod computet*, which was obtained in a suit instituted by the trustees under testator's will, & to which no creditor was a party (LANGDALE, M.R.).—LEE v. PARK (1836), 1 Keen, 714; 6 L. J. Ch. 93; 48 E. R. 482.

Annotations:—Generally, Rejd. Rouse v. Jones (1844), 1 Ph. 462; Ranken v. Harwood, Ranken v. Boulton (1846), 5 Hare, 215; Re Womersley, Etheridge v. Womersley (1885), 29 Ch. D. 557.

8313. Judgment obtained before decree—Whether execution stayed.]—LEE v. PARK, No. 8312, ante.

8314. ———.]—A creditor recovered judgment & sued out a writ of *fi. fa.* thereupon, in the lifetime of his debtor, & placed the writ in the hands of the sheriff on the day after debtor died. A decree was afterwards made in the suit of an equitable mtgee. of certain parts of the real & personal estate of debtor against his devisee & exor. for the sale of the mtged. property, & if the proceeds of such sale should be insufficient to satisfy pltf.'s debt, then for an account & application of the general personal & real estate of testator, in a due course of administration. After this decree the judgment creditor levied, under the *fi. fa.*, on goods left by debtor. The exor. thereupon moved for an injunction to restrain execution, which the ct. refused on two grounds: (a) because the decree for an account & administration of the

general estate was not absolute, but was conditional on the mtged. property proving insufficient to satisfy pltf.'s demand, & (b) because the judgment creditor acquired a right to the goods of debtor, by virtue of the writ of *fi. fa.*, from the teste of the writ, & therefore paramount to the right of the exor.—RANKEN v. HARWOOD, RANKEN v. BOULTON (1846), 5 Hare, 215; 2 Ph. 22; 1 Coop. temp. Cott. 293; 15 L. J. Ch. 446; 7 L. T. O. S. 467; 10 Jur. 791; 67 E. R. 892, L. C.

Annotation:—Rejd. Re Skiggs, Marriage v. Skiggs (1859), 4 De G. & J. 4.

8315. ———.]—Where a creditor of testator obtained judgment against the exor. *de bonis testatoris*, & a decree was immediately afterwards made in a creditor's suit:—**Held:** the exor. was not entitled to an injunction to stay execution on the judgment.—VINCENT v. GODSON (1850), 3 De G. & Sm. 717; 64 E. R. 675.

8315a. ———.]—A judgment creditor prosecuting an action upon his judgment against the exors. of his debtor after notice of decree in administration suit will be restrained, & must pay the costs of the exors. of proceedings in the action taken after such notice, which costs will be set off

at law.—BOSTON v. RICHARDSON (1855), 25 L. T. O. S. 104; 3 W. R. 432.

8316. ———.]—Creditor obtained a judgment against his debtor, who shortly afterwards died. The creditor then, having revived the judgment against the extrix., obtained a charging order *nisi* upon shares forming part of the estate of debtor. A decree for administration of the estate was made on the same day as the order *nisi*, but at a later hour. Pltf. in the suit thereupon, & before the order *nisi* could become absolute, applied for an injunction to restrain creditor from proceeding upon the order:—**Held:** the injunction could not be granted.

The grounds of showing cause against an order must be something prior to the date of such order.—HALY v. BARRY (1868), 3 Ch. App. 452; 37 L. J. Ch. 723; 18 L. T. 491; 16 W. R. 651, L. J.J.

Annotations:—Distd. Finney v. Hinde (1879), 48 L. J. Q. B. 275. **Consd.** Re Womersley, Etheridge v. Womersley (1885), 29 Ch. D. 557; Brereton v. Edwards (1888), 21 Q. B. D. 488; Stewart v. Rhodes, [1900] 1 Ch. 386. **Rejd.** Re Imperial Steam & Household Coal Co. (1868), 37 L. J. Ch. 517; Re Hutchinson, Ex p. Hutchinson (1885), 16 Q. B. D. 515; Re Bell, Carter v. Stadden (1886), 54 L. T. 370; Re O'Shea's Settmt., Courage v. O'Shea, [1895] 1 Ch. 325; Re Thomas, Sutton, Carden v. Thomas (1912), 81 L. J. Ch. 603. **Mentd.** Hewat v. Davenport (1872), 21 W. R. 78.

8317. ——— Pendency of administration proceedings sufficient.]—Testator domiciled in England, but occasionally residing in Scotland, gave the residue of his real & personal estate, the bulk of which was locally situated in England, to two of his sons, one of whom at the time of testator's death was indebted to an insurance co., carrying on business in England & Scotland. The will was proved in England, & probate recorded in Scotland. The insurance co., having previously obtained judgment in an English ct., instituted proceedings against the exors. in the Ct. of Session to arrest, in their hands, the share of debtor in testator's residuary estate. One of the exors. filed a bill for administration of the estate in England, & moved for an injunction to restrain the proceedings in Scotland. The ct. granted the

injunction upon pltf.'s undertaking to obtain an administration decree forthwith.

In such cases the mere fact of a bill pending for administration in this ct. is sufficient to support the injunction. It is not necessary that there should have been a decree.—*BAILLIE v. BAILLIE* (1867), L. R. 5 Eq. 175; 37 L. J. Ch. 225; 17 L. T. 376; 16 W. R. 272.

8318. ———.]—Judgment creditor of intestate having obtained a garnishee order, under C. L. P. Act, 1854 (c. 125), s. 61, against a debtor to the estate, before decree in an administration suit:—*Held*: he could not be restrained from enforcing such order.—*Re BARNES, HARPER v. BARNES* (1866), 36 L. J. Ch. 63; 15 L. T. 312.

8319. ———.]—Proceedings to enforce a county ct. judgment obtained *bonâ fide* against an exor. for a debt of testator will not be restrained by the Ch. Div. merely because an administration action was pending at the time that the judgment was pronounced, & an administration decree has since been made.

An extrix. having failed to satisfy a debt owed by her testator, the assets being insufficient for payment of all his debts in full, the creditor took out a county ct. summons against her as extrix., & obtained judgment by default. Payment being still not made, he obtained an order for her commitment. Before the date of the judgment another creditor commenced an administration action in the Ch. Div., in which, after the judgment, but before the commitment order, the usual administration decree was made, & a receiver appointed. There was no question of *mala fides* on either side.

The extrix. now moved for a stay of proceedings under the commitment order, on the ground that all the assets in her hands available to satisfy the judgment debt had been taken from her by the administration decree.

Motion dismissed with costs.—*Re WOMERSLEY, ETHERIDGE v. WOMERSLEY* (1885), 29 Ch. D. 557; 54 L. J. Ch. 965; 53 L. T. 260; 33 W. R. 935.

Annotation:—*Refd.* *Re Thomas, Sutton, Carden v. Thomas*, [1912] 2 Ch. 318.

8320. Judgment obtained after decree—Stay of execution—Against estate assets.]—If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea, the ct. will, after a decree obtained in a suit by another creditor for the administration of intestate's assets, restrain the pltf. at law from taking out execution against the assets, but not from proceeding against the heir personally.—*PRICE v. EVANS* (1831), 4 Sim. 514; 58 E. R. 193.

Annotation:—*Refd.* *Lee v. Park* (1836), 1 Keen, 714.

8321. ———.]—To an action brought by a creditor of testator the exors. pleaded the decree in a suit for the administration of testator's assets. The plea was held to be bad in law, & judgment was given for pltf. at law. The ct. restrained him from enforcing his judgment against testator's assets, but not against the exors. personally.—*BURLES v. POPPLEWELL* (1839), 10 Sim. 383; 4 Jur. 244; 59 E. R. 663.

8322. Action pending at time decree made—By creditor against representatives—Proceedings stayed.]—(1) Where a judgment creditor receives notice of the decree in a creditor's suit before he has obtained judgment against the exors. he will be restrained by injunction from proceeding to trial; & a false plea by the exors. merely for the

purpose of staying the proceedings at law, by an application to this ct., does not deprive them of their right to protection.

(2) The principle of the cases on which the ct. restrains proceedings at law after a decree in a creditor's suit considered.

It was said that, as the exors. had put in a plea of *plene administravit*, pltf. ought to have been permitted to go to trial in order to falsify that plea. . . . It is clear that, on a plea of *plene administravit*, if the verdict went for pltf., the judgment must be *de bonis testatoris* only, & for a sum not exceeding the value of the goods found to have been in the hands of the exors. The principle on which those decisions proceed fails, because it was assumed very incorrectly that the judgment must be *de bonis testatoris, et si non de bonis propriis*. If there be goods of testator, pltf. might bring an action on the judgment against his exors., on the suggestion of a *devastavit*. The exors. cannot then plead *plene administravit* but can only deny against the exors. out of the assets. If they could prove there were no assets, that would be a discharge. If they proceed to trial, & the jury find assets, they will be withdrawn from the general administration (LORD LYNTHURST, C.).—*VERNON v. THELLUSSON* (1844), 1 Ph. 466; 14 L. J. Ch. 83; 4 L. T. O. S. 149; 9 Jur. 145; 41 E. R. 709.

Annotations:—As to (2) *Refd.* *Ranken v. Harwood, Ranken v. Boulton* (1846), 5 Hare, 215; *Vincent v. Godson* (1850), 3 De G. & Sm. 717.

8323. ———.]—*ROUSE v. JONES*, No. 8062, *ante*.

8324. ———.]—The usual decree for an account having been pronounced in a creditor's suit, & the usual notice of the same having been published, a creditor brought an action against the exors. for an alleged debt of testator. On motion by the exors. the action was restrained; but the costs both at law & in equity were reserved till it should appear whether the creditor would establish his claim.—*BURNETT v. BURNETT* (1845), 6 L. T. O. S. 274; 10 Jur. 4.

8325. ———.]—After a creditor had commenced an action against the administratrix of his debtor a decree was made, in a suit by the next of kin against the administratrix, for the administration of intestate's estate; & the administratrix gave notice of the decree to the creditor. He then gave notice to her that he should proceed with his action, unless he was paid the costs of it: & the costs not being paid, he delivered his declaration. Whereupon the administratrix appeared to the action & called on the creditor, who was out of the kingdom, to give security for the costs of it.

The ct., on the application of the administratrix, restrained the creditor from proceeding with his action, but gave him all his costs at law & also the costs of the motion, & ordered the administratrix to bring the intestate's assets into ct. —*TURNER v. CONNOR* (1847), 15 Sim. 630; 60 E. R. 764.

Annotation:—*Mentd.* *Menzies v. Connor* (1851), 3 Mac. & G. 648.

8326. ———.]—Upon motion for injunction to stay a creditor's action on ground of notice of decree in administration suit. Motion granted, & creditor's costs taxed up to the time of notice.—*MACMULLEN v. ACRES* (1852), 1 W. R. 77.

8327. ——— In foreign court.]—The rule,

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sects. 1 & 2.]

which prevents a creditor from proceeding with an action for the recovery of his debt after a decree in an administration suit, is applicable to the case of a creditor proceeding in a foreign ct., & will render him liable to the costs of an application to restrain him after he has received due notice of the decree.—**GRAHAM v. MAXWELL** (1849), 1 Mac. & G. 71; 1 H. & Tw. 247; 18 L. J. Ch. 225; 13 Jur. 217; 41 E. R. 1189, L. C.

Annotations:—**Reld.** Pennell v. Roy (1853), 22 L. J. Ch. 409; Carron Iron Co. v. MacLaren (1855), 5 H. L. Cas. 416; **Re** Low, Bland v. Low, [1894] 1 Ch. 147.

8328. ——— Ireland.]—Under a decree for the administration of testator's personal estate in England, P. carried in a claim for the specific performance of an agreement to grant a lease of lands in Ireland. P. afterwards commenced a suit in Ireland against the exor. & others for specific performance of the same agreement:—**Held:** the exors. were entitled to an injunction to restrain P. from further prosecuting the Irish suit against them.—**EUSTACE v. LLOYD** (1876), 35 L. T. 900; 25 W. R. 211.

8329. ——— Power of court.]—Although judgment has been given for the administration of an estate, the ct. has no power to restrain a foreign creditor from proceeding in a foreign ct. against the administrator; but if judgment were obtained in the foreign ct. against the administrator by default, it would only be treated in the administration action as *prima facie* evidence of the debt.—**Re BOYSE, CROFTON v. CROFTON** (1880), 15 Ch. D. 591; 49 L. J. Ch. 689; 29 W. R. 169.

Annotation:—**Reld.** **Re** Low, Bland v. Low, [1894] 1 Ch. 147.

8330. ——— In county court.]—After a decree or order on summons for the administration of an estate, a legatee will be restrained from proceeding in the county ct. to recover a legacy, & that notwithstanding the legatee submits to take a judgment against the exor. *de bonis propriis*, alleging a *devastavit*.—**RATCLIFFE v. WINCH** (1853), 16 Beav. 576; 22 L. J. Ch. 915; 21 L. T. 30; 17 Jur. 586; 51 E. R. 902; *subsequent proceedings*, 17 Beav. 217.

Decree or judgment in foreign suit.]—See **CONFLICT OF LAWS**, Vol. XI., pp. 483 *et seq.*, Nos. 1359 *et seq.*

SUB-SECT. 5.—HOW ENFORCED.

See Debtors Act, 1869 (c. 62), s. 4.

8331. Attachment—Failure to account.]—A rule for an attachment against an exor. for not accounting pursuant to a rule of ct. was made absolute, though that rule had not been personally served, upon an affidavit that deft. kept out of the way to avoid being served & that a copy had been left at the house with the daughter of deft.—**Re BARWICK** (1835), 3 Dowl. 703; 5 Tyr. 431.

Annotation:—**Reld.** **Re** Guard (1842), 6 Jur. 916.

8332. ——— Necessity for service of notice of motion.]—On Apr. 27 an order was made that deft., who had not entered an appearance in the action should, within fifteen days after service of the order, leave at the chambers of the judge certain accounts & statements. The order was served on deft. personally on May 12. Deft. did not comply with the order & on June 8 pltf. gave notice of motion for leave to issue an attachment

against him. The notice was not served on deft. but was filed with the officer of the ct. pursuant R. S. O., Ord. 67, r. 4:—**Held:** as pltf. evidently knew where to find deft., leave ought not to be granted to issue an attachment unless notice of the motion was served on deft.—**Re BASSETT, BASSETT v. BASSETT**, [1894] 3 Ch. 179; 63 L. J. Ch. 84; 38 Sol. Jo. 564; 9 R. 474.

8333. ——— Non-compliance with order to pay into court—Sum to be paid must be specified.]—**SPICER, SPICER v. SPICER**, [1881] W. N. 85.

Annotation:—**Reld.** **Re** Weatherley (1918), 88 L. J. K. 482.

8334. ——— Necessity to prove executor's control over money.]—Where an exor. was in default in payment of a sum of money which had been found due from him in an administration action, & which he has been ordered to pay in the ct., he is within the third exception to Debtors Act, 1869 (c. 62), s. 4 (notwithstanding that the sum partly consists of a debt which was owing to the testator in his lifetime), if the exor. was in a fiduciary relation to testator in respect thereof during testator's lifetime.

It is at the same time necessary to show that the money ordered to be paid into ct. had been in the exor.'s possession or under his control. Consequently where the order directs payment of a sum composed of principal & interest not distinguished, a writ of attachment cannot be issued, because so much of the sum as represents interest cannot be said to have been in his possession or under his control.—**Re HICKEY, HICKEY v. COLMER** (1880), 55 L. T. 588; 35 W. R. 53.

8335. ———]—In an action against exors. & trustees to recover pltf.'s share of testator's residuary estate, the master had by his certificate found that debts had received personal estate of testator not specifically bequeathed to a certain amount, & had paid, or were entitled to be allowed in account, certain other sums, leaving a balance due from them, one-fourth of which was due to pltf.

The certificate was based upon (*inter alia*) an affidavit of debts, in which they set forth a full account of testator's personal estate, which had come to their hands or the hands of either of them or to the hands of any person or persons by the order or the order of either of them, or for the use or the use of either of them.

The account contained particulars of the receipts, including various sums of cash.

Defts. having failed to comply with an order to pay into ct. the amount found to be due from them to pltf., a motion for attachment was made against them:—**Held:** there was no evidence of actual receipt by debts, & consequently the money was not shown to be "in their possession or under their control" within the exception to Debtors Act, 1869 (c. 62), s. 4; & no order made on the motion.—**Re FEWSTER, HERDMAN v. FEWSTER**, [1901] Ch. 447; 70 L. J. Ch. 254; 84 L. T. 45; 17 T. L. 205; 45 Sol. Jo. 240.

Annotations:—**Reld.** **Re** Wilkins, Emsley v. Wilkins (1901), 46 Sol. Jo. 14. **Consd.** **Harper v. McIntyre** (1908), 1 L. T. 191. **Reld.** **Re** Underwood, **Re** Bowles, U. v. V. (1903), 51 W. R. 335.

8336. ———]—**Re WILKINS, EMSLEY v. WILKINS** (1901), 46 Sol. Jo. 14.

Annotation:—**Consd.** **Harper v. McIntyre** (1908), 99 L. T. 191.

8337. ——— Representative a married woman—Jurisdiction to make order.]—Where a married

woman administratrix is ordered to pay into ct. a sum of money belonging to the estate of intestate & shown by her account of intestate's personal estate to be in her possession, in the absence of any evidence that she has committed a *devastavit*, the order should be in the common form & should not be restricted to payment out of her separate estate; & if she fails to comply with the order the ct. has jurisdiction to make an order for attachment against her.

Semble: if the object of the order had been, not for the better securing of the fund, but to compel the married woman to make good a loss occasioned by her *devastavit*, the order should have been made in the form prescribed in *Scott v. Morley* (1887), 20 Q. B. D. 126, & she would not have been liable to attachment for non-compliance with it.—*Re TURNBULL, TURNBULL v. NICHOLAS*, [1900] 1 Ch. 180; 69 L. J. Ch. 187; 81 L. T. 439; 48 W. R. 136; 16 T. L. R. 45; 44 Sol. Jo. 59.

SECT. 6.—ACTION BY CREDITORS.

SUB-SECT. 1.—IN GENERAL.

8338. Suits by legatees distinguished.]—*DOODY v. HIGGINS*, No. 7850, *ante*.

8339. Payment of the debt—Right of representatives to pay—After suit filed.]—An exor. or administrator may, after a suit is instituted against him for an account, pay any simple contract or specialty creditor, & will be allowed such payment in passing his accounts.—*MALTBY v. RUSSELL* (1825), 2 Sim. & St. 227; 3 L. J. O. S. Ch. 85; 57 E. R. 333.

Annotations:—*Reid. Wood v. Westall* (1831), You. 305; *Neeves v. Burrage* (1849), 14 L. T. O. S. 394.

8340. — Decree for immediate payment—Not decree for account—Where debt admitted by executors.]—In a suit by a creditor on behalf of himself & all other creditors, if the debt of pltf. be admitted or proved, & the exor. or administrator admits assets, pltf. is entitled at the hearing to an immediate decree for payment & not to a mere decree for an account.

After the decree, every creditor has an interest in the suit; but the question is, whether pltf., until decree, is not *dominus litis*, so that he may deal with the suit as he pleases (*WIGRAM, V.-C.*).—*WOODGATE v. FIELD* (1842), 2 Hare, 211; 11 L. J. Ch. 321; 6 Jur. 871; 67 E. R. 88.

Annotations:—*Reid. Savage v. Lane* (1847), 6 Hare, 32; *Field v. Titmuss* (1851), 1 Sim. N. S. 218.

8341. When particular not general account taken—Single creditor—Seeking payment of own debt only.]—Where a single creditor files a bill for the payment of his own debt only the ct. does not direct a general account of testator's debts, but only an account of the personal estate & of that particular debt, which is ordered to be paid in a course of administration.—*A.-G. v. CORNTHWAITE* (1788), 2 Cox, Eq. Cas. 44; 30 E. R. 21, L. C.

Annotation:—*Consd. Re Blout, Nayler v. Blout* (1879), 27 W. R. 865.

8342. Establishment of will—Against heir—Necessity for—Administration of Estates Act, 1833 (c. 104).]—In a creditor's suit, since above Act,

making the real estate subject to the debts, it is not necessary to establish the will against the heir.—*GOODCHILD v. TERRETT* (1843), 5 Beav. 398; 49 E. R. 632.

Annotation:—*Reid. Reid v. Territt* (1844), 1 Coll. 1.

SUB-SECT. 2.—WHEN MAINTAINABLE.

8343. Where representatives refuse to act—Or unable to do so.]—Suit by a creditor against persons accountable to the estate allowed in a special case; as, where the representatives cannot, or will not, act.—*BURROUGHS v. ELTON* (1805), 11 Ves. 29; 32 E. R. 998, L. C.

Annotations:—*Reid. Pearse v. Hewitt* (1835), 7 Sim. 471; *Barker v. Birch* (1847), 1 De G. & Sm. 376; *Stainton v. Carron Co.* (1854), 18 Beav. 146. *Mentd. Doswell v. Reece* (1865), 13 L. T. 156.

filed a bill on behalf of & other creditors against certain exors. who had renounced. Subsequently, he took out administration, & amended his bill by inserting an allegation to that effect, & a prayer for administration generally:—*Held*: he must still be regarded as pltf. in a creditors' suit, & therefore could not get a decree until the instrument, under which he claimed as a creditor, had been stamped.—*NICHOLS v. NICHOLS* (1862), 10 W. R. 598.

8345. Simultaneous suit by legatee—Decree obtained—No bar to decree in creditor's suit.]—A residuary legatee filed a bill against the personal representatives of testator for an account & payment. Before decree in that cause, a creditor of testator, upon a bond, in respect of which no interest had been paid, or acknowledgment of debt made for upwards of twenty years, filed a creditor's bill against the same representatives; & defts. by their answer to the second bill, admitted the existence of the bond debt. Afterwards, pltf. in the first cause obtained the common decree in a residuary legatee's suit, & defts. thereupon moved for & obtained an order that all further proceedings in the second cause might be stayed. The Lord Chancellor, on appeal, discharged that order, & in the second cause made the common decree in a creditor's suit, & directed the report to be made in both causes.—*BUDGEN v. SAGE* (1838), 3 My. & Cr. 683; 40 E. R. 1089, L. C.

Annotation:—*Reid. Suisse v. Lowther* (1843), 2 Hare, 424.

8346. Acts of deceased alleged to be felonious—Embezzlement.]—A creditors' suit was instituted by A. against the representatives of B. The bill alleged that B. had been a confidential clerk of A.; that B. had fraudulently appropriated money belonging to A., & concealed the fraud by false entries in A.'s books, & that the fraud had not been discovered until B.'s death. The bill sought for payment to A. of the sums so appropriated. A demurrer on the ground that the alleged acts, being felonious, were not the subject of a civil remedy, was overruled.—*WICKHAM v. GATRILL* (1854), 2 Sm. & G. 353; 2 Eq. Rep. 805; 23 L. J. Ch. 783; 23 L. T. O. S. 252; 18 J. P. 677; 18 Jur. 768; 2 W. R. 673; 65 E. R. 433.

8347. Against estates of two testators—Where joint debtors.]—Though an account of real estate can only be had at suit of a creditor in a bill on

Sect. 6.—Action by creditors: Sub-sects. 2, 3 & 4, A. (a).]

behalf of all creditors, still, if in a suit not so entitled, it becomes expedient to take such an account, the ct. will, at the hearing, direct the bill to be taken as a bill on behalf of creditors. There is no objection to a bill for an account of the estates of two testators who are joint debtors.—*WOODS v. SOWERBY* (1865), 14 W. R. 9.

8348. Where party intermeddles with assets—Without authority—Need not be charged as executor de son tort.]—(1) An exor. who has not proved his testator's will, but has received assets may be made a deft. to an action by a creditor to the extent of the assets he has received.

(2) Where a person has intermeddled with the assets of a testator without authority, he may be sued by a creditor of the estate as exor. *de son tort*, to the extent of the assets he has received; & it is not necessary, to support such an action, to charge him expressly with having acted as exor. *de son tort*; it is sufficient to allege that he has intermeddled with the assets without authority.—*Re LOVETT, AMBLER v. LINDSAY* (1876), 3 Ch. D. 198; 45 L. J. Ch. 768; 35 L. T. 93; 24 W. R. 982.

8349. After laches by creditor.]—Creditors are not relieved in equity after gross laches: therefore where a creditor seven years after coming of age filed a bill to obtain the benefit of a decree to account, & after answer took no step for thirty-three years, & then filed another bill against residuary legatees of a party, whose assets were distributed with notice to pltf., & against other representatives, the bill was dismissed upon the laches only; though the question of satisfaction was doubtful.—*HERCY v. DINWOODY* (1793), 2 Ves. 87; 4 Bro. C. C. 257; 30 E. R. 536.

Annotations:—Consd. Campbell v. Graham (1831), 1 Russ. & M. 453. *Refd. Pickering v. Stamford* (1795), 2 Ves. 581; *Pearson v. Belchier* (1799), 4 Ves. 623; *Chalmers v. Bradley* (1819), 1 Jac. & W. 51; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Grenfell v. Girdlestone* (1837), 2 Y. & C. Ex. 662; *Re Newhouse, Ex p. Newhouse* (1841), 1 Mont. D. & De G. 508; *Curtis v. Sheffield* (1882), 46 L. T. 80.

8350. — Fund remaining in court.]—*LASHLEY v. HOGG*, No. 8218, *ante*.

8351. —.]—In a suit of *C. v. M.*, instituted in 1858 for the administration of the estate of J., who died in 1836, B. & H., the trustees of testator's will, were, by an interlocutory order made in 1860, ordered to transfer into ct. a sum of £4,100 consols, to answer breaches of trust committed by B. This order was never obeyed, & process of contempt was issued, which H. avoided by leaving England. By an order made upon the further consideration of *C. v. M.* in 1863, the beneficial interests of B. & H., who were children of testator, were ordered to be impounded, to make good *pro tanto* the breaches of trust; but no personal order was made for payment, either then or on the subsequent further consideration in 1866. In 1870 H. returned to England, & resided in the neighbourhood of London, apparently in comfortable circumstances, until her death in 1880. This was known to pltf. in the present action, who was the then acting trustee of the will of J., & also to the *cestuis que trust*. They, however took no further steps against

H. in her lifetime; but after her death the trustee commenced the present action against her exors., on behalf of himself & all her other creditors, seeking to make her estate liable in respect of the unsatisfied balance of the £4,100 consols. Some of the *cestuis que trust* were still infants. The action was dismissed on the ground that the claim was a stale demand. But on appeal:—*Held*: (1) the *cestuis que trust* were not barred of their rights by any laches which they or their trustee had committed; (2) their trustee was the proper person to sue, & therefore the ordinary order ought to be made for the administration of the estate of H. as in a creditor's action.—*Re CROSS, HARSTON v. TENISON* (1882), 20 Ch. D. 109; 51 L. J. Ch. 645; 45 L. T. 777; 30 W. R. 376, C. A.

Annotations:—Generally, Refd. Soar v. Ashwell, [1893] Q. B. 390; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196.

SUB-SECT. 3.—BY WHOM MAINTAINABLE.

See R. S. C., Ord. 55, rr. 3, 4.

8352. Creditor to testator's business—Executor carrying on business—Debts incurred subsequent to testator's death.]—Testator, the owner of plantations in Jamaica, having been for many years previous to his death, engaged in a course of dealing with a commercial house at New York, who furnished the necessary supplies to his estates, & were to reimburse themselves out of the produce consigned to them, one of his acting trustees, who after his death, had the management of the estates, continued the same course of dealing, & on passing his accounts annually in an amicable suit instituted in the island, had credit for sums due in respect of the supplies so furnished, as being personally charged therewith; he afterwards died insolvent, leaving a balance due to the American house, made up partly of sums for which he had had credit in passing his accounts, & partly of sums for which he had not so had credit:—*Held*: the New York house had a right to claim the payment of the whole balance against the produce of the estate, whether existing in the hands of the surviving trustees, or under the protection of the Ct. of Ch. in England.

To a suit for that purpose, the personal representatives of deceased trustees, who acted, are necessary parties, unless there be a waiver of all personal remedy against the trustees, in respect of the produce come into their hands.—*SIMOND v. HIBBERT* (1825), 4 L. J. O. S. Ch. 38; *on appeal* (1830), 1 Russ. & M. 719, L. C.

Annotations:—Refd. Steele v. Murphy (1841), 3 Moo. P. C. C. 445. *Montd. Morrison v. Morrison* (1855), 2 Sm. & G. 564; *Twynam v. Hudson* (1862), 31 L. J. Ch. 577; *Daniel v. Trotman* (1863), 1 Moo. P. C. C. N. S. 123.

8353. —.]—*Re BACH, WALKER v. BACH, LLOYD'S BANK v. BACH*, [1892] W. N. 108.

8354. —.]—Where a testator has authorised his exors. to carry on his business, an order for administration of his estate may be made at the suit of a subsequent creditor of the business, even although there are no creditors of testator himself.—*Re SHOREY, SMITH v. SHOREY* (1898), 79 L. T. 349; 47 W. R. 188; 43 Sol. Jo. 29.

PART VIII. SECT. 6, SUB-SECT. 3.

*q. Personal representative a creditor.]—*The personal representative may file a bill as a creditor simply

upon testator's estate against a devisee of lands under the will, after the personal estate is exhausted, & obtain a decree as an ordinary creditor.—*TIFFANY v. TIFFANY* (1862), 9 Gr.

158.—CAN.

*r. Person advancing money to pay debts.]—*Where pltf. had, at the request of the mother of infant heirs,

8355. Mortgagee.]—A bill may be maintained by a mtgee. on behalf of himself & all other the creditors of a deceased mtgor.—*SKEY v. BENNETT* (1843), 2 Y. & C. Ch. Cas. 405; 7 Jur. 571; 63 E. R. 181.

8356. Claimant for unliquidated damages—On breach of contract.]—Claimant for unliquidated damages by reason of a breach of covenant [on a sale of land] may institute a creditors' suit to administer the estate of the deceased covenantor.—*BURCH v. CONEY* (1850), 14 L. T. O. S. 414; 14 Jur. 1009.

8357. Voluntary assignee of debt.]—A voluntary assignee of a debt due from a person deceased cannot maintain a suit for the administration of deceased's estate.—*SEWELL v. MOXSY* (1852), 2 Sim. N. S. 189; 21 L. J. Ch. 824; 18 L. T. O. S. 270; 16 Jur. 608; 61 E. R. 313.

8358. Joint creditors—Partnership—Administration of estate of deceased partner.]—Any creditor of a deceased partner, whether joint or separate, may institute a suit to have the partnership as well as the separate estate administered in this ct., & the assignees of a surviving partner, who has become a bkpt., are proper parties to the suit.—*BRETT v. BECKWITH* (1856), 26 L. J. Ch. 130; 28 L. T. O. S. 214; 3 Jur. N. S. 31; 5 W. R. 112.

8359. ———.]—*Qu.*: whether a joint creditor of a partnership firm can take out an originating summons for the administration of the estate of the deceased partner.—*Re BARNARD, EDWARDS v. BARNARD* (1886), 32 Ch. D. 447; 55 L. J. Ch. 935; 55 L. T. 40; 34 W. R. 782, C. A.

8360. Creditor for trivial sum—Five pounds.]—An annuitant under a will, who was also entitled to a debt of less than £5 from testator's estate, after having been informed by testator's exors. that they had set apart a sufficient sum of stock to answer her annuity, filed a bill for the administration of testator's estate. On the motion of the exors., the suit was stayed without costs, upon the ground that the bill ought never to have been filed in respect of the debt alone, & that there was no other dispute between the parties to sustain a suit.—*RUDD v. ROWE* (1870), L. R. 10 Eq. 610; 39 L. J. Ch. 846; 22 L. T. 785; 18 W. R. 977.

8361. Poor law guardians—Poor Law Amendment Act, 1849 (c. 103), ss. 16, 17.]—Deceased had, for over six years prior to her death, been supported as a pauper lunatic at the county lunatic asylum. During the whole of this period she was, in fact, entitled to an annuity of £24 16s. 6d., payable by the comrs. for the reduction of the national debt. This fact only came to the knowledge of the guardians at the time of her death, or shortly thereafter:—*Held*: (1) the guardians were creditors of deceased, within above sects., & as such, entitled to administration of her estate; (2) the claim of the guardians was not limited to the period of twelve months prescribed by sect. 16, but in respect of such period, they were entitled absolutely to repayment, under the statute, & as to a further period, not exceeding five years, making six years in all, they were entitled to come in & claim as ordinary creditors, notwithstanding

the fact of their having taken no steps to recover payment for such expenditure, during the lifetime of the deceased pauper lunatic.—*LAMBETH GUARDIANS v. BRADSHAW* (1886), 57 L. T. 86; 50 J. P. 472.

In respect of what debts.]—*See* Sub-sect. 9, *post*.

SUB-SECT. 4.—ON WHOSE BEHALF MAINTAINED.

A. Administration of Realty.

(a) Before 1898.

8362. On behalf of all other creditors—As well as on own behalf.]—A creditor cannot have a decree for the administration of real estate, unless he sues on behalf of all creditors.—*PONSFORD v. HARTLEY* (1862), 2 John. & H. 736; 70 E. R. 1256.

Annotation:—*Apld.* *Worraker v. Pryer* (1876), 2 Ch. D. 109.

8363. ———.]—*Suit not so entitled—Accounts taken on that footing.]*—*WOODS v. SOWERBY*, No. 8347, *ante*.

8364. ———.]—A single creditor can have administration of the real & personal estate of his deceased debtor without suing on behalf of "all other the creditors," & he should indorse his writ with a claim as a creditor simply.—*COOPER v. BLISSETT* (1876), 1 Ch. D. 691; 45 L. J. Ch. 272; 24 W. R. 235; 2 Char. Pr. Cas. 283.

Annotation:—*N.F.* *Worraker v. Pryer* (1876), 2 Ch. D. 109.

8365. ———.]—*ADCOCK v. PETERS* (1876), 2 Char. Pr. Cas. 288.

8366. ———.]—(1) The writ of summons in an action for administration ought to be intituled in the matter of the estate.

(2) In a creditor's action for administration of real estate it is sufficient that the statement of claim should express that pltf. sues on behalf of all creditors.—*EYRE v. COX* (1876), 24 W. R. 317; 2 Char. Pr. Cas. 287.

Annotations:—*As to* (2) *Expld. & Follid.* *Re Tottenham, Tottenham v. Tottenham*, [1896] 1 Ch. 628. *Reid.* *Dover Picture Palace & Pessers v. Dover Corpn. & Grundall, Wraith, Gurr, & Knight* (1913), 11 L. G. R. 971.

8367. ———.]—In a creditor's action for the administration of the real estate of a deceased person, who has not devised the real estate to trustees with power to sell & give receipts, pltf. must sue on behalf of all creditors.—*WORRAKER v. PRYER* (1876), 2 Ch. D. 109; 45 L. J. Ch. 273; 24 W. R. 269; 2 Char. Pr. Cas. 284.

Annotations:—*Apld.* *Adcock v. Peters* (1876), 2 Char. Pr. Cas. 288. *Follid.* *Re Royle, Fryer v. Royle* (1877), 5 Ch. D. 540; *Re Vincent, Parham v. Vincent* (1877), 26 W. R. 94. *Consd.* *Re James, James v. Jones*, [1911] 2 Ch. 318. *Mentd.* *London Asscn. for Protection of Trade v. Green lands*, [1916] 2 A. C. 15.

8368. ———.]—In a creditor's action for the administration of an intestate's real & personal estate the writ must be indorsed with a claim by pltf. "on behalf of himself & all other creditors."—*Re ROYLE, FRYER v. ROYLE* (1877), 5 Ch. D. 540; 36 L. T. 441; 25 W. R. 528.

Annotation:—*Follid.* *Re Vincent, Parham v. Vincent* (1877), 26 W. R. 94.

8369. ———.]—In an action by a creditor

advanced money to pay debts of their ancestor to save the costs of suits therefor:—*Held*: he was entitled to maintain a suit for administration as a creditor.—*GLASS v. MUNSEN* (1865), 12 Gr. 77.—*CAN.*

PART VIII. SECT. 6. SUB-SECT. 4.— A. (a).

8362 i. On behalf of all other creditors—As well as on own behalf.]—Where a creditor brings an action for the

administration of the real & personal estate of a deceased debtor, he must do so in the name of himself & all other creditors of deceased.—*Re MOODY, REID v. MOODY & MUNRO* (1888), 6 N. Z. L. R. 402.—*N.Z.*

Sect. 6.—Action by creditors: Sub-sect. 4, A. (a) & (b), & B.; sub-sects. 5, 6 & 7, A.]

for the administration of the real estate of a deceased person, it must be expressed in the writ of summons that the action is brought on behalf of pltf. & all other creditors.—*Re VINCENT, PARHAM v. VINCENT* (1877), 26 W. R. 94.

8370. — Unless realty devised to trustees—With power to sell.]—Under an Act of Parliament the real estates of a testator were vested in trustees upon trust to sell, & after applying the purchase-moneys received for the respective estates in discharge of the incumbrances affecting them respectively; to pay the surplus moneys into the Ct. of Ch., there to be applied in payment of testator's debts in a due course of administration. The various classes & also the individual names of creditors were specified in schedules to the Act. On a bill filed by the assignee of a specialty creditor on behalf of himself & all other the creditors of testator to have the trusts of the Act carried into execution:—*Held*: it was not necessary that all the scheduled creditors should be made parties to the suit.—*BATTEN v. PARFITT* (1843), 2 Y. & C. Ch. Cas. 343; 63 E. R. 151.

Annotation:—*Consd. Doody v. Higgins* (1852), 9 Hare, App. I. xxxii.

8371. — — — — —.]—Pltf., at request of A., became surety for the repayment of a sum of £50, advanced to B. & A. gave pltf. a bond of indemnity. A. died, having appointed defts. his exors. & having devised to them certain property in trust to pay the £50, "if then due from him as surety." Creditor called upon pltf. to repay the £50 & he had requested defts. to do so:—*Held*: pltf. could maintain a bill to administer the estate of A. & execute the trusts of his will & he need not sue on behalf of himself & all other creditors.—*WOOLDRIDGE v. NORRIS* (1868), L. R. 6 Eq. 410; 37 L. J. Ch. 640; 19 L. T. 144; 16 W. R. 965.

Annotations:—*Appld. Cooper v. Blissett* (1876), 1 Ch. D. 691. *Expld. Worraker v. Pryer* (1876), 2 Ch. D. 109. *Refd. Ascherson v. Tredegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401. *Mentd. Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561; *Hobbs v. Wayet* (1887), 36 Ch. D. 256; *Wolmershansen v. Gullick*, [1893] 2 Ch. 514; *Mills v. United Counties Bank*, [1911] 1 Ch. 669.

8372. — — — — —.]—*WORRAKER v. PRYER*, No. 8367, *ante*.

8373. — — — — —.]—*Re GREAVES, BRAY v. TOFIELD*, No. 8215, *ante*.

8374. — Where such claim to be set out—Writ or statement of claim.]—*EYRE v. COX*, No. 8366, *ante*.

8375. — — — — —.]—*ADCOCK v. PETERS* (1876), 2 Char. Pr. Cas. 288.

8376. — — — — —.]—*Re ROYLE, FRYER v. ROYLE*, No. 8368, *ante*.

8377. — — — — —.]—*Re VINCENT, PARHAM v. VINCENT*, No. 8369, *ante*.

8378. — — — — —.]—If the writ in a creditor's action for the administration of real & personal estate does not show that pltf. is suing on behalf of all the other creditors of deceased, this fact ought to appear in the title of the statement of claim, & not merely in the body thereof.—*Re TOTTENHAM, TOTTENHAM v. TOTTENHAM*, [1896]

1 Ch. 628; 65 L. J. Ch. 549; 74 L. T. 376; 44 W. R. 539.

Annotations:—*Refd. Dover Picture Palace & Pessers v. Dover Corpn. & Grundall, Wraith, Gurr, & Knight* (1913), 11 L. G. R. 971; *London Assocn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15.

(b) Since 1897.

See Land Transfer Act, 1897 (c. 65), ss. 1, 2 (repealed by *Law of Property Act, 1922* (c. 16), s. 156 (11)); *Administration of Estates Act, 1925* (c. 23), ss. 1–3; R. S. C., Ord. 3, r. 4; Ord. 16, r. 9; Ord. 55, rr. 3, 4.

8379. On own behalf only.]—If a creditor desires administration of real estate of a person who died after the date of *Land Transfer Act, 1897* (c. 65), it is no longer necessary that he should sue on behalf of all the creditors.—*Re JAMES, JAMES v. JONES*, [1911] 2 Ch. 348; 80 L. J. Ch. 681; 106 L. T. 214.

B. Administration of Personality.

See R. S. C., Ord. 16, r. 9.

8380. On own behalf only.]—Any one bond creditor may bring a bill against an exor. for a discovery of assets, & for satisfaction, as the ct. decrees only an account, & directs the exor. to pay in a course of administration.—*ANON.* (1747), 3 Atk. 572; 26 E. R. 1130.

8381. — — — — —.]—*COOPER v. BLISSETT*, No. 8364, *ante*.

8382. — — — — —.]—In a creditor's action for the administration of the personal estate of a deceased person, pltf. need not, since 15 & 16 Vict., c. 86, s. 45, sue on behalf of all the creditors in order to obtain a general account of debts.—*Re BLOUNT, NAYLER v. BLOUNT* (1879), 27 W. R.

8383. — — — — —.]—*Re GREAVES, BRAY v. TOFIELD*, No. 8215, *ante*.

SUB-SECT. 5.—AGAINST WHOM MAINTAINABLE.

See Sub-sect. 7, A. & B., post.

SUB-SECT. 6.—STATUTES OF LIMITATION.

See, generally, LIMITATION OF ACTIONS.

8384. Whether bar to action.]—A debt upon which Stat. Limitations has attached, will enable the creditor to compel an administrator to account in the Spiritual Ct.—*WAINFORD v. BARKER* (1697), 1 Ld. Raym. 232; 91 E. R. 1051.

8385. — — — — —.]—*STORY v. FRY*, No. 7883, *ante*.

8386. — Failure of defendant to plead statute.]—In a creditor's suit for administration the extrix. set up Stat. Limitations at the hearing, not having set it up on the pleadings:—*Held*: she was too late, & the usual decree was made

A creditor came in under the decree, & attempted to set up the statute against pltf.:—*Held*: it was clearly not competent to him to do so.—*ADAMS v. WALLER* (1866), 35 L. J. Ch. 727; 14 L. T. 727; 14 W. R. 789.

8387. Whether bar to particular creditors—Proving in action.]—*STERNDAL v. HANKINSON*, No. 8288, *ante*.

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8387 i. Whether bar to particular

*creditors—Proving in action.]—*Where a judgment is successfully impeached on the ground of fraud & collusion

between the creditor & the exor. of the debtor, it is open to the parties interested in the estate of deceased

8388. ———.]—ADAMS v. WALLER, No. 8386, ante.

8389. ———.]—*Re* GREAVES, BRAY v. TOFIELD, No. 8215, ante.

8390. From when statute runs—Death of debtor—Or grant of probate.]—STORY v. FRY, No. 7883, ante.

SUB-SECT. 7.—PARTIES.

A. Personal Representatives.

See, generally, PRACTICE ; R. S. C., Ord. 16, r. 8.

8391. Necessary defendants.]—GRIFFITH v. BATEMAN (1677), Cas. temp. Finch, 334 ; 23 E. R. 183.

8392. ——— Completely representative of estate.]—The general rules are plain, that a creditor of testator or intestate need not make any body but the personal representative a party. At the same time in this ct., if there are any persons who have possessed the estate, or any debtors of deceased, & any collusion between them & the representative, they may here, though not at law, follow the assets & make them parties, & demand an account against them ; but that is not to be done, unless there is some proof of collusion ; but I take the case of partnership to be different ; & though there was no suggestion of collusion, yet I do not think the bill would have been demurrable to, as has been insisted on. Many bills are brought in this ct., not only making the representatives parties, but also any other persons who have possessed the specific assets ; & there are many instances, where the surviving partner is made party, that they may have an account of the personal estate entire (LORD HARDWICKE, C.).—NEWLAND v. CHAMPION (1748), 1 Ves. Sen. 105 ; 2 Coll. 46 ; 27 E. R. 920, L. C.

Annotations :—Consd. Doran v. Simpson (1799), 4 Ves. 651 ; Holland v. Prior (1834), 1 My. & K. 237 ; Law v. Law (1845), 2 Coll. 41. Refd. Alsager v. Rowley (1802), 6 Ves. 748.

8393. ———.]—*Re* YOUNGS, DOGGETT v. REVETT, *Re* YOUNGS, VOLLUM v. REVETT, No. 8297, ante.

8394. ——— Unless able to be found.](1) A. & B. partners in a goldsmith's trade, are bound in a bond to J. A. & B. break off the partnership & divide their stock ; J. the obligee in the bond knows this, & that A. took upon him to pay the debts, & after a great distance of time brings a bill against the exors. of B. yet he, J., shall recover.

(2) Where an exor. in trust was outlawed & a witness proved he had inquired after, & could not find him, not necessary to make him a party.—HEATH v. PERCIVAL (1720), 1 P. Wms. 682 ; 2

Eq. Cas. Abr. 630 ; 1 Stra. 403 ; 24 E. R. 570, L. C.

Annotations :—As to (1) Consd. *Ex p.* Bradbury (1839), 4 Deac. 202. Refd. *Ex p.* Ruffin (1801), 6 Ves. 119 ; David v. Ellice (1826), 5 B. & C. 196 ; Oakeley v. Pasheller (1836), 4 Cl. & Fin. 209 ; Wilson v. Lloyd (1873), 42 L. J. Ch. 559 ; *Re* Head, Head v. Head (No. 2) (1894), 63 L. J. Ch. 549. As to (2) Refd. Brown v. Blount (1830), 9 L. J. O. S. Ch. 74.

8395. ———.]—In a creditor's suit for the administration of real & personal estate, charging appropriation of testator's property by deft. G., the sole exor. & trustee, for his own use, the usual order having been obtained under Consolidated Ord. 22, r. 4, a decree was made at the hearing by the Master of the Rolls that the bill should be taken *pro confesso* against him, subject to the general orders of the ct. relating to decrees founded on bills taken *pro confesso*, & the usual administration accounts & inquiries in a suit of the above nature were directed. Application for leave to dispense with service of the decree, & with the summons to proceed in chambers on G., as otherwise by r. 13 no proceedings could be taken under it, & by r. 15 it could not be made absolute until after the lapse of three years. Affidavit produced that G., was believed to be out of the jurisdiction, but that his residence could not be discovered, & that pl'tfs. were unable to make such service on him. Order made.—MERRIMAN v. GOODMAN (1867), 17 L. T. 101 ; 15 W. R. 1132.

8396. ——— Representative of deceased executor—Executor carrying on testator's business—Debts in respect of business.]—SIMOND v. HIBBERT, No. 8352, ante.

8397. ———.]—A., by will, directed his debts to be paid out of his personal estate, & the deficiency to be made up out of his real estate ; & subject thereto, he devised his copyhold messuages. Testator died. A creditor's bill was then filed, but neither the heir-at-law nor any personal representative were parties ; in fact, the will had not been proved ; there was no personal estate :—*Held* : administration *cum testamento annexo* must be taken out, & the administrator & heir-at-law must be parties, & the bill must be so amended.—FORDHAM v. ROLFE (1820), Tam. 1 ; 48 E. R. 1.

8398. ———.]—BROWN v. DOUGLAS, No. 8035, ante.

8399. ———.]—A creditor's suit was instituted by the judgment creditor of an intestate, against the heir-at-law of deceased, a mtgee. & trustee for sale of a portion of the real estate of intestate, also against a purchaser of that portion of the estate, for the purpose of having the estates administered under the directions of the ct., but without making the personal representative of intestate a party. To this bill, two separate demurrers were put in, by the purchaser & the

to set up Stat. Limitations to the claim of the creditor, which the exor. had omitted or neglected to plead.—JARDINE v. WOOD (1873), 19 Gr. 617.—CAN.

s. From when statute runs—Forged will.]—*Held* : the period of limitation would not begin to run until after the discovery that a will proved & admitted to probate was a forgery.—MCDONNELL v. McISAAC (1891), 23 N. S. R. (11 R. & G.) 407.—CAN.

t. Whether bar to action—Notice by administrator repudiating claim—Foreign grant of letters.]—The claim of a creditor against the estate of a deceased person, whose domicile was

in Manitoba, is not barred in a Manitoba Ct. by failure to sue within six months after a notice under R. S. M., c. 146, s. 31, repudiating the claim, given by an administrator of such estate appointed by a foreign ct., though the letters of administration be afterwards re-sealed in Manitoba pursuant to Surrogate Cts. Act. Such a notice, to be effectual, must be given by the person who is at the time the duly appointed administrator of the estate in Manitoba.—DOIDGE v. MIMMS (1900), 20 C. L. T. 90 ; 13 Man. L. R. 48.—CAN.

a. ——— By creditor—Discovery of fresh assets by representative.]—Intestate

died in 1893, & the administrator in 1896, distributed amongst the creditors whose claims were filed & allowed by him the proceeds of all the assets of the estate of which he had any knowledge, such proceeds being only sufficient to pay the creditors a dividend of about 3.41 per cent. In 1909, the administrator realised a further sum for the estate upon assets then recently discovered. There had been no payment on account or written acknowledgment made by the administrator to any creditor since 1896 :—*Held* : the claims of the creditors were barred by Stat. Limitations.—*Re* BEDSON'S ESTATE (1910), 19 Man. L. R. 664.—CAN.

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heir-at-law, on the ground that no personal representative of the intestate was before the ct. One of the demurrers contained a misnomer & false description, the other a false description only:—**Held:** on this account the demurrers must be overruled, for the suit was defective for want of intestate's personal representative.—**MANTON v. ROE** (1844), 14 Sim. 353; 4 L. T. O. S. 190; 60 E. R. 394.

8400. —.]—In a suit by some of many creditors, on behalf of themselves & others, for an account of property which had been vested in defts., the trustees, for the benefit of such creditors, & one of the trustees died after answer, the other trustees are not necessary parties to the bill of revivor, or revivor & supplement, against the representative of the deceased trustee. The author of the trust, or his personal representative, is a necessary party to such a suit; & he is not regularly or properly a party thereto by being a deft. to a bill of revivor, or revivor & supplement, against the representatives of a trustee who died after the institution of the suit, even though all the trustees are, unnecessarily, parties to such bill of revivor, or revivor & supplement; he must be made a party to the original bill, or to a bill in which the trustees are all properly defts.—**BATEMAN v. MARGERISON** (1848), 6 Hare, 496; 67 E. R. 1200.

Annotation:—**Consd.** *Knight v. Cawthron* (1817), 1 De G. & Sm. 714.

8401. — **Representative to be constituted in this country.]**—Testator dying in the Mauritius appointed exors. in that country, & left the residue of his property to his mother in England. The exors. in the Mauritius transmitted the residue to England, but the mother of testator having died, the amount was paid to her exors., who paid all her debts exceeding the amount to which she became entitled from testator's estate. Pltf. was a creditor of testator, & filed a claim to obtain payment of his debt, or to have testator's estate administered:—**Held:** the Mauritius exors. were improperly made parties to this claim, & pltf. could not have relief against the exors. of testator's mother without having a legal personal representative of testator constituted in this country, a party to the suit.—**SILVER v. STEIN** (1852), 21 L. J. Ch. 312.

8402. — **Court will not appoint representative.]**—Bill filed by one of the creditors of an intestate against the son, who had alleged that he became entitled to all his father's property under a deed of gift, & praying that such deed might be declared void as against pltf. on the ground of fraud, or that, if necessary the suit might be taken as on behalf of all the creditors of intestate. Upon demurrer:—**Held:** it was necessary to have a personal representative of intestate before the ct., & it was not sufficient in such a case to nominate a person under the recent Act [15 & 16 Vict., c. 86] to represent the estate.—**JAMES v. ASTON** (1856), 25 L. J. Ch. 343; 27 L. T. O. S. 33; 2 Jur. N. S. 224; 4 W. R. 401.

8403. —.]—A judgment creditor took out an originating summons under R. S. C., 1883, Ord. 55,

rr. 3, 4, against the husband of the judgment debtor, who had died intestate, as the person "entitled to take out letters of administration of the estate" of deceased, for administration of that estate. Deft. had applied for, but had not yet obtained, letters of administration, & there was in fact no legal personal representative of intestate yet constituted. Pltf. moved for the appointment of a receiver. In opposition to the motion, an affidavit was made by deft., stating that since his wife's death he had taken all necessary steps to take out letters of administration, & that it was his intention to do so immediately:—**Held:** the summons was entirely bad, even treating it as a writ, since it asked only for administration of the estate, & there was no legal personal representative before the ct.—**Re LEASK, RICHARDSON v. LEASK** (1891), 65 L. T. 199.

8404. Attorney of representative—Representative resident in India—Attorney obtaining representation—Receiving rents of real estate.]—Substituted service of a *subpœna* to appear ordered in a creditor's suit on one, who, acting as the attorney of the exor. & general devisee & legatee resident in India, had obtained administration here, & had entered into receipt of the rents of the real estate.—**WEYMOUTH v. LAMBERT** (1840), 3 Beav. 333; 49 E. R. 131.

Annotations:—**Refd.** *Pincock v. Rigby* (1812), 11 L. J. Ch. 408; *Hornby v. Holmes* (1845), 4 Hare, 306.

8405. Right to representation disputed—Joinder of both claimants.]—**COHENS v. NAIRNE** (1845), 5 L. T. O. S. 36.

8406. Executor de son tort.]—**VICKERS v. BELL**, No. 7582, *ante*.

8407. —.]—**RAYNER v. KOEHLER**, No. 7839, *ante*.

8408. —.]—**Re LOVETT, AMBLER v. LINDSAY**, No. 8318, *ante*.

B. Other Persons.

See, generally, PRACTICE; R. S. C., Ord. 16, r. 8.

8409. Debtor to estate—Only on collusion shown.]—**NEWLAND v. CHAMPION**, No. 8392, *ante*.

8410. — **Or insolvency.]**—**BICKLEY v. DORRINGTON** (1737), West temp. Hard. 169; 25 E. R. 877; *sub nom.* **BECKLEY v. DORRINGTON**, cited 0 Ves. 749, L. C.

Annotations:—**Consd.** *Alsager v. Rowley* (1802), 6 Ves. 748; *Consett v. Bell* (1842), 11 L. J. Ch. 401. **Refd.** *Franklyn v. Fern* (1740), Barn. Ch. 30; *Holland v. Prior* (1834), 1 My. & K. 237; *Barker v. Birch* (1847), 1 De G. & Sm. 376.

8411. —.]—The established rule of the ct. is certainly . . . that in ordinary cases a debtor to the estate cannot be made a party to a bill against the exor.; but there must be . . . collusion or insolvency (**LORD ELDON**, C.).—**ALSAGER v. ROWLEY** (1802), 6 Ves. 748; 31 E. R. 1289, L. C.

Annotations:—**Consd.** *Ambler v. Lindsay* (1876), 35 L. T. 93. **Refd.** *Benfield v. Solomons* (1803), 9 Ves. 77; *Holland v. Prior* (1834), 1 My. & K. 237; *Consett v. Bell* (1842), 1 Y. & C. Ch. Cas. 569; *Barker v. Birch* (1847), 1 De G. & Sm. 376.

8412. — **Or fraud.]**—**BURROWES v. GORE**, No. 7937, *ante*.

8413. —.]—Creditor filing a bill against exor.

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b. General rule.]—A creditor of deceased suing for administration is in

the same situation with regard to all persons as if he were bringing an action at law against the administrator, & a debtor to the estate of deceased can

only be made answerable as such debtor by the representative of deceased's estate. There being nothing to show that defts. were in the position

cannot make a debtor of the debtor a party.—**UTTERSON v. MAIR** (1793), 2 Ves. 95; 4 Bro. C. C. 270; 30 E. R. 540, L. C.

Annotations:—**Refd.** *Troughton v. Blinks* (1801), 11 Ves. 573; *Alsager v. Rowley* (1802), 6 Ves. 748; *Bowen v. Phillips* (1896), 75 L. T. 628.

8414. Surviving partner.]—**NEWLAND v. CHAMPION**, No. 8392, *ante*.

8415. —.]—Demurrer to a bill filed by a creditor, against A., the exor., & his partners B., C., etc., alleging, that assets of testator had come into the hands of the partnership, & that all the partners claimed to retain these assets, in satisfaction of a debt due from testator to their firm, but not alleging in terms collusion between A. & the other defts.: demurrer overruled.—**GEDGE v. TRAILL** (1823), 1 Russ. & M. 281, n.; 2 L. J. O. S. Ch. 1; 39 E. R. 109.

Annotations:—**Consd.** *Re Lovett, Ambler v. Lindsay* (1876), Ch. D. 198. **Refd.** *Holland v. Prior* (1834), 1 My. & K. 237.

8416. —. Though no decree sought against them.]—To a bill filed by joint creditors for the purpose of obtaining relief against the assets of a deceased partner or joint contractor, the surviving partners or joint contractors must be made parties, though no decree is sought against them; such persons being necessarily interested in taking the accounts.—**THORPE v. JACKSON** (1837), 2 Y. & C. Ex. 553; 160 E. R. 515.

Annotations:—**Consd.** *Slater v. Wheeler* (1838), 2 Jur. 887. **Mentd.** *Jones v. Beach* (1852), 2 De G. M. & G. 886; *Lyth v. Ault* (1852), 7 Exch. 669; *Other v. Iveson* (1855), 3 Drew. 177; *Beresford v. Browning*, *Browning v. Beresford* (1875), L. R. 20 Eq. 561.

8417. —.]—The surviving partner of a firm is a necessary party to a claim by a creditor for payment out of the estate of a deceased partner of a partnership debt.—**HILLS v. M'RAE** (1851), 9 Hare, 297; 20 L. J. Ch. 533; 17 L. T. O. S. 242; 15 Jur. 766; 68 E. R. 516.

Annotations:—**Consd.** *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177. **Refd.** *Re Barnard, Edwards v. Barnard* (1886), 32 Ch. D. 447; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Moore v. Knight*, [1891] 1 Ch. 547.

8418. —. Assignee of—**Bankruptcy of partner.**]—**BRETT v. BECKWITH**, No. 8358, *ante*.

8419. —.]—**BURROWES v. GORE**, No. 7937, *ante*.

8420. Heir-at-law—Testator having no personal estate.]—**FORDHAM v. ROLFE**, No. 8397, *ante*.

8421. —.]—The heir of a deceased debtor is not a necessary party to a suit instituted under 3 & 4 Will. 4, c. 104, which makes real estates assets for payment of simple contract debts.—**WEEKS v. EVANS** (1835), 7 Sim. 516; 5 L. J. Ch. 16; 58 E. R. 947.

Annotation:—**N.F.** *Brown v. Weatherby* (1811), 10 Sim. 125.

8422. —.]—To a suit for administering the real assets of a testator under 3 & 4 Will. 4, c. 104, the heir as well as the devisee is a necessary party.—**BROWN v. WEATHERBY** (1841), 10 Sim. 125; 12 Sim. 6; 10 L. J. Ch. 190; 5 Jur. 384; 59 E. R. 560.

Annotation:—**N.F.** *Bridges v. Hinxman* (1847), 16 Sim. 71.

8423. —.]—Testator devised all his real estate

to his widow:—**Held**: his heir was not a necessary party to a suit to administer his real estates under 3 & 4 Will. 4, c. 104.—**BRIDGES v. HINXMAN** (1847), 16 Sim. 71; 60 E. R. 799.

8424. Creditor claiming specific lien.]—A creditor, who claims a specific lien on the part of testator's assets, which, at the time of his death, was at testator's disposition, is properly made a deft. to a creditor's suit, for the administration of the estate, though the bill does not charge collusion between him & the exor.—**TYLER v. MANSON, MANSON v. TYLER** (1826), 5 L. J. O. S. Ch. 31.

8425. Tenant for life—Devise with power to sell—Discretion of court.]—Testator devised an estate, to trustees, upon trust for his widow for her life, with power to sell the estate, if they should see fit or in case such sale should be necessary for the payment of his debts, during the life of his widow. On a creditor filing his bill for the usual accounts in a creditor's suit, without making testator's widow a party:—**Held**: the case came within the words at the conclusion of Ord. 30 of Aug. 26, 1841, respecting the discretion of the ct., & under the particular circumstances, it was proper for it to act under those words, by directing that the widow should be made a party to the suit.—**HILL v. LEDBROOK** (1842), 6 Jur. 1078.

8426. Legatee—Legacies charged on realty.]—In a suit since the 30th Order of Aug. 1841, to establish the claims of creditors of a testator against his real estate devised, legatees, whose legacies are charged on such real estate, are not necessary parties, where there are devisees in trust, having the powers specified in the order.—**WARD v. BASSETT** (1846), 5 Hare, 179; 67 E. R. 877.

8427. —. Of residue.]—**Re YOUNGS, DOGGETT v. REVETT, Re YOUNGS, VOLLUM v. REVETT**, No. 8297, *ante*.

8428. Co-trustees—Revived suit against representative of deceased trustee.]—**BATEMAN v. MARGERISON**, No. 8400, *ante*.

8429. Official assignee—Deceased insolvent.]—**GALSWORTHY v. DURRANT**, No. 7791, *ante*.

8430. Remaindermen.]—**Re WARD, BEMMENT v. BALLS**, No. 7919, *ante*.

C. Effect of Death of Parties.

See, generally, PRACTICE; R. S. C., Ord. 17.

8431. Plaintiff—Co-plaintiff—Suit continued by representatives of one—Joinder of representatives of other.]—A creditors' suit was instituted by A., a specialty creditor, & B., a simple contract creditor of a debtor deceased, & a decree made in it. A. died, & B. declined to go on with the suit. A supplemental suit was instituted by the representatives of A., to which B. was made a party, & the usual decree in a supplemental suit was made in it. B. afterwards died:—**Held**: the representatives of B. were necessary parties to the suit.—**WILLIAMS v. JONES** (1843), 13 L. J. Ch. 64.

8432. —. Suit continued by other creditor—**Necessity for filing supplemental bill.**]—If, after a decree in a creditors' suit, the suit abates by the death or bkpcy. of pltf., another creditor cannot

of an exor. or administrator *de son tort*, or that they had been partners with deceased, or that they could not be sued, if necessary, by the legal repre-

sentative himself, & there being no other circumstances which would make it equitable that they should be sued jointly with the legal repre-

sentative, they were wrongly made parties.—**DIHUNRAJ v. BROUGHTON** (1875), 15 B. L. R. 296.—**IND.**

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upon petition, without filing a supplemental bill, upon leave for that purpose, obtain an order giving to him the conduct of the cause.—*NASH v. WARD, WARD v. WARD, SAPTE v. WARD* (1840), 9 L. J. Ch. 265.

Annotation:—*Refd. Paddon v. Richardson* (1855), 7 De G. M. & G. 563.

8433. ——— Where debt proved or allowed.]

—In an administration suit, on the death of the sole pltf., an order to the effect of the usual supplementary decree, under 15 & 16 Vict. c. 86, s. 52, was made on behalf of a person not a party to the suit, but found a creditor by the master's report, he having served the parties with notice of the application, & they not having appeared.—*LOWES v. LOWES, LOWES v. IVES* (1852), 2 De G. M. & G. 784; 22 L. J. Ch. 179; 20 L. T. O. S. 196; 16 Jur. 991; 1 W. R. 34; 42 E. R. 1079, L. J.J.

Annotation:—*Folld. Bell v. Bell* (1863), 33 L. J. Ch. 384.

8434. ———]—Upon the death of pltf. in a creditors' suit, the common order to revive was made in favour of another creditor, whose debt had been proved & allowed by the chief clerk's certificate, although the certificate had not been signed.—*INCHELEY v. ALLSOPP* (1861), 7 Jur. N. S. 1181; 9 W. R. 649.

8435. ———]—Where pltf. in a creditor's suit died pending the proceedings, on a supplemental statement to the original bill, the ct. made an order in favour of other creditors whose debts had been allowed by the chief clerk, although the certificate had not yet been made out.—*BELL v. BELL* (1863), 33 L. J. Ch. 384; 9 L. T. 643; 10 Jur. N. S. 14; 12 W. R. 230.

8436. Defendant—Plaintiff creditor representative of deceased—Suit continued by other creditor.]—*SCOTT v. MAXWELL* (1872), 41 L. J. Ch. 600; 20 W. R. 763.

8437. ——— After order for administration—Appointment of interim receiver.]—The extrix. of testator in a creditor's administration action being the sole deft. & having died after the usual order for administration & pending a summons for the appointment of a receiver, the ct., upon the *ex p.* application of pltf. who had applied for administration *de bonis non* to the estate, made an order appointing an interim receiver upon terms.—*Re PARKER, CASH v. PARKER* (1879), 12 Ch. D. 293; 48 L. J. Ch. 691; 27 W. R. 835.

Annotations:—*Consd. Re Shephard, Atkins v. Shephard* (1889), 43 Ch. D. 131. *Apld. Re Clark, Clark v. Clark* (1910), 55 Sol. Jo. 64.

SUB-SECT. 8.—WHAT CREDITORS MAY PROVE.

See R. S. C., Ord. 16, r. 47.

8438. General rule.]—*Re SCHWABACHER, STERN v. SCHWABACHER*, No. 8154, *ante*.

8439. Equitable creditors—Not without direction of court—Partnership—Estate of deceased partner.]—Equitable creditors cannot prove their debts, under a decree for the proof of debts, without a declaration of their right by the ct., or some special direction to the master. Therefore, one partner having died, & the surviving partners afterwards becoming bkpt., creditors by promis-

sory notes of the original partnership cannot, under a common decree, prove their claims against the estate of the deceased partner.—*BOWLES v. YORK* (1823), 1 L. J. O. S. Ch. 134.

8440. Joint creditors.]—In a creditor's suit for administering the assets of B., a joint creditor of A. & B. was permitted to prove, A. having become bkpt., & it appearing that there were no joint assets of A. & B.—*COWELL v. SIKES* (1827), 2 Russ. 191; 38 E. R. 307, L. O.

Annotations:—*Consd. Lodge v. Pritchard* (1863), 4 Giff. 294. *Refd. Thorpe v. Jackson* (1837), 2 Y. & C. Ex. 553; *Winter v. Innes* (1838), 4 My. & Cr. 101; *Crossley v. Dobson* (1848), 2 De G. & Sm. 486; *Jones v. Beach* (1852), 2 De G. M. & G. 886; *Lodge v. Pritchard* (1863), 1 De G. J. & Sm. 610.

8441. Legatee.]—An exor. paid interest on a legacy & died. The legatee filed a bill for payment of the principal, against the exor.'s representative. The legatee afterwards presented a petition consenting to abandon his suit, & praying for liberty to prove for his legacy & for the costs of his suit & of the petition against the exor.'s estate, in a suit subsequently instituted by creditors of the exor. The prayer of the petition was granted.—*TURNER v. WARDLE* (1834), 7 Sim. 80; 58 E. R. 767.

Annotations:—*Mentd. Re Hawksworth, Lovell v. Sherwin* (1853), 2 W. R. 34; *Jenkins v. Robertson* (1853), 1 Eq. Rep. 123; *Holland v. Holland* (1869), 4 Ch. App. 450, n.

8442. Holder of promissory note.]—A. having lent B. £1,000, without taking any security for it, stated to C. & his family that the money had been held by him, A., in trust for C. Afterwards, B. becoming embarrassed in his circumstances, & unlikely to repay the money, A., at the urgent solicitation of C., gave the latter his promissory note for the amount. Subsequently, B. died insolvent, & without having repaid the money. Then A. died. In a suit for the administration of A.'s assets, there being no evidence to rebut the trust:—*Held*: C. might prove the note against A.'s estate as a valuable security.—*BURKITT v. RANSOM* (1846), 2 Coll. 395; 15 L. J. Ch. 174; 6 L. T. O. S. 452; 10 Jur. 193; 63 E. R. 786.

8443. Covenantee—Not as specialty creditor.]—Where an intestate & another had mortgaged a leasehold estate, of which they were tenants in common, to secure payments in respect of shares held by them in a benefit building society, & had entered into a joint covenant to make the payments, but were not partners, & had no joint estate, & intestate's co-debtor was sworn to be in insolvent circumstances:—*Held*: the covenantee was not entitled to prove as a specialty creditor under a decree for the administration of intestate's estate.—*CROSSLEY v. DOBSON* (1848), 2 De G. & Sm. 486; 64 E. R. 217.

8444. Company—Calls on shares—Existing & future calls.]—A creditors' suit being instituted to administer the estate of a testator who died possessed of certain shares in a co., a claim was made by the co. for payment of calls already due upon the shares, & for a provision as to future calls:—*Held*: the calls already made were specialty debts, but no provision could be made for future calls, as against the simple contract creditors.—*WENTWORTH v. CHEVILL* (1857), 26 L. J. Ch. 760; 29 L. T. O. S. 383; 3 Jur. N. S. 805; 5 W. R. 743.

—*See, further, Part VI., Sect. 1, ante.*

8445. Judgment creditor—Cross-examination as

to judgment—Permissible.]—Where a judgment creditor brought in his claim in an administration suit, & submitted to answer any questions as to the debt, but refused to be examined as to the judgment:—*Held*: he might be cross-examined thereon.—*LEUTON v. BRUDENELL, Re BAKER* (1864), 10 L. T. 859; 12 W. R. 1127.

Annotation:—*Reid. Re Barber, Burgess v. Vinnicome* (1886), 31 Ch. D. 665.

8446. Purchaser—Of realty—Administration of vendor's estate—Damages for breach of covenant.—A vendor, being seised of an estate in fee simple subject to an executory devise over in an event which subsequently happened, in a deed of conveyance of the same estate, entered into covenants with the purchaser similar to those which are usually contained in an absolute conveyance of an estate in fee simple, including a covenant for quiet enjoyment:—*Held*: the purchaser could not be admitted as a creditor in a suit for the administration of the vendor's estate in respect of damage which he had sustained in an ejectment brought by the parties entitled to possession under the executory devise.—*HUNT v. WHITE* (1868), 37 L. J. Ch. 326; 19 L. T. 141; 16 W. R. 478.

Annotation:—*Reid. Page v. Mid. Ry.*, [1894] 1 Ch. 11.

8447. Foreign creditor—After report of master Security for costs given.—A foreigner, who claimed to be a creditor of testator in the cause, petitioned to have his claim referred to the master, after he had made his report. The ct. made the order, upon condition of his giving security for the costs.—*DREVER v. MAUDESLEY* (1828), 5 Russ. 11; 38 E. R. 931.

Annotation:—*Reid. Atkins v. Cook* (1857), 5 W. R. 381.

8448. — Administrator of such creditor—English administration unnecessary.—Where judgment had been obtained in a foreign ct. by the foreign administrator of a creditor against an English debtor who had since died, & whose estate was being administered in England:—*Held*: the foreign administrator could prove without taking out English administration to his intestate.—*Re MACNICHOL, MACNICHOL v. MACNICHOL* (1874), L. R. 19 Eq. 81; 31 L. T. 566; 23 W. R. 67.

8449. — Administration of English estate—Deceased foreigner domiciled abroad.—In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors.—*Re KLOEBE, KANNREUTHER v. GEISELBRECHT* (1884), 28 Ch. D. 175; 54 L. J. Ch. 297; 52 L. T. 19; 33 W. R. 391; 1 T. L. R. 139.

Annotation:—*Consd. Re Lorillard, Griffiths v. Catforth*, [1922] 2 Ch. 638.

8450. — Scottish creditor.—J. died in Apr. 1892, resident & domiciled in England, but having a small amount of property in Scotland. He had borrowed money from L., who was resident & domiciled in Scotland, the recovery of which was barred by Stat. Limitations in England, but not in Scotland. In Dec. 1892, L. commenced proceedings in Scotland against the administratrix of J. to recover the money. On Jan. 17, 1893, a creditor commenced an action in England for the administration of J.'s estate, & an administration order was made on Jan. 20. On Feb. 1, judgment was given against the administratrix in the Scottish action in her absence; but on the 14th she obtained leave to defend. On Mar. 24,

L. applied to prove his debt in the English action, & by his affidavit stated the pendency of the Scottish action. The Chief Clerk refused to adjourn the question till after the decision of the Scottish action, & on May 1, made his certificate disallowing L.'s claim. On May 30, L. recovered judgment in the Scottish action, & on July 22 this judgment was registered in England under Judgments Extension Act, 1868, s. 3. The administratrix applied for an injunction to restrain L. from enforcing his judgment, & an injunction was granted. On appeal:—*Held*: the injunction ought only to have been granted on the terms of admitting L. as a creditor for the amount of the judgment debt & the costs of registration, for under Judgments Extension Act, 1868, s. 3, L. was in the same position as if on the day of registration he had recovered judgment for the amount in an English ct. against the administratrix, in which case, the assets being still under the control of the ct. undistributed, it would have been of course to allow him to prove for the amount of the judgment in the administration.—*Re Low, BLAND v. LOW*, [1894] 1 Ch. 147; 63 L. J. Ch. 60; 70 L. T. 57; 10 T. L. R. 106; 38 Sol. Jo. 78; 7 R. 346, C. A.

Annotation:—*Consd. Re A Bankruptcy Notice*, [1898] Q. B. 383.

8451. Mortgagee—Unsatisfied balance of debt.—In a foreclosure suit the mortgaged estate was, by the consent of all parties, sold, & the purchase money invested in consols, which were subsequently sold at a lower price, & the produce paid to the mtgee. At the time of investment the purchase-money was sufficient to satisfy the debt, but the produce of the consols was not sufficient. The mtgee. claimed to be entitled to the difference out of the assets in an administration suit:—*Held*: the mtgee. was still a creditor, & entitled to the balance of his principal, interest, & costs, including the costs of this application.—*TOMPSETT v. WICKENS, BRIDGER v. WICKENS* (1855), 3 Sm. & G. 171; 26 L. T. O. S. 163; 2 Jur. N. S. 10; 4 W. R. 136; 65 E. R. 611.

8452. — Deceased insolvent before death—Mortgagees taking no part in composition scheme.—A receiving order having been made against H. on his own petition, H. made a composition with his creditors under Bkpcy. Act, 1883 (c. 52), s. 18, which provided for their being paid by instalments extending over a year, & died shortly after the expiration of the year. The instalments were not paid, & an action was commenced in the Ch. Div. by a creditor to administer H.'s estate. Certain mtgees. of H. who had neither attended the creditors' meeting nor assented to the composition, took out a summons in the Chancery action to be admitted as creditors in that action in respect of the balance of the mtge. debt after deducting the assessed value of their security:—*Held*: under sects. 108 & 18, of above Act, the Ct. of Bkpcy. would have jurisdiction to proceed notwithstanding H.'s death, & would apply its powers & exercise its jurisdiction in favour of appcts., & pltf. in the Chancery action having submitted to take the opinion of the Ch. Ct. as to what would be the result of appct.'s proceeding in bkpcy., the application of the mtgees. were consequently allowed.—*Re HARDY, HARDY v. FARMER*, [1896] 1 Ch. 904; 65 L. J. Ch. 461; 74 L. T. 403; 44 W. R. 503; 40 Sol. Jo. 437; 3 Mans. 150.

In respect of what debts.—*See Sub-sect. 9, post.*

Sect. 6.—Action by creditors: Sub-sects. 9 & 10.
Sect. 7: Sub-sects 1 & 2, A.]

SUB-SECT. 9.—IN RESPECT OF WHAT DEBTS.

8453. Legacy—Administration of executor's estate.]—TURNER v. WARDLE, No. 8441, ante.

8454. Joint debt—No relief sought against surviving debtors.]—THORPE v. JACKSON, No. 8416, ante.

8455. — Partnership debt—Suit after dissolution of partnership.]—HEATH v. PERCIVAL, No. , ante.

8456. — — —.]—BRETT v. BECKWITH, No. 8358,

8457. Admitted debt—Admission by executors.]—The admission of the debt by the answer of one of two exors., is a sufficient foundation for a decree in a creditors' suit.—**BURDETT v. BOOTH (1841), 10 L. J. Ch. 356.**

8458. Same debt against two estates.]—BONSER v. COX, No. 8529, post.

8459. Debt payable in futuro—When immediate security obtainable.]—A creditor having *debitum in presenti solvendum in futuro* may maintain a creditors' bill. Whether he can obtain a decree for immediate security must depend on circumstances.—**WHITMORE v. OXBORROW (1842), 2 Y. & C. Ch. Cas. 13; 12 L. J. Ch. 21; 6 Jur. 985; 63 E. R. 6.**

Annotation:—Consd. Re Hargreaves, Dicks v. Hare (1890), 44 Ch. D. 236.

8460. Unliquidated damages—Arising in breach of covenant—On sale of land.]—BURCH v. CONEY, No. 8356, ante.

8461. — — —.]—HUNT v. WHITE, No. 8446, ante.

8462. Debt under instrument—Paid by surety of obligor—Right as simple contract creditor.]—A. & B., his surety, executed a joint & several bond to C., conditioned to be void on payment of £5,000 by A. C. proved the £5,000 as a specialty debt, under the decree in a suit instituted by A.'s creditors after his death. Afterwards B. paid the £5,000, & thereupon, C. executed to him a general release of all claims & demands in respect of the bond, & by the same deed, covenanted to stand possessed of all moneys to be received under the proof & of all the securities for the £5,000, in trust for B., & to use his utmost endeavours to obtain payment of that sum for B.'s benefit:—**Held: the legal effect of the release was not controlled by the covenant, & the master, when he made his report in pursuance of the decree, was justified in disallowing the £5,000 as a specialty debt, & in allowing it merely as a simple contract debt to B.—WARWICK v. RICHARDSON (1845), 14 Sim. 281; 60 E. R. 366.**

8463. — Instrument must first be stamped.]—NICHOLS v. NICHOLS, No. 8344, ante.

8464. Maintenance of lunatic.]—Upon a reference in lunacy, it was found & reported that the sum of £413 14s., was due to A. for the maintenance of the lunatic, & necessities supplied by him to the lunatic during his lunacy. The heir-at-law & next of kin of the lunatic had notice of & was present at the proceedings under the reference. Before A. received payment of the sum of £413 14s., or any part of it, the lunatic died intestate, & it having been ascertained that his personal estate had been exhausted, A. instituted a creditor's

suit against the heir-at-law for payment of his debt out of the real estate of the lunatic:—**Held: the heir-at-law was bound by the proceedings in lunacy, & A. had established a sufficient *prima facie* case to entitle him to a reference to the master to inquire & find whether any debt was due to him from the estate of the lunatic.—WENTWORTH v. TURB (1842), 12 L. J. Ch. 61; 6 Jur. 980, L. C.**

Annotations:—Consd. Re Rhodes, Rhodes v. Rhodes (1890), 44 Ch. D. 94. Refd. Re Rutter, Chester v. Rolfe (1853), 4 De G. M. & G. 798; Re Newbegin's Estate, v. Newbegin (1887), 36 Ch. D. 477.

8465. — Pauper lunatic.]—LAMBETH GUARDIANS v. BRADSHAW, No. 8361, ante.

8466. Costs—Suit against executor's estate—To recover legacy.]—TURNER v. WARDLE, No. 8441, ante.

8467. — In consistory court—Monition to pay.]—An order of a consistory ct. to pay costs followed by a monition to pay the amount creates a debt upon which a creditor's suit for administration of debtor's estate can be founded.—**Re NATERS, AINGER v. NATERS (1919), 88 L. J. Ch. 521; 122 L. T. 151; 83 J. P. 266; 63 Sol. Jo. 800.**

8468. Bank overdraft—Interest & commission not included.]—A customer of a bank became of unsound mind. His son arranged with the bank to continue the lunatic's banking account & to draw upon it on behalf of the lunatic for the maintenance of the lunatic's household & for the necessary outgoings of his estate. At the death of the lunatic this banking account was overdrawn. In a creditor's action to administer the real & personal estate of the lunatic the bank claimed to prove as creditors for the amount of the overdraft, which included usual bank charges for interest & commission:—**Held: (1) although the bank were not creditors of the lunatic they were entitled under the doctrine of subrogation to stand in the shoes of creditors paid by the son by means of the banking account for necessities supplied for the maintenance of the lunatic's household, & for the necessary outgoings of his estate; (2) the bank were not entitled to prove for interest & commission on the overdraft.—Re BEAVAN, DAVIES, BANKS & CO. v. BEAVAN, [1912] 1 Ch. 196; 81 L. J. Ch. 113; 105 L. T. 784; subsequent proceedings, [1913] 2 Ch. 595.**

Annotation:—Generally, Mentd. Lloyd v. Cooto & Bull, [1915] 1 K. B. 242.

8469. Affiliation order—Made in foreign court.]—A posthumous affiliation order for an alimentary allowance for her child obtained by a girl against the estate of the dead father of such child in Malta, which is an order unknown to the English law, is not enforceable as a claim in an administration action in England.—**Re MACARTNEY, MACFARLANE v. MACARTNEY, [1921] 1 Ch. 522; 90 L. J. Ch. 314; 124 L. T. 658; 65 Sol. Jo. 435.**

Annotation:—Mentd. Beatty v. Beatty, [1924] 1 K. B. 807.

SUB-SECT. 10.—CONTROL OF ACTION BY CREDITORS.

8470. Every creditor has inchoate interest—After bill filed.]—STERNDAL v. HANKINSON, No. 8288, ante.

8471. Prior to decree—Plaintiff's right as to suit—Dismissal of suit—On satisfaction of own debt.]—Where a pltf. files a bill on behalf of himself & all other persons of the same class, he retains the

absolute dominion of the suit until the decree, & may dismiss the bill at his pleasure; but after a decree he cannot deprive the other persons of the same class of the benefit of the decree, if they think fit to prosecute it. A creditor who had filed a bill on behalf of himself & all other creditors against trustees to whom estates had been conveyed for payment of the debts, having, in consideration of payment of his debt by an agent of debtor, dismissed the bill before any decree, although he was paid out of the trust fund, a bill filed by another creditor on behalf of himself & all other creditors, against pltf. in the first suit & the trustees, for recovery of the sum paid to him, was dismissed with costs, it appearing that the trustees gave no authority for the payment out of the trust fund, & that he did not know that he had been paid out of that fund.—*HANDFORD v. STORIE* (1825), 2 Sim. & St. 196; 57 E. R. 320.
*Annotations:—*Consd. *Wood v. Westall* (1831), You. 305; *Re Alpha Co., Ward v. Alpha Co.*, [1903] 1 Ch. 203.

8472. ——— **To what extent applicable.]**
 —*STERNDAL v. HANKINSON*, No. 8288, *ante*.

8473. ——— **—.]**—It is competent to a creditor filing a bill on behalf of himself & all other the creditors of a testator, to compromise the suit & dismiss the bill; & in such a case a fund brought into ct. by the exors. will, with the consent of the exors., be paid to pltf.—*WOOD v. WESTALL* (1831), You. 305; 159 E. R. 1008.

8474. ——— **—.]**—*WOODGATE v. FIELD*, No. 8310, *ante*.

8475. ——— **Compromise.]** — *WOOD v. WESTALL*, No. 8473, *ante*.

8476. ——— **Adverse report by master—As to status of creditor—Whether deprived of conduct of suit.]**—Pltf., who sues as creditor, will not be deprived of the conduct of the suit, because the master has reported that he is not a creditor, if exceptions to that finding of the report are pending, & there is no reason to suppose that the exceptions will not be prosecuted actively.—*JEUDWINE v. AGATE* (1828), 5 Russ. 283; 38 E. R. 1033, L. C.

8477. ——— **Executors' right to dismiss suit—On payment of plaintiff's debt.]**—Where a pltf. files his bill on behalf of himself & the other unsatisfied creditors of testator, the exors. are entitled to dismiss it before decree, on payment of pltf.'s principal debt & interest, with the costs of the suit as between party & party.—*PEMBERTON v. TOPHAM* (1838), 1 Beav. 316; 2 Jur. 1009; 48 E. R. 962.

*Annotation:—*Refd. *Paynter v. Carew* (1854), 2 W. R. 345.

8478. **After decree—Every creditor entitled to benefit.]**—*HANDFORD v. STORIE*, No. 8471, *ante*.

8479. ——— **—.]**—*WOODGATE v. FIELD*, No. 8310, *ante*.

8480. **Adoption of creditor's action—By legatee—Creditor cannot sanction—Legatee must start fresh proceedings.]**—*Re AINSWORTH, COCKCROFT v. SANDERSON*, [1895] W. N. 153.

SECT. 7.—ADMINISTRATION OF INSOLVENT ESTATES.

SUB-SECT. 1.—ADMINISTRATION IN BANKRUPTCY.

See *BANKRUPTCY*, Vol. IV., pp. 501–507, Nos. 4509–4577.

SUB-SECT. 2.—ADMINISTRATION APART FROM BANKRUPTCY.

A. When Bankruptcy Rules Applied.

See *Jud. Act*, 1875 (c. 77), s. 10; *Administration of Estates Act*, 1925 (c. 23), s. 34.

8481. General rule.]—An equitable mtgee. obtained a common decree for administration of his deceased debtor's estate, & sent in a claim for the whole amount of his debt. When the certificate of debts came to be settled the mistake was pointed out, & the chief clerk required pltf. to put a value on his security. He did so, & was admitted as a creditor for the balance, £28. The estate was then believed to be insolvent, but the fact had not been formally established. After the certificate had become binding pltf. took out a summons asking that the property might be sold, & that he might be allowed to prove for the deficiency. A sale was ordered, & the summons directed to stand over. The property sold for much less than the value set upon it, & the summons was then brought on again:—*Held*: by *Jud. Act*, 1875 (c. 77), r. 101, of the *Bankruptcy Rules* of 1870 was made applicable to the case, & pltf. could only stand as a creditor for £28.

It [sect. 10 of above Act] provides that, in the administration by the ct. of the assets of a person who dies after the commencement of the Act & whose estate may prove to be insufficient for the payment in full of his debts & liabilities, the same rules shall prevail as to the rights of secured & unsecured creditors, & as to debts & liabilities provable, as may be in force for the time being under the law of bkpcy. with respect to the estates of persons adjudged bkpt. "may prove to be insufficient" cannot mean shall be proved to be insufficient, for the insufficiency cannot be established till afterwards. The words must mean only that there is sufficient reason to believe that the estate will turn out insolvent (*JESSEL, M.R.*).—*Re HOPKINS, WILLIAMS v. HOPKINS* (1881), 18 Ch. D. 370; 45 L. T. 117; 29 W. R. 767, C. A.
*Annotations:—*Distd. *Re McMurdo, Penfield v. McMurdo*, [1902] 2 Ch. 684. Refd. *Re Hildick, Hipkins v. Hildick* (1881), 44 L. T. 547. Mentd. *Couldery v. Bartrum* (1881), 19 Ch. D. 394.

8482. When estate insufficient—Anticipation of insolvency—Proof unnecessary.]—*Re HOPKINS, WILLIAMS v. HOPKINS*, No. 8481, *ante*.

8483. ——— **Application of mutual credit clause—Bankruptcy Act, 1869 (c. 71), s. 39.]**—The mutual credit clause, sect. 39 of above Act, will not be applied in the administration of the estate of a deceased person until it is shown that the estate is insolvent, but the ct. may direct that a debt claimed on behalf of the estate from a creditor shall be paid into ct. to a separate account, with liberty to the creditor to apply, in case the estate shall prove to be insolvent.—*Re SMITH, GREEN v. SMITH* (1883), 22 Ch. D. 586; 52 L. J. Ch. 411; 48 L. T. 254; 31 W. R. 413; *subsequent proceedings*, 24 Ch. D. 672.

*Annotation:—*Refd. *Re Rees, Rees v. Rees* (1889), 60 L. T. 260.

Rule in bankruptcy.]—See *BANKRUPTCY*, Vol. IV., pp. 397, 414, Nos. 3627, 3744.

8484. How insolvency ascertained—Costs of administration included.]—(1) By the combined effect of *Married Women's Property Act*, 1882 (c. 75), s. 3, & *Jud. Act*, 1875 (c. 77), s. 10, in the administration by the ct. of the assets of a deceased person whose estate may prove to be insolvent,

Sect. 7.—Administration of insolvent estates: Subsect. 2, A. & B. (a) & (b).]

the claim of the widow for money lent to deceased for the purposes of his trade or business is postponed to the claims of the other creditors.

(2) It is settled that the rules in bkpcy. which increase a bkpt.'s assets, e.g., the reputed ownership clause, the fraudulent preference clause, & the sections which defeat certain settlements & executions do not apply to the administration in Chancery of the assets of a deceased person (LINDLEY, L.J.).

(3) It only remains to notice the point that the husband's estate is not proved to be insolvent. When he died his assets exceeded his debts; but, unfortunately, the costs of the administration action have to be provided for, & it is admitted that his estate is insolvent if the costs of the administration action are to be taken into account. But these costs must be paid out of the estate of deceased before any question can arise which concerns the payment of his creditors (LINDLEY, L.J.).

(4) Jud. Act, 1875 (c. 77), s. 10, does not import into administrations those provisions of the bkpcy. law which merely go to swell the assets of the estate which is being administered, such, for instance, as the provisions by which a judgment creditor is not allowed to reap the benefit of his execution by reason of a bkpcy. intervening before its completion (SMITH, L.J.).—*Re LENG, TARN v. EMMERSON*, [1895] 1 Ch. 652; 64 L. J. Ch. 468; 72 L. T. 407; 43 W. R. 406; 11 T. L. R. 286; 39 Sol. Jo. 329; 12 R. 202, C. A.

Annotations:—*As to* (1) **Consd.** *Re Ambler, Woodhead v. Ambler*, [1905] 1 Ch. 697. **Refd.** *Re Heywood, Parkington v. Heywood*, [1897] 2 Ch. 593; *Re Webb (Smithfield, London)*, [1922] 2 Ch. 369. *As to* (4) **Refd.** *Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9.

8485. Direction to apply bankruptcy rules—Necessity for inclusion in administration order.]—In a creditor's administration action, when there is any probability that the estate of the deceased person will prove insufficient for the payment in full of his debts & liabilities, there should be inserted in the judgment a provision to the effect that if the estate is so insufficient, the rules in bkpcy. are to apply, following the terms of Jud. Act, 1875 (c. 77), s. 10.—*Re HILDICK, HIPKINS v. HILDICK* (1881), 44 L. T. 547; 29 W. R. 733.

8486. ———.]—It is unnecessary to include in the judgment upon a creditor's administration action the statutory direction that in case the estate shall prove insolvent the rules with respect to the estates of persons adjudged bkpt. shall prevail & be observed.—*Re MURRAY, WOODS v. GREENWELL* (1882), 45 L. T. 707; 30 W. R. 283.

B. To What Extent Bankruptcy Rules Applied.

(a) In respect of What Debts.

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8487. Debts & liabilities provable.]—Jud. Act, 1875 (c. 77), s. 10, by which in the administration of the estates of deceased persons, & in the winding up of cos., the same rules are made to apply as to the rights of secured & unsecured creditors, & as to debts & liabilities provable, & as to the valuation of annuities & future & contingent liabilities, as may be in force for the time being under the law of bkpcy., does not assimilate the

administration of such insolvent estates & the winding up of cos. in all respects to the administration of bkpt. estates, but only in respect of the debts & liabilities provable. Consequently, the priority of payment secured by Bkpcy. Act, 1869 (c. 71), in favour of local rates, etc., does not extend to the winding up of cos. or the administration of the estates of insolvent deceased persons.—*Re ALBION STEEL & WIRE CO.* (1878), 7 Ch. D. 547; 47 L. J. Ch. 229; 38 L. T. 207; 42 J. P. 279; 26 W. R. 348.

Annotations:—**Refd.** *Re D'Epineuil* (1882), 51 L. J. Ch. 491; *Re Maggi, Winehouse v. Winehouse* (1882), 20 Ch. D. 545; *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652; *Re Heywood, Parkington v. Heywood*, [1897] 2 Ch. 593. **Mentd.** *Re Printing & Numerical Registering Co.* (1878), 8 Ch. D. 535; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Re Richards* (1879), 11 Ch. D. 676; *Re West of England Bank, Ex p. Brown* (1879), 12 Ch. D. 823; *Re Northern Counties of England Fire Insce., Macfarlane's Claim* (1880), 17 Ch. D. 337; *Re Land Financiers Assocn.* (1881), 16 Ch. D. 373; *Re Webb (Smithfield, London)*, [1922] 2 Ch. 369; *Re Winget, Burn v. The Co.*, [1924] 1 Ch. 550.

8488. ———.]—*Re HOPKINS, WILLIAMS v. HOPKINS*, No. 8481, *ante*.

8489. Debt satisfied by legacy—Election by creditor—As to proof.]—*LECHIMERE v. BLAIGRAVE* (1707), Gilb. Ch. 64; 25 E. R. 45, L. C.

8490. Contingent liability—Contingency happening during administration—Application of bankruptcy rule.]—Testator covenanted by deed for payment to his daughter of a sum of £5,000, with interest at 4 per cent. *per annum*, within one month after the death of his wife; also for payment to his daughter of an annuity of £100 during the joint lives of himself & his wife & the life of the survivor, if his daughter should so long live. Testator died in 1879, insolvent, leaving his widow & daughter surviving, & a judgment was made, in a creditor's action for administration of his estate. The daughter having sent in claims in respect of the principal sum & the annuity, they were both allowed on a valuation as at the date of the judgment, but subsequently the widow died. No certificate had yet been made in the action:—**Held:** applying the rules in bkpcy. as to contingent liabilities the daughter was entitled to prove for the full amount of the £5,000, less a rebate of interest at 4 per cent. *per annum* for the period between the date of the judgment & the death of the widow, & her proof in respect of the annuity must be treated on the same principle.—*Re BRIDGES, HILL v. BRIDGES* (1881), 17 Ch. D. 342; 50 L. J. Ch. 470; 44 L. T. 730.

Annotation:—**Mentd.** *Sovereign Life Assoc. v. Dodd*, [1892] 2 Q. B. 573.

8491. Rent due—Not limited to one year's rent.]—Upon the construction of Bkpcy. Act, 1883 (c. 52), ss. 42, 125, an order obtained in the Ch. Div. by a creditor for administration of a deceased debtor's estate, not followed by any proceedings in bkpcy. is not equivalent to or included in the term "order of adjudication," sect. 42, so as to limit the power of the landlord, or other person to whom rent is due from the deceased person's estate, to recover by distress one year's rent only accrued due prior to the date of the administration order.—*Re FRYMAN'S ESTATE, FRYMAN v. FRYMAN* (1888), 38 Ch. D. 468; 57 L. J. Ch. 862; 58 L. T. 872; 36 W. R. 631.

8492. Call on shares in company—Estimated value of future calls—As well when company going concern—As when being wound up.]—In the administration of the insolvent estate of a deceased person the amount due for calls which may be

made in respect of shares in a co. held by him should be estimated & proved for as well when the co. is a going concern as when it is being wound up.—*Re McMAHON, FULLER v. McMAHON*, [1900] 1 Ch. 173; 69 L. J. Ch. 142; 81 L. T. 715; 16 T. L. R. 73; 7 Mans. 38.

Proof of debts—Rules in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 243–355, Nos. 2303–3330.

Priority of payment.]—*See* Sub-sect. 2, B. (c), *post*

(b) *Nature of Assets to be Administered.*

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8493. Assets of insolvent estate not enlarged—By application of bankruptcy rules.]—Jud. Act, 1875 (c. 77), s. 10, is not intended to enlarge the assets of an insolvent estate, but only to vary the rights of the persons entitled to the assets; &, therefore, that sect. does not apply the rules of bkpcy. so as to make an unregistered bill of sale void as against the unsecured creditors of an insolvent estate.—*Re D'EPINEUIL (COUNT) (1), TADMAN v. D'EPINEUIL* (1882), 20 Ch. D. 217; 51 L. J. Ch. 491; 46 L. T. 409; 30 W. R. 423.

*Annotations:—*Consd. *Re Gould, Ex p. Official Receiver* (1887), 19 Q. B. D. 92. *Reid. Hasluck v. Clark*, [1899] 1 Q. B. 699.

8494. ———.]—The bkpcy. rules as to reputed ownership are not imported into the winding up of cos. by Jud. Act, 1875 (c. 77), s. 10. A limited co. being indebted to H. & Co. on an acceptance, wrote to them a letter in Jan. 1885, in the following terms: "We hold at your disposal the sum of £425 due from Messrs. C. & Co. for goods delivered by us to them up to Dec. 31, 1884, until the balance of our acceptance for £660 has been paid." No notice was given by H. & Co. to C. & Co. until Feb. 5, 1885, which was after a petition for winding up the co. had been presented:—*Held*: as the bkpcy. rules as to reputed ownership did not apply to the winding up of cos., the debt did not form part of the assets of the co. at the commencement of the winding up.

It is not intended to bring into the assets of the estate being administered, or of the co. being wound up, any property which would not be otherwise assets, but to regulate the mode of dealing with the assets which are proved to belong to the co.; it was to do away with the difference which was known to exist between the mode of dealing with the assets in bkpcy. & the assets in an administration or in a winding up by the Ct. of Ch. The order & disposition clause in Bkpcy. Act, 1883 (c. 52), has nothing to do with the respective rights of the secured & unsecured creditors, but is intended to include in the estate which is being administered property that would otherwise belong to somebody else (COTTON, L.J.).—*GORRINGE v. IRWELL INDIA RUBBER & GUTTA PERCHA WORKS* (1886), 34 Ch. D. 128; 56 L. J. Ch. 85; 55 L. T. 572; 35 W. R. 86, C. A.

*Annotations:—*Mentd. *Re Hughes* (1888), 59 L. T. 586; *Re Sheward, Sheward v. Brown*, [1893] 3 Ch. 502.

8495. ———.]—*Re LENG, TARN v. EMMERSON*, No. 8484, *ante*.

8496. Avoidance of unregistered bill of sale—As against unsecured creditors—Bankruptcy rule not applicable.]—*Re KNOTT* (1878), 7 Ch. D. 549, n.; 26 W. R. 349.

*Annotations:—*Appl. *Re D'Epineuil (1), Tadman v. D'Epineuil* (1882), 20 Ch. D. 217. *Reid. Re Albion Steel & Wire Co.* (1878), 7 Ch. D. 547.

8497. ———.]—*Re D'EPINEUIL (COUNT) (1), TADMAN v. D'EPINEUIL*, No. 8493, *ante*.

8498. Avoidance of security—Bankruptcy rule not applicable.]—The Master of the Rolls thinks that this enactment [Jud. Act, 1875 (c. 77), s. 10], involves the proposition that, whereas under certain circumstances a security is avoided in bkpcy., therefore, in the administration of the assets of a deceased person & in the winding up of a co., a security is to be avoided under similar circumstances. There are, to my mind, no words in the sect. which, expressly or by implication, lead to that result (JAMES, L.J.).—*Re WITHERNSEA BRICKWORKS* (1880), 16 Ch. D. 337; 50 L. J. Ch. 185; 43 L. T. 713; 29 W. R. 178, C. A.

*Annotations:—*Reid. *Re Hopkins, Williams v. Hopkins* (1881), 18 Ch. D. 370; *Re D'Epineuil (1), Tadman v. D'Epineuil* (1882), 20 Ch. D. 217; *Re Maggi, Winehouse v. Winehouse* (1882), 20 Ch. D. 545; *Gorringe v. Irwell India Rubber & Gutta Percha Works* (1886), 34 Ch. D. 128; *Re Gould, Ex p. Official Receiver* (1887), 19 Q. B. D. 92; *Pratt v. Inman* (1889), 43 Ch. D. 175; *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652; *Hasluck v. Clark*, [1899] 1 Q. B. 699; *Re Whitaker, Whitaker v. Palmer* (1900), 83 L. T. 342. Mentd. *Re Northern Counties of England Fire Insee., Macfarlane's Claim* (1880), 17 Ch. D. 337; *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442; *Re National United Investment Corp.*, [1901] 1 Ch. 950.

8499. Property in reputed ownership—Bankruptcy rule not applicable.]—*GORRINGE v. IRWELL INDIA RUBBER & GUTTA PERCHA WORKS*, No. 8494, *ante*.

8500. ———.]—*Re LENG, TARN v. EMMERSON*, No. 8484, *ante*.

8501. Restriction of rights under execution or attachment—Bankruptcy rule not applicable.]—A trustee having failed to comply with an order directing him to pay money into ct., a writ of sequestration was issued against his estate & effects & subsequently the sequestrators were authorised to sell certain chattels in their possession belonging to the trustee. Before any sale was effected the trustee died & a creditor's action was brought in which the usual judgment was made & a receiver appointed. The trustee's estate was insolvent & the receiver & the administrator of the deceased trustee commenced an action against the sequestrators to restrain them from selling the chattels & moved for an injunction:—*Held*: Bkpcy. Act, 1883 (c. 52), s. 45, restricting the rights of creditors under execution or attachment is not made applicable to the administration of insolvent estates in the Ch. Div. by Jud. Act, 1875 (c. 77), s. 10.—*PRATT v. INMAN* (1889), 43 Ch. D. 175; 59 L. J. Ch. 274; 61 L. T. 760; 38 W. R. 200; 6 T. L. R. 91.

*Annotations:—*Reid. *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652; *Re Whitaker, Whitaker v. Palmer* (1900), 83 L. T. 342; *Re National United Investment Corp.*, [1901] 1 Ch. 950. Mentd. *Re Hastings, Ex p. Brown* (1892), 61 L. J. Q. B. 654.

8502. ———.]—*Re LENG, TARN v. EMMERSON*, No. 8484, *ante*.

8503. ———.]—Bkpcy. Act, 1883 (c. 52), s. 45, which restricts the rights of creditors under execution or attachment, does not apply to the administration of the estate of a deceased insolvent in pursuance of an administration order made under sect. 125 of the Act.—*HASLUCK v. CLARK*, [1899] 1 Q. B. 699; 68 L. J. Q. B. 486; 80 L. T. 454; 47 W. R. 471; 15 T. L. R. 277; 43 Sol. Jo. 352; 5 Mans. 146, C. A.

*Annotations:—*Consd. *Johnson v. Pickering*, [1908] 1 K. B. 1. *Reid. Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B.

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347; *Re National United Investment Corp'n.*, [1901] 1 Ch. 950; *Re Mellison, Ex p. Day*, [1906] 2 K. B. 68; *Re Sarjeant*, [1923] 2 Ch. 302.

8504. Avoidance of fraudulent preference—Bankruptcy rule not applicable.]—*Re LENG, TARN v. EMMERSON*, No. 8484, *ante*.

Effect of administration order—Whether equivalent to receiving order.]—*See BANKRUPTCY*, Vol. V., p. 820, Nos. 6964, 6965.

Property available for distribution—Rules in bankruptcy.]—*See BANKRUPTCY*, Vol. V., pp. 630–971, Nos. 5676–7953.

(c) Order of Payment of Debts.

Jud. Act, 1875 (c. 77), s. 10; *Administration of Estates Act*, 1925 (c. 23), s. 34.

8505. Secured & unsecured creditors.]—The rule by which a judgment creditor of a testator is entitled to priority over simple contract creditors in the administration of the assets of testator under an administration decree is not affected by *Jud. Act*, 1875 (c. 77), s. 10, which provides that in such administration of assets the same rules shall prevail as to the respective rights of secured & unsecured creditors as may be in force under the law of bkpcy. with respect to bkpts.' estates.—*SMITH v. MORGAN* (1880), 5 C. P. D. 337; 49 L. J. Q. B. 410.

Annotations:—*Apld. Re Maggi, Winehouse v. Winehouse* (1882), 20 Ch. D. 545. *Consd. Re Jones, Calver v. Laxton* (1885), 31 Ch. D. 440. *Obtd. & N.F. Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9. *Refd. Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652.

8506. —.]—*Re HOPKINS, WILLIAMS v. HOPKINS*, No. 8481, *ante*.

8507. —.]—*Jud. Act*, 1875 (c. 77), s. 10, does not introduce into the administration of insolvent estates of deceased persons the provision of *Bkpcy. Act*, 1869 (c. 71), s. 32, that all debts, with certain exceptions, are to be paid *pari passu*. Sect. 10 of former Act affects only the rights of the class of secured creditors as conflicting with those of the class of unsecured creditors; it does not affect the rights *inter se* of the members of those classes. Therefore, if a creditor of an insolvent testator recovers judgment for his debt against the exor. before the date of a judgment in an administration action, he is, notwithstanding sect. 10, entitled to be paid out of the assets in priority to the other creditors of equal degree.—*Re MAGGI, WINEHOUSE v. WINEHOUSE* (1882), 20 Ch. D. 545; 51 L. J. Ch. 560; 46 L. T. 362; 30 W. R. 729.

Annotations:—*Consd. Re Art Engraving Co.* (1889), 60 L. T. 381; *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652. *Overd. Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9. *Refd. Re Gould, Ex p. Official Receiver* (1887), 19 Q. B. D. 92; *Re Williams, Jones v. Williams* (1887), 36 Ch. D. 573; *Re Whitaker, Whitaker v. Palmer*, [1904] 1 Ch. 299; *Re Ambler, Woodhead v. Ambler*, [1905] 1 Ch. 697.

8508. —.]—The right given by *Post Office Savings Banks Act*, 1863 (c. 14), s. 14, to a savings bank to recover from the estate of any one of its officers moneys due to it from him in priority to all

other claims, is destroyed by *Bkpcy. Act*, 1883 (c. 52), s. 40, in cases in which his estate is being administered in bkpcy., but not in cases in which his estate is being administered by the Ch. Div., since *Jud. Act*, 1875 (c. 77), s. 10, does not operate to introduce into administrations in the Ch. Div. the bkpcy. rule that all debts due from the estate are to be paid *pari passu*.—*Re WILLIAMS, JONES v. WILLIAMS* (1887), 36 Ch. D. 573; 57 L. J. Ch. 264; 57 L. T. 756; 36 W. R. 34; 3 T. L. R. 805.

8509. —.]—The effect of *Jud. Act*, 1875 (c. 77), s. 10, is to introduce into the administration of the estates of deceased insolvents by the Ch. Div. the rule in *Bkpcy.* that voluntary creditors are to be paid *pari passu* with creditors for value.—*Re WHITAKER, WHITAKER v. PALMER*, [1901] 1 Ch. 9; 70 L. J. Ch. 6; 83 L. T. 449; 49 W. R. 106; 17 T. L. R. 24; 45 Sol. Jo. 43, C. A. *proceedings*, [1904] 1 Ch. 290.

Annotations:—*Consd. Re Whitaker, Whitaker v. Palmer*, [1904] 1 Ch. 299. *Refd. Re Webb* (Smithfield, London), [1922] 2 Ch. 369.

8510. Claim by savings bank—Against estate of officer.]—*Re WILLIAMS, JONES v. WILLIAMS*, No. 8508, *ante*.

— Rule in bankruptcy.]—*See BANKRUPTCY*, Vol. IV., p. 473, Nos. 4272–4275.

8511. Rates -- Preferential payments.]—*Re ALBION STEEL & WIRE CO.*, No. 8487, *ante*.

8512. —.]—The priority as to rates & wages conferred by *Preferential Payments in Bkpcy. Act*, 1888 (c. 62), applies in the case of a deceased insolvent whose estate is being administered in the Ch. Div. where the date of his death occurs after the commencement of the Act.—*Re HEYWOOD, PARKINGTON v. HEYWOOD*, [1897] 2 Ch. 593; 67 L. J. Ch. 25; 77 L. T. 423; 46 W. R. 72; 42 Sol. Jo. 33; 4 Mans. 321.

Annotations:—*Expld. Re Laycock, Laycock v. Income Tax Special Comrs.*, [1919] 1 Ch. 211. *Refd. Re Whitaker, Whitaker v. Palmer*, [1900] 2 Ch. 676; *Re Webb* (Smithfield, London), [1922] 2 Ch. 369.

— Rule in bankruptcy.]—*See BANKRUPTCY*, Vol. IV., p. 474, Nos. 4277–4283.

8513. Wages -- Preferential payment.]—*Re HEYWOOD, PARKINGTON v. HEYWOOD*, No. 8512, *ante*.

Rule in bankruptcy.]—*See BANKRUPTCY*, Vol. IV., pp. 475–478, Nos. 4284–4321.

8514. Loan from wife to husband—Postponement—Married Women's Property Act, 1882 (c. 75), s. 3.]—*Re LENG, TARN v. EMMERSON*, No. 8484, *ante*.

— Rule in bankruptcy.]—*See BANKRUPTCY*, Vol. IV., pp. 481, 482, Nos. 4335–4342.

Priority of debts—Rule in bankruptcy.]—*See BANKRUPTCY*, Vol. IV., pp. 471–485, Nos. 4250–4360.

(d) Extent to which Crown Bound.

See Part IV., Sect. 2, sub-sect. 3, B., ante.

PART VIII. SECT. 7, SUB-SECT. 2.—B. (c).

c. Common law priority of classes—Pari passu in each class.]—26 Geo. III., c. 11, s. 18, directs exors., where an estate is insolvent, "to divide it in due proportion to & among the creditors." It is their duty to pay

debts according to the common law priority of classes, & *pari passu* in each class.—*JOSEPH v. McLEOD* (1833), N. B. Dig. 376.—**CAN.**

d. Priority of judgment obtained before decree for administration—Payment out of fund in court.]—Where a

creditor obtained judgment against an administratrix before decree for administration, the judge in chambers ordered his demand to be paid in full out of a fund in ct. in priority to the other unsecured creditors.—*SCOTT v. MURPHY* (1883), 13 L. R. Ir. 10.—**IR.**

(e) *Right of Retainer.*

See Part IV., Sect. 4, *ante*.

(f) *Interest on Debt.*

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8515. Funds accruing after decree—Interest from admission of proof of debts—No interest on shares unclaimed.]—A decree made in a creditor's administration suit operates as a judgment in favour of creditors, & when, in the case of a deficient estate, the available assets have been apportioned amongst & directed to be paid to certain creditors who have proved their debts, but some of such creditors have left unclaimed for many years the sums directed to be paid, the creditors named in the decree have a vested right to the sums originally apportioned to them, & the ct. has no jurisdiction to order payment of those apportioned sums, however long they may have been left in ct. unclaimed, to any one but the creditors to whom they were apportioned by the decree, or their representatives. Where, many years after the administration decree in such a suit, funds had accrued to the estate, & some only of the creditors named in the decree, or their representatives, appeared in answer to advertisements:—*Held*: (1) the newly accrued funds must be apportioned amongst all the creditors named in the decree, & any other persons who might prove that they were creditors; (2) those creditors who appeared in answer to the advertisements were only entitled to the proportions of the new funds which their debts bore to the total amount of the debts proved against the estate, & the remainder must be retained to meet any future claims by other creditors; (3) the creditors whose debts carried interest were entitled to interest on the unpaid balances of the debts from the date of the master's report certifying the proof of their debts, except those creditors who had left the sums apportioned to them unclaimed, & who were not entitled to interest on the sums so left unclaimed by their own neglect.—*ASHLEY v. ASHLEY* (1877), 4 Ch. D. 757; 46 L. J. Ch. 322; 36 L. T. 200; 25 W. R. 356, C. A.

Annotations:—*Generally*, *Mentd. Re Higginson & Dean. Ex p. A.-G.*, [1899] 1 Q. B. 325; *Wilson v. Church* (1911), 106 L. T. 31.

8516. To what date payable—Date of judgment for administration—Not date of payment.]—In an action for the administration of the estate of a person who has died insolvent since the commencement of Jud. Act, 1875 (c. 77), a creditor on the estate, whose debt bears interest is not entitled to interest up to the day of payment, but only to the date of the judgment for administration, which, by sect. 10 of the Act, is equivalent to an adjudication in bkpcy.—*Re SUMMERS, BOSWELL v. GURNEY* (1879), 13 Ch. D. 136; 27 W. R. 865.

Annotation:—*Distd. Re Talbott, King v. Chick* (1888), 39 Ch. D. 567.

8517. Payment of interest out of surplus—Application of dividends—Method of accounting.]—One of two obligors in a joint & several bond became bkpt. The obligee having by several dividends in the bkpcy. been paid 20s. in the

pound upon the amount of principal & interest due at the date of the commission, also carried in a claim in respect of the same bond under a decree in a suit for the administration of the estate of the co-obligor who had died:—*Held*: the amount due to the obligee in respect of such claim was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividend, & the surplus, if any, in reduction of the principal.

Semble: the same principle of computation was applicable in bkpcy. as between bkpt. & the creditors, where there was a surplus of the estate after payment of 20s. in the pound upon all the debts proved.—*BOWER v. MARRIS* (1841), Cr. & Ph. 351; 10 L. J. Ch. 356; 41 E. R. 525, L. C.

Annotations:—*Reid. Re Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643; *Whittingstall v. Grover* (1886), 55 L. T. 213; *Smith v. Law Guarantee & Trust Soc.*, [1904] 2 Ch. 569; *Re Calgary & Medicine Hat Land Co., Pigeon v. Calgary & Medicine Hat Land Co.* (1908), 78 L. J. Ch. 97.

8518. ———.]—For many years prior to 1856, A. carried on a banking business in partnership with B. On Mar. 13, 1856, A. died. On Aug. 14, 1856, the bank stopped payment, & on the 27th of the same month B. was adjudicated bkpt. Several actions were commenced for the administration of the estate of A. By an order made in 1861 in one of those actions it was declared that the separate creditors of A. were entitled to be paid out of his estate in priority to the joint creditors; & it was also declared that the separate creditors of A., whose debts did not by law or special contract carry interest were not entitled to interest in priority to the joint creditors in respect of the principal due to such creditors. B. died in 1863. The joint estate of the banking firm down to A.'s death, called the *ante-mortem* estate, & the assets of the bank as carried on by B., down to his bkpcy., called the *post-mortem* estate, & the separate estate of B. were administered in bkpcy. The result of the actions to administer the estate of A. & of the administration in bkpcy., was to pay dividends amounting to 20s. in the pound to the joint & separate creditors of the partners. It was then found that some surplus assets would remain, but not enough to satisfy all the interest on the joint as well as on the separate debts. Accordingly, a question arose between the creditors of the joint estate & those of the separate estate of A., whose debts did not by law carry interest, whether such creditors of the separate estate of A. were entitled to take the interest on their debts out of the surplus in priority to the joint creditors, or whether the surplus should be distributed between the joint & separate creditors *pari passu*. There was a further question as to the manner in which the dividends out of the estate ought to be accounted for in ascertaining the amount of interest due:—*Held*: (1) the question of interest should be decided in accordance with the established rule as to the principal, & consequently the separate creditors were entitled to take their interest in priority to the joint creditors; (2) the dividends received ought to be accounted for, in ascertaining the amount of interest due, by treating the dividends as ordinary

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8516 i. To what date payable—Date of judgment for administration.]—*O'BRIEN v. GILLMAN* (1883), 13 L. R. Ir. 8.—IR.

8516 ii. ———.]—In the administration of an insolvent estate a secured creditor is only entitled to interest on the amount at which he values his security from the date of valuing it, & not from the judgment for adminis-

tration, which is the equivalent for adjudication in bkpcy.—*Ross v. Ross* (1890), 25 L. R. Ir. 362.—IR.

e. Arrears—From date of commencement of suits.]—Creditors who had filed bills to enforce their claims

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payments on account, & applying each dividend first in the payment of interest calculated to the day of such dividend, & the surplus, if any, to the reduction of the principal.—**WHITTINGSTALL v. GROVER** (1886), 55 L. T. 213; 35 W. R. 4.

8519. — Whether bankruptcy rule prevails.]—H. died in 1882. In 1883, an order was made for the administration of his estate in a creditor's action. The estate was then insolvent, consisting of shares in a co. which were worthless. These shares afterwards became valuable. In 1896, the chief clerk made a certificate stating the amount of the debts in which he calculated interest on the debts carrying interest only down to the date of the judgment. The estate turned out more than sufficient to pay the certified debts:—**Held**: (1) the questions as to which the rules of bkpcy. were incorporated by Jud. Act, 1875 (c. 77), s. 10, were all settled by the certificate, & those rules had nothing to do with the distribution of the surplus; (2) the surplus must be distributed according to the rules of the Ch. Div., viz. in paying first interest on the debts which at law carried interest down to the date of payment, at the rates fixed by their contract, & subject thereto in paying interest at 4 per cent. to the other creditors on their debts.—**Re HENLEY, ALCOCK v. HENLEY** (1896), 75 L. T. 307.

Annotation:—As to (2) N.F. Re Whitaker, Whitaker v. Palmer, [1904] 1 Ch. 299.

8520. — —.]—In the administration of an estate which is insolvent at the date of the judgment, but afterwards realises enough to pay the principal of all the debts, but not the whole of the interest allowed by the ct., whether on debts which by law carry interest, or on debts which do not, the payment of interest must be governed by the rules of bkpcy. & not those of the Ch. Div.—**Re WHITAKER, WHITAKER v. PALMER, [1904] 1 Ch. 299; 73 L. J. Ch. 166; 90 L. T. 277; previous proceedings, [1901] 1 Ch. 9, C. A.**

8521. Income tax on interest—Method of computation.]—Re GREEN, BAIL v. ELLIS, [1904] W. N. 78.

Claim of creditors to interest—Rule in bankruptcy.]—See BANKRUPTCY, Vol. IV., pp. 305–307, Nos. 2852–2875.

(g) Property Acquired after Bankruptcy.

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8522. Property acquired after second discharge—Order of payment of creditors.]—A person, who had taken the benefit of the Act for the relief of insolvent debtors, first in 1814, & a second time in 1820, died in 1826, leaving assets more than sufficient for the payment of all the debts which he had contracted subsequently to his second insolvency:—**Held**: the assets ought to be applied in payment first of these subsequent debts, & secondly, of the debts scheduled under the second insolvency, & thirdly of the debts scheduled under the first insolvency.—**BARTON v. TATTERSALL** (1830), 1 Russ. & M. 237; Taml. 378; 39 E. R. 92.

Annotations:—Consd. Re Bender, Ex p. Fenwick (1830), 5 L. J. Bcy. 46; Ward v. Painter (1839), 2 Beav. 85;

Dunlevie v. Hort (1857), 30 L. T. O. S. 23. Expld. Re Hare, Ex p. Welchman (1879), 11 Ch. D. 48. Consd. Re Clagett's Estate, Fordham v. Clagett (1882), 20 Ch. D. 637; Re Smith, Green v. Smith (1883), 24 Ch. D. 672. Held. Re Moylan (1852), 16 Beav. 220. Mentd. Ward v. Painter (1840), 5 My. & Cr. 298; Re Lyon, Ex p. Robinson (1844), 2 L. T. O. S. 440; Re Emmings (1849), 14 L. T. O. S. 208.

8523. Estate of discharged bankrupt—Proof by creditor in insolvency—Whether admissible beyond amount shown in schedule.]—In a suit for administration of assets of a deceased person, who had been discharged many years before under the Insolvent Act, the ct. will not order the master to admit proof by any creditor of a larger sum than that mentioned to be due to him in the schedule filed in the Insolvent Ct.—**BARTON v. TATTERSALL** (1831), 2 Russ. & M. 541; 9 L. J. O. S. Ch. 199; 39 E. R. 500.

8524. Estate of uncertificated bankrupt—Rights of creditors subsequent to bankruptcy—Priority over former creditors.]—An uncertificated bkpt. carried on business for several years after his bkpcy. with the knowledge of his assignees & of others who were his creditors at the time of the bkpcy. He died possessed of considerable property. On a claim filed by one of his exors. against the other & the official assignee under the bkpcy.:—**Held**: the creditors subsequent to the bkpcy. were entitled to priority over the former creditors, & the estate ought to be administered in Chancery.

The Ct. of Bkpcy. can have no jurisdiction to administer the estate of bkcy. for the benefit of the creditors subsequent to the commission. These creditors have proved no debts under the commission, & have no rights under it (**TURNER, L.J.**).—**TUCKER v. HERNAMAN** (1853), 4 De G. M. & G. 395; 1 Eq. Rep. 360; 22 L. J. Ch. 791; 17 Jur. 723; 1 W. R. 498; 43 E. R. 561, L. JJ.

Annotations:—Consd. Kerakoose v. Brooks (1860), 14 Moo. P. C. C. 452. Expld. Re Magnus, Ex p. Robertson (1873), 42 L. J. Bcy. 85. Consd. Engelback v. Nixon (1875), L. R. 10 C. P. 645; Re Caughey, Ex p. Ford (1876), 1 Ch. D. 521. Expld. Meggy v. Imperial Discount Co. (1878), 3 Q. B. D. 711. Held. Collins v. Burton (1859), 33 L. T. O. S. 313; Re Gorton, Dowse v. Gorton (1889), 60 L. T. 305; Re Burr, Ex p. Pannell (1901), 84 L. T. 327. Mentd. Re M'Lintock, Ex p. Scott (1854), 23 L. T. O. S. 258; Talby v. Official Receiver (1888), 13 App. Cas. 523.

8525. Property acquired after close of bankruptcy—Surplus after payment of new creditors—Administratrix entitled—As against old creditors.]—An undischarged bkpt. died intestate within three years after the close of his bkpcy., having in the interval acquired fresh property & contracted fresh debts. Only a small dividend had been paid in the bkpcy., & bkpt. had not, after the close of the bkpcy., made any further payments to the creditors who had proved. An action was brought by one of the new creditors to administer bkpt.'s estate. The estate was sufficient to pay the costs of the action, to pay the new creditors in full, & to leave a surplus. This surplus was claimed by the old creditors:—**Held**: the administratrix was entitled to the surplus, & the old creditors had no right to it.—**Re SMITH, GREEN v. SMITH** (1883), 24 Ch. D. 672; 52 L. J. Ch. 921; 49 L. T. 297; *previous proceedings*, 22 Ch. D. 586.

Property acquired after close of bankruptcy or after discharge—Rule in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 738–740, Nos. 6380–6391.

having, by order made under an administration decree, been restrained from proceeding with their own suits, &

directed to prove under the administration decree:—**Held**: they were entitled to six years' arrears of interest

computed back from the commencement of their own suits.—**MAYNARD v. MAYNARD** (1879), 10 Q. B. 125.—**GAM.**

(h) Estate of Deceased Partner.

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8526. Joint & separate assets — Distinction between—Application of bankruptcy rules.]—The distinction between joint & separate assets is not restricted to the cases of a distribution under a bkpcy. or insolvency; it applies equally to the case of the administration of assets of deceased partners. In the administration of the assets of a deceased partner, where both partners are solvent, there is no distinction made between joint & several creditors; they are all paid, & in taking the partnership accounts, the joint debts thus paid will be allowed in account by the surviving partner. If the estate of the deceased partner be insolvent, & that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share. If both the deceased & surviving partner are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, & can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied. If both partners die before administration takes place, the rule is the same.—*RIDGWAY v. CLARE* (1854), 19 Beav. 111; 52 E. R. 291.

Annotation:—Reid. Lodge v. Pritchard (1863), 4 Off. 294.

8527. Surviving partner solvent—Joint creditors satisfied by surviving partner—Claim of surviving partner against estate of insolvent partner—Amounts paid beyond his share.]—*RIDGWAY v. CLARE*, No. 8526, *ante*.

8528. Surviving partner insolvent—Position of joint creditors.]—*RIDGWAY v. CLARE*, No. 8526, *ante*.

Joint & separate estates—Rules in bankruptcy.]—See *BANKRUPTCY*, Vol. IV., pp. 420–471, Nos. 3788–4249.

(j) Creditor Claiming against Two Estates.

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8529. Right to dividends from both estates—On same debt.]—A creditor against two estates for the same debt is entitled to receive dividends on the full amount from both estates, until he has been satisfied his debt.—*BONSER v. COX* (1842), 6 Beav. 84; 49 E. R. 756.

(k) Disposal of Unclaimed Shares.

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8530. To be retained in court—Not distributable among other creditors.]—*ALDERSON v. PETRIE* (1873), 25 W. R. 361, L. C.

Annotation:—Folld. Ashley v. Ashley (1877), 4 Ch. D. 757.

8531. ——— No interest payable.]—*ASHLEY v. ASHLEY*, No. 8515, *ante*.

8532. ———.]—Under an administration decree made in 1866 divers creditors carried proofs, but the proceedings were not completed, in consequence of an insufficiency of assets. In 1888, further assets fell in, & by the chief clerk's certificate it appeared that there was a sufficient fund in ct. to pay all the creditors, but that some of the creditors whose claims were allowed could not be found:—*Held*: the proper course was to retain in ct. to the credit of each of such last-mentioned creditors a sum of consols representing the amount of his debt & the interest thereon, & to fully administer the residue of the fund.—*Re MACDONALD, MCALPIN v. MACDONALD* (1889), 59 L. J. Ch. 231; 62 L. T. 541.

Disposal of unclaimed dividends—Rule in bankruptcy.]—See *BANKRUPTCY*, Vol. IV., p. 499, Nos. 4494–4499.

*(l) Position of Secured Creditors.**i. Before Judicature Act, 1875.*

8533. Former law.]—*MASON v. BOGG* (1837), 2 My. & Cr. 443; *ROME v. YOUNG* (1840), 4 Y. & C. Ex. 204; *RHODES v. MOXHAY* (1861), 10 W. R. 103; *LOVEL v. LOVEL* (1881), 45 L. T. 252.

ii. After Judicature Act, 1875.

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8534. General rule.]—*Re HOPKINS, WILLIAMS v. HOPKINS*, No. 8481, *ante*.

8535. Valuation of security—Sale below valuation—Proof restricted to difference between valuation & debt.]—*Re HOPKINS, WILLIAMS v. HOPKINS*, No. 8481, *ante*.

8536. ——— Sale above valuation—Benefit of security not limited to estimated value.]—Secured creditors of an insolvent estate claimed for £400 & interest; they valued their security at £500; their names were struck out from the schedule of creditors in the chief clerk's certificate. The security realised more than £500:—*Held*: their right to the benefit of security was not limited to £500.—*Re HOPKINS, WILLIAMS v. HOPKINS* (1883), 52 L. J. Ch. 736; 48 L. T. 513; 31 W. R. 495.

8537. ——— Depreciation of value—Admission of proof for deficiency.]—E. died in 1889 insolvent, & an order was made for the administration of his estate. A creditor for £47,000 held as security (*inter alia*) shares & debentures of the Delagoa Bay Ry. The railway was seized by the Portuguese Govt., & an arbn. tribunal was appointed in 1891. The creditor declined to prove for his debt, & stated that he preferred to rely on his securities. In 1893, the chief clerk filed his certificate in which the creditor's claim was entered as disallowed. In 1900 the award was made, & resulted in the creditor only receiving £1,448 in respect of his shares & debentures. In Jan. 1902, he took out a summons to vary the certificate by allowing his claim & for liberty to prove for his debt:—*Held*: under Jud. Act, 1875 (c. 77), s. 10, the bkpcy. rules applied to the

PART VIII. SECT. 7, SUB-SECT. 2.—
B. (h).

1. Surviving partner entitled to rank — For balance due — In respect of partnership transaction.]—In the administration by the ct. of the insolvent estate of a deceased partner the surviving partner is entitled to

rank for a balance due to him in respect of partnership transactions & partnership debts paid by him, when, apart from his claim, there would be no surplus available for partnership creditors.—*Re RUBY, TRUSTS CORPN. OF ONTARIO v. RUBY* (1897), 24 A. R. 509.—OAN.

PART VIII. SECT. 7, SUB-SECT. 2.—
B. (i) ii.

8537i. Valuation of security—Depreciation of value—Admission of proof for deficiency.]—In the administration of the insolvent estate of a deceased person, who died after the coming into

Sect. 7.—Administration of insolvent estates:
sect. 2, B, (l) ii., & (m). Sect. 8: Sub-sect. 1, A.]

case, & under them the creditor could come in & prove at any time if there were assets undistributed, & if no injustice would be caused; he could do the same thing in an administration in the Ch. Div.; inasmuch as his debt had not been adjudicated upon, the disallowance of it in the certificate was not a fatal objection; if it was necessary to show special circumstances he had done so; the certificate need not be varied, & the creditor must be allowed upon terms to come in & prove.

Semble: a mtgee. of shares is not bound to watch the market so as to sell them at the highest price; & he does not by failing to sell at the most favourable opportunity lose his right to prove against the estate of the mtgor.

The legislature clearly contemplated the right of a creditor, on any alteration during the bkpcy. in the value of his security by realisation of that security or otherwise, to be allowed to re-adjust his claims—of course not by so doing thereby creating any injustice to the other parties & of course not interfering with anything that had been done as to dividend or otherwise prior to change of proof (ROMER, L.J.).—*Re McMURDO, PENFIELD v. McMURDO*, [1902] 2 Ch. 684; 71 L. J. Ch. 691; 86 L. T. 814; 50 W. R. 644; 46 Sol. Jo. 550, C. A.

8538. ——— Mortgaged shares—Not sold at best price.]—*Re McMURDO, PENFIELD v. McMURDO*, No. 8537, *ante*.

8539. Application of proceeds of security—Applied first in payment of interest—Next in discharge of principal—Right to prove for balance of principal.]—In the administration of an insolvent estate, a mortgaged property of testator having been sold in the administration action, & the proceeds of sale paid into ct.:—*Held:* the mtgee. was entitled to have the proceeds of sale applied first in payment of interest on the mtge. debt down to the date of payment, & then in payment of principal, & to prove against the estate for the unpaid balance of principal, but the amount of the proof could not exceed the amount of principal due at the date of the judgment in the action.—*Re TALBOTT, KING v. CHICK* (1888), 39 Ch. D. 567; 58 L. J. Ch. 70; 60 L. T. 45; 37 W. R. 233.

Annotation:—Reid. Re London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639.

8540. Election to assign security—Assignee of mortgage security.]—*Re NELSON, NELSON v. COLLINS* (1919), 147 L. T. Jo. 4.

Rules in bankruptcy.]—See BANKRUPTCY, Vol. IV., pp. 355–389, Nos. 3331–3560.

(m) Time for Proving

See Jud. Act, 1875 (c. 77), s. 10; Administration of Estates Act, 1925 (c. 23), s. 34.

8541. General rule—Application of bankruptcy rule—To chancery practice.]—*Re McMURDO, PENFIELD v. McMURDO*, No. 8537, *ante*.

8542. Creditors admitted while assets undistributed.]—LASHLEY *v. HOGG*, No. 8218, *ante*.

operation of Judicature Act, a creditor holding a security sent in a claim in the suit, & in answer to a notice calling on him to value his security,

valued it at the full amount of his debt & interest:—*Held:* the creditor could not subsequently reduce the valuation of the security in order to

8543. ——— Although fund apportioned—& transferred to Accountant-General.]—Creditor allowed, on motion, to prove his debt under a decree upon a creditor's bill, though money apportioned amongst the creditors, & transferred to the Accountant-General; on paying the costs of the motion, & of reapportioning the funds.
v. HADDON (1816), 1 Madd. 529; 56 E. R. 194.

8544. ———.]—In a creditor's suit for the administration of the assets of an intestate who had joined in a bond as a surety, the bond creditor, being aware of the suit, omitted to prove till the time limited by the advertisements for creditors to come in had expired; a decree on further directions had been made, the administratrix had admitted assets, & the principal debtor in the bond had become bkpt.:—*Held:* he might still be let in upon terms, the fund remaining undistributed.

It seems to me, therefore, that I must give the creditor an inquiry as to the debt, he paying the costs of the petition, & undertaking to abide by any order that the ct. may think fit to make as to subsequent costs (KNIGHT-BRUCE, V.-C.).—*BROWN v. LAKE* (1847), 1 De G. & Sm. 114; 63 E. R. 1008.

Annotation:—Consd. Re McMURDO, Penfield v. McMURDO, [1902] 2 Ch. 684.

8545. ———.]—BRETT *v. CARMICHAEL*, No. 8220, *ante*.

8546. ———.]—*Re METCALFE, HICKS v. MAY*, No. 8221, *ante*.

8547. ——— Unless debt previously adjudicated upon—By master.]—*Re McMURDO, PENFIELD v. McMURDO*, No. 8537, *ante*.

8548. ——— Proof by secured creditor—On depreciation of security.]—*Re HOPKINS, WILLIAMS v. HOPKINS*, No. 8481, *ante*.

8549. ———.]—*Re McMURDO, PENFIELD v. McMURDO*, No. 8537, *ante*.

8550. ———.]—HARRISON *v. KIRK*, No. 8222, *ante*.

8551. After assets distributed—Refund by beneficiaries.]—DAVID *v. FROWD*, No. 8240, *ante*.

8552. After order for payment made.]—In an administration suit, after an order has been made for the payment of a specific dividend to the creditors who have proved, a creditor will not, though the dividend has not actually been paid, be allowed to come in & prove, so as to disturb that order.—*HULL v. FALKNER* (1865), 5 New Rep. 266; 11 L. T. 761; 11 Jur. N. S. 151.

Annotation:—Reid. The Zoe (1886), 11 P. D. 72.

8553. On what terms admitted—Payment of costs—Of motion—& re-apportionment of fund.]—ANGELL *v. HADDON*, No. 8543, *ante*.

8554. ——— Undertaking as to future costs.]—BROWN *v. LAKE*, No. 8544, *ante*.

8555. ———.]—HARRISON *v. KIRK*, No. 8222, *ante*.

8556. ——— Such as court considers proper.]—*Re McMURDO, PENFIELD v. McMURDO*, No. 8537, *ante*.

8557. ——— Regard to payments already made—

prove on the estate for the balance of his claim.—*FINDLATER v. BUTLER* (1880), 5 L. R. Ir. 95.—*IR.*

Justice to other parties.]—*Re* McMURDO, PENFIELD v. McMURDO, No. 8537, *ante*.

8558. ———.]—HARRISON v. KIRK, No. 8222, *ante*.

Time for proof—Rule in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 321, 322, Nos. 3004—

SECT. 8.—COSTS.

SUB-SECT. 1.—COSTS OF REPRESENTATIVE.

A. In General.

See R. S. C., Ord. 65, r. 1, & generally, PRACTICE.

8559. General rule—Representative entitled to costs—Unless guilty of misconduct.]—(1) An exor. or trustee who retains a balance in his hands, & against whom a suit is instituted, will not be charged with the costs of the suit, except under circumstances of considerable misconduct.

(2) Where a suit is instituted with unnecessary haste against an exor. or trustee who has not grossly misconducted himself, he will be allowed his costs.—*BENNETT v. ATKINS* (1835), 1 Y. & C. Ex. 247; 4 L. J. Ex. Eq. 35.

8560. ———.]—*Re* KNIGHT'S WILL, No. 9014, *post*.

8561. ———.]—(1) The decision of a judge of the High Ct., ordering deft. exor. to pay to costs of an administration action, on the ground that he has caused litigation by refusing to furnish accounts, is subject to appeal.

(2) L. & P. were the exors. appointed by the will of X., who died in May, 1883. P. proved the will in June, 1883. On May 20, 1884, the solr. of L. wrote a letter to P., saying that L. had instructed him to take out administration to the estate as joint exor. with P., & asking P. to furnish accounts. On May 31, 1884, the same solr. wrote another letter to P., asking for a reply to his former letter. Neither letter contained any threat of litigation. P. denied that he had received either letter, & there was no strict evidence that either letter was posted.

On July 2, 1884, L. proved the will, & on Aug. 9, 1884, P. was served with the writ in an administration action brought by L. No threat of litigation had been made in the meantime:—*Held*: no misconduct had been established & P. was entitled to his costs.—*Re* PUGH, LEWIS v. PRITCHARD (1888), 57 L. T. 858, C. A.

8562. ———.]—(1) An administrator is entitled to his costs of an administration action even though the action has been caused by a claim by him for the allowance of certain payments made by him out of the estate & subsequently disallowed in his accounts in the action; provided the claim was made under an honest mistake, & was neither fraudulent nor monstrous. Nor if he complies with an order for payment into ct. of the balance representing the payments so dis-

allowed, is he, in the absence of special circumstances chargeable with interest thereon.

(2) By the judgment in a probate action, unsuccessfully brought by two of the children & next of kin of a father who had died leaving a will against the exor. for revocation of the probate deft.'s costs were ordered to be taxed & to be paid by plffs. Subsequently, in an action for administration of the estate of the mother who had died intestate deft., her administrator, who was the same person as exor. of the father, paid into ct. in that action a balance which had been found due from him in taking the accounts. On a summons in that action for the distribution of that balance among the several persons entitled to intestate's estate two of whom were assignees of the share of two next of kin plffs. in the probate action:—*Held*: deft. was entitled to set off his costs of the probate action, which had been taxed but not yet paid against the shares of the two assignees whose assignments were dated one before & the other after the judgment in the probate action.

(3) A man who fulfils the difficult duties of an administrator, exor. or trustee is, in common sense & common justice, entitled to be recouped to the very last penny everything that he has expended properly—that is to say, without impropriety—in his character of administrator, exor. or trustee (*KEKEWICH, J.*).

(4) Of course, if an action is brought for the purpose of making the exor. or administrator liable for breach of trust, & he has been found guilty of a breach of trust, & costs have been incurred in resisting the action, it is only right that, where these costs have been ascertained the exor. or administrator should pay them as part of the penalty for the breach of trust. Again, if an exor. brings in claims strictly in his character of exor., which the ct. can see from the evidence, documentary or arising out of cross-examination, or otherwise, or by a sort of intuitive process, or by a general view of the case, are not honestly brought forward, then the ct. notwithstanding the general rule, may fairly deprive the exor. of his costs, & if he is convicted of dishonesty, may, I have no doubt, order exor. to pay the costs so incurred. Again, apart from dishonesty, the ct. may, in my opinion, visit exor. with costs, or deprive him of his costs, where the claim is of a monstrous character, that is, one which no reasonable man could say ought to have been put forward. Even though exor. may have believed it, & a solr. may have prepared the case & counsel may have argued it; in such a case the ct. has quite sufficient power to deprive exor. of his costs, or even to make him pay the costs he has occasioned to the estate. But subject to these limitations there is no doubt that the general rule prevails, & that, even though exor. makes a mistake, even though he endeavours to charge against the estate items which the law does not allow him to charge, or where the endeavour to prove them has been defeated with costs, still he may have his costs if they have been incurred without impropriety or fraud, or if they do not partake of that monstrosity to which I have alluded (*KEKEWICH, J.*).

PART VIII. SECT. 8, SUB-SECT. 1.—A.

8559 i. General rule—Representative entitled to costs—Unless guilty of misconduct.]—It is a general rule that where a creditor proceeds against a personal representative for the administration of the personal estate, & the

result shows that there was no personal estate at the time of the commencement of the suit, & therefore nothing to pay the costs of the personal representative, & that the personal representative is not in any default, plff. must indemnify the personal representative in respect of the costs of the

proceedings.—*HIBERNIAN BANK v. LAUDER*, [1898] 1 I. R. 262.—*IR.*

g. Executors submitting questions to court—Right of executors to costs on appeal.]—Exors. were refused their costs of appeal out of the estate on the ground that having applied to the ct. for advice & received it they had no

Sect. 8.—Costs: Sub-sect. 1, A. & B. (a).]

—*Re* JONES, CHRISTMAS *v.* JONES, [1897] 2 Ch. 190 ; 66 L. J. Ch. 439 ; 76 L. T. 454 ; 45 W. R. 598.

Annotation:—As to (1) *Reid. Re* England's Settlement. Trusts, Dobb *v.* England, [1918] 1 Ch. 24.

8563. Fact of misconduct—Matter for appeal.]—*Re* KNIGHT'S WILL, No. 9014, *post*.

8564. ———.]—*Re* PUGH, LEWIS *v.* PRITCHARD, No. 8561, *ante*.

8565. ———.]—*Re* ISAAC, CRONBACH *v.* ISAAC, No. 8637, *post*.

Compare Nos. 8678, 9013, 9014, *post*.

8566. Application of rule—Right to immediate payment—Although liable to as debtor of estate—Debt due at future date.]—By the master's report, made in an administration suit, exor. was found to be indebted to testator's estate in a sum payable at a future day:—*Held*: notwithstanding that the exor. was entitled to immediate payment of his costs of suit.—STEPHENS *v.* PILLEN (1848), 17 L. J. Ch. 214 ; *sub nom.* STEVENS *v.* PILLEN, 10 L. T. O. S. 481 ; 12 Jur. 282.

8567. ——— Size of estate not material.]—SHERMAN *v.* KENDALL & ROBINSON (1885), 1 T. L. R. 627, C. A.

8568. ——— Under R. S. C., Ord. 55, r. Administration not asked for.]—An originating summons under Ord. 55, r. 3, for inquiries or directions, without administration, is equivalent to the old Chancery practice of commencing an administration suit, raising the particular point by the pleadings, obtaining an inquiry or direction upon that point, & then staying further proceedings. Accordingly, upon such a summons, the ct. has jurisdiction, provided it has proper parties before it under r. 5, to deal with the question of costs although no estate or fund is sought to be administered, & if the summons had been taken out by trustees, they are precisely in the same position, as regards their right to costs under Ord. 65, r. 1, as if it were an ordinary action for administration.—*Re* MEDLAND, ELAND *v.* MEDLAND (1889), 41 Ch. D. 476 ; 58 L. J. Ch. 572 ; 60 L. T. 851 ; 37 W. R. 753 ; 5 T. L. R. 523, C. A.

Annotation:—Mentd. Re Chapman, Cocks *v.* Chapman, [1896] 2 Ch. 763.

8569. Retainer of same solicitor—By executor & co-defendants—Proportion of costs out of estate.]—HARMER *v.* HARRIS, No. 8758, *post*.

8570. Lien for costs—Order for payment into court—Effect on lien.]—(1) Where an order has been made directing the costs of certain residuary legatees to be taxed as between solr. & client, the ct. refused to vary the order on the mere ground that it had been obtained without the consent of all the residuary legatees.

(2) An exor. having been ordered to pay money into ct. is not thereby deprived of his lien on the fund for his costs.—BLENKINSOP *v.* FOSTER (1838), 3 Y. & C. Ex. 205 ; 8 L. J. Ex. Eq. 8 ; 160 E. R. 675.

Annotation:—As to (1) *Reid. Re* Griffith, Jones *v.* Owen (1904), 73 L. J. Ch. 464.

8571. ——— In favour of deceased representative's estate.]—TURNER *v.* LETTS, No. 7851, *ante*.

8572. Costs, charges & expenses—What included under—In order to tax.]—An order to tax the costs of an exor. in a suit, including any costs, charges & expenses properly incurred by him in the execution of the trusts of the will, does not include the costs of his defence to other suits instituted against him as exor.—PAYNE *v.* LITTLE (1859), 27 Beav. 83 ; 54 E. R. 33.

8573. ———.]—(1) An order in an administration suit to tax the costs, charges, & expenses properly incurred by exors., not being costs in the cause, may include costs incurred by them in defending testator's estate to a suit in another ct., although such costs have not been provided for by the decree in the other suit, or in the order in the administration suit.

Semble: (2) it is not the ordinary practice that such costs should be provided for by the decree in the other suit.

Semble: (3) such costs, when incurred before the institution of the administration suit, may be properly included under the head of just allowances.

Exors. of a will were also residuary legatees. An administration suit was instituted, & after the decree, a creditor's suit was filed by a partner of the testator, to have the partnership declared void, & a receiver appointed. Some delay in appointing the receiver occurred, & exors. filed a bill for an account of the partnership assets, & also for a receiver, & a receiver was then appointed by consent. Exors. also defended the creditor's suit, although the question had been decided at law on the merits, but, in taking the accounts, they succeeded in reducing the creditor's claim by a considerable amount:—*Held*: (4) after the verdict at law, exors. were not justified in defending the creditor's suit on the merits, without applying to the ct. for leave to do so, but were entitled to their costs subsequent to the decree ; (5) they ought to have applied to pltf. in the creditor's suit to move to appoint a receiver, & not having done so, were not entitled to their costs of the third suit.—GRAHAM *v.* WICKHAM (1865), 2 De G. J. & Sm. 497 ; 5 New Rep. 292 ; 34 L. J. Ch. 220 ; 12 L. T. 39 ; 11 Jur. N. S. 168 ; 13 W. R. 396 ; 40 E. R. 467, L. J.J.

Annotation:—Consd. Fulton v. Andrew (1876), 46 L. J. Ch. 131.

8574. ——— Proceedings to strike solicitor off rolls.]—A solr. acting for the administrator of deceased intestate, retained in his hands a portion of the estate, & failed to account for the same. The administrator applied for & obtained in 1876, in the Q. B. Div., a rule that the solr. should be struck off the Rolls, or should answer an affidavit relating to the retention of the sum by him. A writ of attachment was issued against the solr., who absconded, & the writ was renewed in each term down to 1887. In that year, upon further consideration of an action to administer the intestate's estate, the taxing master was directed to tax the costs, charges & expenses of the administrator properly incurred. He disallowed all the costs of the proceedings against

further interest in the matter except to await the result of the appeal.—*Re* WALSH ESTATE, MILBURN *v.* GRAYSON, [1921] 2 W. W. R. 596 ; 62 S. C. R. 40—CAN

*h. Claims made by beneficiaries.]—*Where in an administration action the beneficiaries set up claims against the trustees in respect of alleged breaches of trust & fail to account of some of

them & abandon others, they may be ordered to pay the trustees' costs in connection with such claims.—MILLS *v.* ISAAC (1901), 20 N. Z. L. R. 752.—N.Z.

the solr., on the ground that they were not the ordinary proceedings, but were in the nature of punishment to the solr.:—*Held*: the real object of the proceedings against the solr. was to obtain the money due to the estate, & that therefore some of the costs incurred ought to be allowed, but it was referred to the taxing master to consider how far the costs incurred subsequently to obtaining the rule were for the benefit of the estate, & should be allowed.—*Re DAVIS, MUCKALT v. DAVIS* (1887), 57 L. J. Ch. 3; 57 L. T. 755.

Costs in probate action.]—See Part II., Sect. 6, sub-sect. 9, F., ante.

8575. No order as to costs—Effect on representative's right.]—GRAHAM v. WICKHAM, No. 8573, ante.

See, generally, SOLICITORS.

8576. ———.]—A summons having been taken out by a beneficiary for the administration of testator's estate under which several questions arose with respect to the accounts of the trustee & his management of the property, the judge made an order as to the questions in dispute, & ordered the accounts to be taken, & declared that "he did not think fit to make any order as to the costs of the action":—*Held*: this declaration was a judicial decision that the trustee was not entitled to his costs in the action, & he had no right to retain them out of the estate.—*Re HODGKINSON, HODGKINSON v. HODGKINSON*, [1895] 2 Ch. 190; 64 L. J. Ch. 663; 72 L. T. 617; 43 W. R. 594; 39 Sol. Jo. 468; 12 R. 297, C. A.

8577. Costs not reserved—Practice on further consideration.]—In an action against an exor. or trustee where the ct. after hearing the facts, makes an order for administration without any reservation of costs, it is not in accordance with the practice to entertain an application on further consideration that exor. or trustee should be ordered to pay costs down to the judgment, but this practice does not extend to a case where the order is made without evidence on both sides, or full discussion, either for the sake of convenience or to save expense, or otherwise in circumstances in which the ct. has not a sufficient knowledge of the facts (EVE, J.).—*Re GARDNER, ROBERTS v. FRY*, [1911] W. N. 155.

8578. Administration in county court — Discretion of registrar as to costs.]—In the administration of an estate in a county ct. the costs of the administrator are, under C. C. R., 1889, Ord. 50A, r. 20, within the discretion of the registrar, & the registrar, in taxing such costs in the case of an insolvent estate, may properly take into account the fact that the estate is insolvent, & may disallow costs which would properly be allowed if the estate were solvent. In such taxations of the administrator's costs a difference is to be made between the cases of solvent & insolvent estates, & in the case of insolvent estates such costs only are to be allowed as are

strictly necessary for the protection of the estate.—*PAIN v. BOWDEN*, [1896] 2 Q. B. 301; 65 L. J. Q. B. 530; 75 L. T. 102; 45 W. R. 48; 40 Sol. Jo. 622, D. C.

8579. Estate exhausted by creditors—Costs not allowed on fund in court.]—(1) Solrs. have no right to look for their costs to a fund in ct. not belonging to their clients.

(2) Where in an administration suit the estate in ct. was exhausted by creditors so that nothing was left for testator's representative, & she became insolvent, a motion that her costs of suit might be retained out of the fund in ct., so that her solrs. might be paid, was refused.—CHICK v. NICHOLLS (1877), 26 W. R. 231.

See, generally, SOLICITORS.

B. When Deprived of, or Liable for Costs.

(a) Mistake or Neglect.

See R. S. C., Ord. 65, r. 1.

8580. Mere neglect—Failure to get in assets—Costs allowed.]—Exors., against whom an inquiry has been directed as to what part of testator's assets might, but for their wilful default, have been got in, & who have been guilty of some acts of negligence, may nevertheless be entitled to their costs of an administration suit brought against them.—BAILEY v. GOULD (1840), 4 Y. & O. Ex. 221; 9 L. J. Ex. Eq. 43; 160 E. R. 987.

Annotation:—Reid. Re McEacharn, Gambles v. McEacharn (1911), 103 L. T. 900

8581. ——— Failure to invest balance—Not fraudulent—Costs allowed.]—Mere neglect of duty in an exor., as, for instance, the omission to invest balances pursuant to a direction in the will, if unaccompanied by fraud, is not such misconduct as to disentitle him to the general costs of a suit for the administration of the estate, although it may subject him to the costs of so much of the suit as was occasioned by such neglect.—HEIGHINGTON v. GRANT (1845), 1 Ph. 600; 10 Jur. 21; 41 E. R. 761, L. O

Annotation:—Consd. Tickner v. Smith (1855), 25 L. T. O. S. 44.

Failure to account.]—See Nos. 8594, 8595, post.

8582. Mistake—Charging items wrongfully—Costs allowed.]—A residuary legatee objected to the account rendered by exors., & on their refusing to pay, in discharge of all her claims, a sum larger than the amount thereby shown to be due to her, filed a bill against them for administration. In the suit they were disallowed certain items of disbursement, & in consequence the balance found due from them was larger than the amount which pltf. had offered to accept:—*Held*: exors. ought not to be ordered to pay the costs of the suit, which was consequent on their mistake, but they were entitled to retain their costs out of the fund in the usual way.—SMITH v. CREMER (1875), 24 W. R. 51.

PART VIII. SECT. 8, SUB-SECT. 1.— B. (a).

k. Misconduct justifying action for receiver.]—Where a bill was filed against an exor. & trustee for the administration of an estate, & praying a receiver on the ground of the exor. having become embarrassed, & of his misconduct, & the circumstances were such as to justify alarm on the part of the cestui que trust, the exor. was

charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver.—*BALD v. THOMPSON* (1870), 17 Gr. 154.—CAN.

l. Mere neglect — Retention of money.]—Exor. though in the result made answerable for default, by reason of loss incurred through neglect, or chargeable with interest for retaining money in his hands, yet if there is nothing beyond such negli-

gence, or retention of money is still entitled to the costs of the suit.—*TRAVERS v. TOWNSEND* (1828), 1 Mol. 496.—IR.

m. ———.]—A personal representative who had been ordered in an administration suit, to bring in money due by him to the estate, will not be allowed any costs in the suit until he has complied with the order.—*Re O'KEAN, FERRIS v. O'KEAN*, [1907] 1 I. R. 223.—IR.

Sect. 8.—Costs: Sub-sect. 1, B. (a), (b) & (c).]

8583. ————.]—*Re JONES, CHRISTMAS v. JONES*, No. 8562, *ante*.

Costs of trustees.]—*See TRUSTS & TRUSTEES.*

See, generally, PRACTICE.

(b) Breach of Trust.

See, generally, PRACTICE.

8584. Order that costs be taxed—Not expressly burdening representative with costs—Liability of representative.]—*BRETLAND v. COPE* (1700), Colles, 97; 1 E. R. 199, H. L.

8585. Fraud—Liability for costs—Notwithstanding provisions of will.]—Notwithstanding testator directed that exors., for any expenses they shall be put to, shall be allowed their costs out of his estate, yet as there was a plain fraud in this case in exors., the ct. decreed costs against them.—*HIDE v. HAYWOOD* (1741), 2 Atk. 126; 26 E. R. 479.

8586. Costs of accounts & inquiries—Relating to breach.]—Exor. charged with compound interest, at 5 per cent. under a direction for half-yearly rests, as not having attempted to execute a trust to accumulate, though no loss happened, & a due execution of the trust could not have produced so much allowed, subsequent costs of proceedings, consequential upon those, of which the costs were allowed him by the original decree, not as to the inquiries & accounts, relating to the breach of trust, nor charged with those costs, arising principally from a necessary investigation as to the rule, by which he ought to be charged.—*RAPHAEL v. BOEHM* (1807), 13 Ves. 590; 33 E. R. 415, L. C.

*Annotations:—*Consd. *Tebbs v. Carpenter* (1816), 1 Madd. 290; *Heighington v. Grant* (1845), 1 Ph. 600. *Reid. Dornford v. Dornford* (1806), 12 Ves. 127; *Montgomery v. Wauchope* (1816), 4 Dow, 109; *Binnington v. Harwood* (1825), Turn. & R. 477; *Law v. Hunter* (1826), 1 Russ. 100; *Sutton v. Sharpe* (1826), 1 Russ. 146; *A.-G. v. Solly* (1829), 2 Sim. 518; *Docker v. Somes* (1834), 2 My. & K. 655; *Cotham v. West* (1837), Donnelly, 199; *Heighington v. Grant* (1840), 5 My. & Cr. 258; *A.-G. v. Alford* (1855), 4 De G. M. & G. 843; *Feltham v. Turner* (1870), 23 L. T. 345; *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

8587. Costs of investigation—Into chargeability.]—*RAPHAEL v. BOEHM*, No. 8586, *ante*.

8588. Proceedings subsequent to decree—For distributing estate.]—A trustee was declared liable for a breach of trust & was ordered to pay the costs up to the hearing. He complied with the decree:—*Held*: he was entitled to his costs of the subsequent proceedings for clearing & distributing the fund.—*HEWETT v. FOSTER* (1844), 7 Beav. 348; 8 Jur. 769; 49 E. R. 1099.

*Annotations:—*Expld. & Distd. *Easton v. Landor* (1892), 15 F. Re Skinner, Cooper v. Skinner, 1 Ch. 289.

See, now, Nos. 8590, 8595, post.

See, generally, TRUSTS & TRUSTEES.

8589. Direction by testator as to costs—If suit instituted by beneficiary—Payment out of beneficiary's interest—Whether applicable when wilful default alleged.]—Testator, after giving his residuary real & personal estate to his exors. & trustees upon trust to sell & convert & hold the proceeds in trust for certain beneficiaries, provided that, in case any proceedings for the administration of his estate should be commenced by any beneficiary, his trustees should hold the interest

of the beneficiary in trust to pay thereout in the first place the costs of such proceedings. Thirteen years after testator's death his estate remained unrealised by the trustees, who kept no proper accounts of profits received by them from the estate. Annual sums payable under the provisions of the will had been irregularly paid, & capital sums payable thereunder remained unpaid. Some of the beneficiaries commenced an administration action against the exors. & trustees, alleging wilful default by them in the administration of the estate, & claiming damages for loss to the estate & payment of the sums due under the provisions of the will:—*Held*: the provision for payment of costs was inapplicable to an action based on wilful default, which was a *probabilis causa litigandi*, & if applicable to such an action, would have been void as repugnant to the gift, since it would prevent the beneficiaries from obtaining the enjoyment of it.—*Re WILLIAMS, WILLIAMS v. WILLIAMS*, [1912] 1 Ch. 399; 81 L. J. Ch. 296; 106 L. T. 584; 56 Sol. Jo. 325.

Failure to render account.]—*See Sub-sect. 2, C., post.*

(c) Conduct in relation to Accounts.

See R. S. C., Ord. 55, r. 10A.

8590. Costs of taking account.]—In a case where proceedings for administration are rendered necessary by the gross & indefensible neglect of trustees to deliver accounts, the defaulting trustees may be ordered to pay all the costs, including the costs of taking & vouching the accounts. Such an order may be made in proceedings commenced by originating summons.

Then comes the question as to the costs of taking the account. I think that the view expressed by LORD LANGDALE in *Hewett v. Foster*, No. 8588, *ante*, as explained by the Ct. of Appeal in *Easton v. Landor*, 62 L. J. Ch. 164, was a correct statement of the law applicable at the date of the case before him. Under the old practice, inasmuch as every one interested in the estate had a right to have the accounts taken in ct., the order for an account in an administration action went as a matter of course, & the costs of taking it came as a general rule out of the estate. But that is no longer the case now. Since Oct. 24, 1883, there is no longer any such general right to have an account taken, & it is by no means a matter of course that the costs of taking the account are paid out of the estate. The result is that I have to decide which of the two parties shall bear the costs of taking & vouching the accounts. I have come to the conclusion in the circumstances that I ought to make these two debts pay them (*FARWELL, J.*).—*Re SKINNER, COOPER v. SKINNER*, [1904] 1 Ch. 289; 73 L. J. Ch. 94; 89 L. T. 663; 52 W. R. 346.

*Annotation:—*Reid. *Re Holton's Settlement. Trusts, Holton v. Holton* (1919), 88 L. J. Ch. 444.

8591. Account obstructed—Necessitating services of accountant.]—In taking the accounts of an intestate's estates plffs., in consequence of the evasive & fraudulent conduct of the administratrix, had been under the necessity of employing an accountant. Before the hearing for further directions the administratrix was ordered to pay the costs of employing the accountant.—*TONER v. THOMPSON* (1834), 7 Sim. 145;

8592. ———.]—The ct. will disallow the costs of exor. who vexatiously obstructs the taking of his accounts.

It is not necessary to file a bill to deprive him of them.—*Re KING, GILBERT v. LEE* (1865), 34 Beav. 574; 12 L. T. 818; 11 Jur. N. S. 899; 13 W. R. 1012; 55 E. R. 757.

8593. Account successfully disputed—By residuary legatee.]—A residuary legatee objected to certain items in accounts furnished by the exors., amounting in all to about £100, & issued a writ for an account specially indorsed under R. S. C., Ord. 3, r. 8, & payment of the balance. An account was taken under R. S. C., Ord. 5, r. 1, without any pleadings being delivered, & the chief clerk disallowed all the items objected to, & made his certificate accordingly:—*Held*: the exors. must pay the costs of the action.—*Re RADCLYFFE, PEARCE v. RADCLYFFE, DE FOE v. RADCLYFFE* (1881), 50 L. J. Ch. 317; 44 L. T. 96; 29 W. R. 420.

8594. Mere neglect to account — Whether sufficient to establish liability.]—The mere fact that an exor. neglected to render accounts when asked, is not of itself sufficient to make him liable to the costs of a suit for administering the estate.—*WHITE v. JACKSON* (1852), 15 Beav. 191; 51 E. R. 510.

Annotation:—*Reid. Springett v. Dashwood* (1860), 3 L. T. 542.

8595. ———.]—Deft. S., a solr., was exor. of the will of testator in the cause, who left his residuary estate to be divided between H. & G., G. being trustee of H.'s share. S. paid £50 to G. on account of his share, but refused or neglected to furnish accounts, although repeatedly requested to do so, on the plea that he had mislaid them. The suit was instituted, but on deft. furnishing an account, pltf. agreed to compromise, but his offers were refused, & an order was obtained against S. to pay the fund into ct. S. had also dealt improperly with the fund:—*Held*: he was liable for the costs of the suit, except in so far as they were not incurred through his misconduct.

In certain cases of mere neglect or refusal to furnish accounts, when the neglect is very gross or the refusal wholly indefensible, I reserve to myself the right of making exor. or trustee pay the costs of litigation caused by his neglect or refusal. But I expressly guard myself from saying that in every case of mere neglect, or even in every case of mere refusal, an honest exor. or trustee who has fairly discharged his duty, an onerous & thankless one, is to pay costs. But when I find, in addition to unjustifiable neglect or delay, that there has been misconduct in dealing with the trust fund, then I look upon that neglect or delay as an aggravation of the latter misconduct; & although, standing alone, the neglect or delay might not be sufficient to induce me to order trustee or exor.

to pay costs, yet, when combined with such misconduct, I should order him to do so. In this case I find inexcusable delay, inexcusable refusal to furnish accounts, & misconduct in dealing with the trust fund. . . . In that state of matters I am told, on behalf of deft., that he is entitled to his costs of the whole suit, including the costs of taking the accounts. I think he must pay the costs of the suit, except the costs of vouching the accounts. Inasmuch as that vouching was not occasioned by any misconduct of his, I think he ought to have those costs, & he must set them off against the costs, which he is ordered to pay (*JESSEL, M.R.*).—*HEUGH v. SCARD* (1875), 33 L. T. 659; 24 W. R. 51.

Annotation:—*Consd. Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289.

8596. Fraudulent omission to account.]—*DEYE v. STEVENSON* (1706), Colles, 357; 1 E. R. 324, H. L.

8597. Neglect necessitating action for administration—Account rendered before decree—Costs of subsequent proceedings.]—*ANON.* (1819), 4 Madd. 273; 26 E. R. 706.

Annotations:—*Reid. Springett v. Dashwood* (1860), 2 Giff. 521; *Sellar v. Griffin* (1863), 33 L. J. Ch. 6.

8598. ——— Unsatisfactory conduct.]—(1) Defts. being exors., by their answer in a suit for administration, swore that nothing was due from testator's estate, & that no good result could follow from the prosecution of the suit, as there was no estate of testator remaining unapplied. A decree was ordered for an account, whereupon defts. carried in an account claiming a balance of £400 as due to them. This account was directed to be remodelled & defts. claimed a balance of £60 as due to them. Ultimately, the chief clerk found that a balance was due from defts. of £202:—*Held*: the conduct of defts. was so unsatisfactory as to render them liable to pay the costs of the suit, with the exception of the costs of an inquiry as to real estate which had been needlessly pursued by pltf.

(2) The rule is not invariable, that where interest is chargeable against exors. in respect of a balance retained by them in their hands, they are also to be charged with the costs of the suit.—*EGLIN v. SANDERSON* (1862), 3 Giff. 434; 6 L. T. 151; 8 Jur. N. S. 329; 66 E. R. 479.

8599. ——— Facilities offered to inspect accounts.]—Trustees & exors., when called upon to render an account, offered to allow pltf., who were residuary legatees, or an accountant, or any other person named by pltf., to inspect the accounts. Notwithstanding this offer the acting exor. & trustee refused to allow pltf.' solr. to interfere with the accounts, alleging that he was inquiring not in pltf.' interest, but in his own, he having

PART VIII. SECT. 8, SUB-SECT. 1.—
B. (c).

8594 i. Mere neglect to account—Whether sufficient to establish liability.]—An exor. having failed to file accounts after the lapse of over five years from the grant, & after several applications by a beneficiary, accounts were ordered, & upon the result of the accounts an order was made for judgment against the exor., with costs against him personally. The exor. appealed on the ground that as "an executor, administrator, trustee or mtgee., who had not unreasonably instituted or carried on or resisted any proceedings" he was entitled to have the costs paid out of the estate:—

Held: as between exor. & beneficiary the order for the payment of costs personally by the exor. was within the discretion of the judge; & the question of the right of the exor. to indemnity out of the estate for the costs was a matter for consideration on his final application for discharge, on the basis of whether or not there were circumstances which would satisfactorily explain his neglect.—*LOVE v. LOVE* (1914), 16 W. A. L. R. 131.—*AUS.*

8594 ii. ———.]—*Re RALSTON'S ESTATE* (1857), 2 Thom. 195.—*CAN.*

8594 iii. ———.]—The exors. in this case were held entitled to their costs, because the action was not

occasioned by their misconduct; but they were disallowed the costs of such part of the inquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate.—*Re HONSBERGER, HONSBERGER v. KRATZ* (1885), 10 O. R. 521.—*CAN.*

8594 iv. ———.]—*MILLS v. ISAAC* (1901), 20 N. Z. L. R. 752.—*N.Z.*

8594 v. Proper books of account not kept by executor.]—An exor. took out an administration order for the purpose of establishing a claim which he made against the estate, & of having it paid by sale of the realty; but he failed to prove his claim, & on the contrary, a small balance was found against him.

Sect. 8.—Costs: Sub-sect. 1, B. (c) & (d) i.]

advanced money to pl'tfs. The exors. & trustees were ordered to pay the costs of the suit up to the hearing.—*KEMP v. BURN* (1863), 4 Giff. 348; 1 New Rep. 257; 7 L. T. 666; 9 Jur. N. S. 375; 11 W. R. 278; 66 E. R. 740.

Annotation:—*Folld. Jeffreys v. Marshall* (1870), 23 L. T. 548.

8600. — Costs up to hearing.]—Exors. who had neglected to produce their accounts were deprived of their costs of suit up to the hearing.

I think that deft. . . . has compelled pl'tfs. to file this bill by not producing his accounts which he was bound to have ready (*ROMILLY, M.R.*).—*GRESHAM v. PRICE* (1865), 35 Beav. 47; 55 E. R. 812.

Annotation:—*N.F. Jeffreys v. Marshall* (1870), 23 L. T. 548.

8601. — Coupled with misconduct.]—*HEUGH v. SCARD*, No. 8595, *ante*.

8602. — — — Extent to which liable—Costs of taking & vouching accounts.]—*Re SKINNER, COOPER v. SKINNER*, No. 8590, *ante*.

8603. — In respect of one share only of estate.]—Where exors. & trustees had, prior to an administration action, distributed three-fourths of testator's residuary property, but had been irregular in paying the income of the other one-fourth, which was held by them in trust for a person during her life, & afterwards for her children, & had persistently neglected to furnish accounts in respect of this share, on an administration action being brought by the persons entitled to the one-fourth share:—*Held*: the costs of the action, including those of the hearing, but excepting those of the accounts & inquiries, must be paid by the trustees personally, & the remainder of the costs must in the first instance be thrown on the whole of testator's residuary property, the proportion of them, which would have been payable out of the three-fourths, if such parts had not been distributed, being borne by the trustees personally, & the remainder being paid out of the one-fourth share actually administered in the action.—*Re BELL'S ESTATE, BATH v. BELL* (1878), 39 L. T. 422.

8604. —.]—Under the new rules, if an administration action be rendered necessary solely by the neglect of a trustee to furnish accounts, the decree should be so framed as to enable the ct. to throw the whole costs of action on the party in default.—*Re HAYTER, Re WALLETT, HAYTER v. WELLS* (1883), 32 W. R. 26.

(d) Unnecessary or Unreasonable Proceedings by Representative.

i. Actions by Representative.

See R. S. C., Ord. 65, r. 27 (38A), & generally, PRACTICE.

8605. General rule—Costs not to be borne by estate.]—BROWN v. BURDETT, No. 8610, *post*.

8606. Taking opinion of court—On clear case—Construction of will.]—A trustee, refusing to pay a legacy without the direction of the ct., in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, & not from any improper motive.—*KNIGHT v. MARTIN* (1829), 1 Russ. & M. 70; Tambl. 237; 39 E. R. 27.

8607. — — —.]—Testator gave a legacy to his daughter for life, & after her death to his grandson; & if he should die in the lifetime of the tenant for life, then to the children of W. who should be then living:—*Held*: it was so clear that the bequest was confined to the children of W. living at the death of the daughter, that the exor. was ordered to pay the costs of the suit, because he refused to pay the legacy without the opinion of the ct. on the construction of the will.—*HARVEY v. HARVEY* (1839), 3 Jur. 949.

8608. — — —.]—*Re CABBURN, GAGE v. RUTLAND*, No. 8612, *post*.

8609. Improper instigation of suit—& delay in prosecuting.]—Where an extrix. commenced an action with temerity, & prosecuted it recklessly, laying the venue in Middlesex, notwithstanding all the parties lived in Monmouthshire, & twice violating a peremptory undertaking to try, the ct. refused to exonerate her from costs.—*WILKINSON v. EDWARDS* (1834), 1 Bing. N. C. 301; 1 Scott, 173; 4 L. J. O. P. 6; 131 E. R. 1132.

Annotations:—*Consd. Southgate v. Crowley* (1835), 1 Bing. N. C. 518. *Folld. Farley v. Briant* (1836), 3 Ad. & El. 839.

8610. — — — Amount of taxed costs to be borne by estate.]—The ct. will not permit the costs occasioned by the improper litigation or by the negligent conduct of administration proceedings to be paid out of an estate under its care, & the amount allowed by a taxing master as between client & his solr. is not conclusive of the amount which the ct. will allow out of the estate.

An action for administration was instituted in 1875, & was uncompleted in 1887, when it came before KAY, J., on second further consideration, when he directed under R. S. C., 1883, Ord. 65, r. 11, a reference to the taxing master for inquiry & report as to the cause of the delay & who was responsible for the costs incurred thereby. The taxing master reported that the former solr. of pl'tf. in the action had been guilty of great delay, & had improperly conducted the case. The taxing master, on taxation, disallowed a large sum in the bill of costs as between pl'tf. & the former solr., but the sum actually allowed on taxation as between pl'tf. & the former solr. was £1,139. KAY, J., on receiving the taxing master's report, consulted with the taxing master, & having ascertained from him that, if the action had been properly conducted, the amount of pl'tf.'s costs as between pl'tf. & the former solr. would have been only £800, he directed that, notwithstanding the amount of costs allowed on taxation as between

It appeared, also, that he had not kept proper books of account as exor.:—*Held*: he should pay the costs of the suit.—*SULLIVAN v. SULLIVAN* (1869), 16 Gr. 94.—CAN.

PART VIII. SECT. 8, SUB-SECT. 1.—B. (d) i.

8606 i. Taking opinion of court—On clear case.]—An exor. or administrator

has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the ct. There must be some real question to submit to the ct. or some dispute requiring interposition, when he will be entitled to his costs; otherwise he will not receive them.—*WHITE v. CUMMINGS* (1862), 3 Gr. 602.—CAN.

e. Improper instigation of suit—

*Difficulties in administration caused by executors.]—Where difficulties in the administration of an estate were created by a claim of the exors. which they failed to make good, they were charged with the costs of an administration suit brought by a creditor.—*MCGILL v. COURTICE* (1870), 17 Gr. 271.—CAN.*

p. —.]—Although the ct. can

pltf. & his former solr., pltf. was only to be allowed out of the estate, which was represented by a fund in ct., with regard to which pltf. was in the position of a trustee, the sum of £800 for costs:—*Held*: KAY, J., had jurisdiction to make such an order, it being based on the ground that pltf., assuming he was a trustee, had lost all right to costs as trustee out of the estate by reason of the proceedings in the action having been unreasonably carried on.—*BROWN v. BURDETT* (1888), 40 Ch. D. 244; 60 L. T. 520; 37 W. R. 533; 5 T. L. R. 88, C. A.

Annotations:—*Reid. Re Scowby, Scowby v. Scowby*, [1897] 1 Ch. 741; *Re Burn & Borridge* (1908), 99 L. T. 606.

8611. — Coupled with misconduct—Reasonable scheme for administrator rejected—Costs to commencement of action.]—Testator, after some small bequests, appointed his daughter residuary legatee, & appointed her extrix., & another person exor., of his will. Part of the estate consisted of leaseholds. Exor. was guilty of great misconduct & obstruction, which occasioned much expense to the extrix., & delay in the administration of the estate. His solrs. took out an administration summons on behalf of an assignee of a pecuniary legacy, whose name they had refused to give to the extrix., that she might satisfy his claim. The exor. commenced an action for the administration of the estate:—*Held*: notwithstanding the exor.'s misconduct he was entitled to obtain an indemnity in respect of the leaseholds, & therefore to such costs of the action as would have been occasioned by a simple administration summons, but he must pay all costs of the legatee's administration summons, including the costs of the affidavits used there & in the action, & he must be disallowed all other costs, charges, & expenses incurred since a certain date, when he declined to entertain a reasonable scheme for the administration of the estate submitted to him by the extrix., but subject as aforesaid, he should be allowed his costs, charges, & expenses properly incurred before the commencement of the action.—*Re BOSWORTH, HOWARD v. EASTON* (1881), 45 L. T. 136; 29 W. R. 885.

8612. — Relating to small estate—Detriment to persons entitled.]—Pltf., trustee & exor. under a will, brought an action for the administration of a small estate, on the ground that it was in the interest of all parties, as there were doubts as to the true construction of the will, & difficulties & disagreements with regard to the interpretation of the trusts, & that he needed the protection of the ct. Defts., the beneficiaries, who, after the commencement of the action, had suggested that the quickest & least expensive mode would be to state a special case for the opinion of the ct., denied that it was in the interest of all parties that the estate should be administered under the direction of the ct., & contended that the question of construction was in no respect doubtful. They submitted that the action should be dismissed, as being unnecessary, harassing, & destructive of the trust property:—*Held*: the action must be dis-

missed with costs to be paid by trustee personally, as the ct. will not allow itself to be made an instrument or mere agent of oppression, nor interfere where the only result must be to despoil of their property persons unable to protect themselves, & in this case there was no ground whatever on which the ct. would be asked to interfere except the question of construction of the will, & that was not in doubt.—*Re CABBURN, GAGE v. RUTLAND* (1882), 46 L. T. 848.

missed with costs to be paid by trustee personally, as the ct. will not allow itself to be made an instrument or mere agent of oppression, nor interfere where the only result must be to despoil of their property persons unable to protect themselves, & in this case there was no ground whatever on which the ct. would be asked to interfere except the question of construction of the will, & that was not in doubt.—*Re CABBURN, GAGE v. RUTLAND* (1882), 46 L. T. 848.

8613. — Effect of R. S. C., Ord. 65, r. 27 (38A).]—This case came before the ct. for further consideration, & defts. asked that pltf. might be ordered to pay the costs of the action. Pltf. was the sole exor. & trustee of the will of G. D., a grocer. The property had been realised in the action, & the total amount of the proceeds was about £370. Testator died in 1878, having by his will left all his property upon trust for his wife during widowhood, with power to carry on the business, & on her death or marriage, upon trust for sale, the residue to be divided among his children & the issue then living of any deceased. On May 30, 1879, the writ was issued in this action. In Apr. 1880, the statement of claim was delivered, in which the number & names of testator's children were stated, the only reason given for the action being that difficulties had arisen in the administration of the trust. The widow & J. D., an adult son, were defts. On Nov. 17, 1880, pltf. applied for & obtained an order for accounts & inquiries. The certificate was not made until June 5, 1889:—*Held*: (1) many of the inquiries, particularly that concerning the children, were unnecessary & improper; (2) the suit being instituted, & the order for accounts & inquiries made before the General Orders of 1883 came into operation, the trustee, under the old practice, was not so much to blame as to be ordered to pay the costs; (3) it was a case to which the above rule applied.—*Re DALE, STUBBS v. DALE* (1889), 62 L. T. 28.

8614. — Unreasonable claim made in bad faith.]—*Re JONES, CHRISTMAS v. JONES*, No. 8562, ante.

8615. Improper claim as beneficiary—Resulting in further proceedings—In which representative made defendant—Costs of defence.]—In consequence of a groundless claim of an administratrix to free bench out of intestate's copyhold estate, she was made deft. in a suit. Under an order of reference to take an account of the costs & expenses incurred by her solr., in his character of solr. to her as personal representative of intestate, the master must allow the costs of that suit, & has no authority to disallow them, because he may think the suit was occasioned by the improper claims of administratrix herself.—*WATKINS v. MAULE* (1823), 1 L. J. O. S. Ch. 82.

8616. — Costs of further proceedings.]—Generally a legatee has a right to file a bill that an account may be taken of testator's estate, with the sanction of oaths. Where a party in that

protect the estate of testator by charging the exor. with the costs of a suit for administration unnecessarily brought by him, it will refuse an application for administration made by the exor. if no sufficient ground exists for it.—*BARRY v. BARRY* (1872), 19 Gr. 458.—CAN.

the exors. were to manage afterwards; & the latter filed a bill against the extrix. without sufficient cause, they were not allowed their costs.—*HELLEM v. SEVERS* (1876), 24 Gr. 320.—CAN.

r. —.]—*WILSON v. MADDISON & CHESNUT* (1868), 16 W. R. 417.—IR.

s. Needless inquiry before master—

Executors disputing claims.]—In an administration suit, the exors. were charged with so much of the expenses of the reference as was incurred in the master's office in establishing charges which they disputed.—*STEWART v. FLETCHER* (1871), 18 Gr. 21.—CAN.

t. Against whom judgment entered.]—In every case commenced by an exor. or administrator in which deft. becomes entitled to costs, judgment

g. —.]—Where testator provided that the extrix. was to have the sole management during her life, &

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character, & also as creditor, sued the co-exors. & trustees, his administratrix, who has revived the cause, was allowed the costs of suit, notwithstanding he, as a co-exor., had joined in proving the will, & an inspection of the accounts had been offered, & the balance of the personalty was greatly in favour of defts. Pltf. liable to pay additional costs, if any, caused by the unsupported claim as a creditor. Costs in the cause refused, as between solr. & client.—*SHARPLES v. SHARPLES* (1824), *M'Cle.* 506; 13 *Price*, 745; 148 *E. R.* 211.

8617. — — — — —.]—Where administratrix of a deceased person claimed a portion of the estate beneficially, & a suit was instituted to recover that portion from her, in which pltf. were successful:—*Held*: administratrix must bear the costs of the suit.—*BRUIN v. KNOTT* (1848), 12 *L. T. O. S.* 3; 12 *Jur.* 616.

8618. Needless inquiry before master.—Trustees were decreed to pay the costs of an unnecessary inquiry directed before the master, as to the state of testator's family.—*WESTOVER v. CHAPMAN* (1844), 1 *Coll.* 177; 63 *E. R.* 372.

8619. Action on promissory note—Despite receipt signed by testator—Counsel's opinion taken.]—An exor. found certain promissory notes in his testator's possession, & demanded payment, but was met with a receipt in writing signed by testator. The notes were made the subject of bequest in the will to the maker, & exor., upon the advice of counsel, brought an action & filed a bill:—*Held*: he was entitled to retain the costs of such action & suit out of the estate.—*FOSTER v. DAWBER* (1857), 6 *W. R.* 47.

8620. Administration action instituted—Notice of other claim to administer—Revocation of letters of administration.]—(1) When pltf. is, after decree, found to have no title, the suit may be stayed on the application of a person who had been served with notice of the decree.

(2) Where letters of administration are revoked the administrator will not get his costs of an administration suit instituted by him with knowledge that another person claimed to administer.—*HOUSEMAN v. HOUSEMAN* (1876), 1 *Ch. D.* 535; 34 *L. T.* 633; 24 *W. R.* 592, *C. A.*

8621. Continuing action instigated by testator—By leave of court—Costs out of estate.]—*Re BENTINCK, BENTINCK v. BENTINCK* (1893), 37 *Sol. Jo.* 233.

8622. Costs unnecessarily incurred—Jurisdiction to vary order—By supplemental order.]—Though the ct. has no jurisdiction to alter or vary an order after it has been passed & entered, yet it may make a supplemental order, such as an order directing that the party benefited by the previous order shall not be entitled to receive any benefit under it except on certain conditions.

In an administration action an order was made in 1887 directing the trustees to raise a sum of taxed costs which they had incurred to their solr. & to pay into ct. the amount when raised. The trustees raised the amount but, instead of paying into ct., allowed their solr. to retain it in

payment of his costs, although no order for actual payment had been made. In 1892 the trustees obtained orders directing certain further costs to be taxed & paid to them & those orders were duly passed & entered; but before they had been acted upon *KEKEWICH, J.*, was informed of the default of the trustees under the order of 1887, & moreover that the taxed costs directed to be raised by that order amounted to about one-third of the value of the whole estate & had mostly been incurred in fruitless & unnecessary proceedings carried out under the advice of the trustees' solr. He accordingly made an order supplemental to the orders of 1892, directing that although the taxation of costs under those orders should be proceeded with, none of those costs should be paid to the trustees until they had first complied with the order of 1887. On appeal that supplemental order was affirmed.—*Re SCOWBY, SCOWBY v. SCOWBY*, [1897] 1 *Ch.* 741; 66 *L. J. Ch.* 327; 76 *L. T.* 363; 41 *Sol. Jo.* 330, *C. A.*

Costs of trustees.—*See TRUSTS & TRUSTEES.*

ii. *In Actions against Representatives.*

See R. S. C., Ord. 65, r. 27 (38A), & generally, PRACTICE.

8623. Failure to apply for stay of proceedings—In second administration action—Instituted with notice of first.]—A person to whom a legacy was assigned upon certain trusts, having filed a bill against exors. to recover the legacy, notwithstanding he had notice of a subsisting suit & decree for administering the assets, the ct. refused to allow the legacy to be paid over to him because he had acted improvidently, or to give him his costs, & it also refused to give exors. their costs because they had answered the bill instead of moving to stay proceedings in the suit.—*PACKWOOD v. MADDISON* (1823), 1 *Sim. & St.* 232; 1 *L. J. O. S. Ch.* 107; 57 *E. R.* 93.

8624. Refusal to inform legatee—Resulting proceedings.]—(1) Exor., though he has discharged himself by paying the money into ct., in a suit, is nevertheless bound to give every proper information to the parties interested respecting their legacies. *Semble*: that if he improperly refuses, he does so at the peril of the costs of a subsequent suit.

(2) The ct. will not, on an interlocutory application by pltf., order deft. to pay the costs of a second suit, which has been caused by deft.'s misconduct in not giving proper information, although it appears that it will be useless to proceed in such second suit.—*WOOLLETT v. HARRIS, FULKER v. HARRIS* (1835), 4 *L. J. Ch.* 151.

8625. Claim unreasonably resisted—Legitimacy of grand-daughter—Mentioned as such in will.]—*GREEN v. CHALLENGOR*, No. 7748, *ante*.

8626. — — — — — **Identity of legatees.**—Where exor. has received satisfactory evidence of the identity of legatees, prior to the institution of a suit for payment, the ct. in making a decree in favour of legatees, will hold exor. liable to their costs up to the hearing, & in case an inquiry should be taken as to debts, etc., will, if the result be favourable to pltf., direct that the costs thereof shall be borne by exor.—*WILLETT v. JONES* (1842), 6 *Jur.* 923.

ought to be entered against such exor. or administrator personally. After payment he may charge the amount in his account against the estate to be allowed or not, as it may appear to the judge of probate that the suit was discreet or otherwise.—*GRANGER v. O'NEIL* (1899), 31 *N. S. R.* (19) 71 & 72, 449.—*CAM*

8627. — Right of legatee.]—A party was unable to obtain payment of his legacy & his portion of the residue without suit. The case being clear, & the remaining portion of the residue having been paid by exor., he was charged with costs.—*CURTIS v. ROBINSON* (1845), 8 Beav. 242; 50 E. R. 95.

8628. Costs of successful defence—Where misconduct charged—Plaintiff unable to pay—Defence benefiting estate.]—(1) A suit was instituted by a next friend on behalf of infants interested in the administration of testator's estate, for the purpose of setting aside an agreement which had been entered into by exors. & trustees for the disposal of testator's business, & the bill contained charges of gross misconduct against T., one of the trustees & exors. T. defended the suit, & the bill was dismissed with costs, the ct. being of opinion that the agreement was for the benefit of the estate, & that the charges against T. were unfounded. The next friend being insolvent, T. applied in a suit for the administration of testator's estate to be allowed his costs out of the estate, but they were refused on the ground that he had not previously obtained leave to defend. But, on appeal, this decision was reversed & the costs were allowed.

(2) An action brought by a stranger against a trustee in relation to the trust estate, such as an action of ejectment to turn a trustee out of possession of the trust estate, or an action of trespass involving a question of title, or any other action of that kind, & which must necessarily be defended by the trustee, not on the ground of any interest of his own, but for the benefit of the trust estate, is an action against the costs of which the trustee ought to be indemnified (*JESSEL, M.R.*).

(3) It was misconduct alleged against him in respect of the trust estate, & in respect of transactions entered into by him on behalf of the trust estate, & ultimately sustained for the benefit of the trust estate, for if the compromise was beneficial & proper, it was for the benefit of the trust estate that the compromise should be upheld. It was upheld & the trustee therefore has maintained the property for the trust estate, in doing which he was also enabled to clear himself of the charges improperly brought against him. We cannot divide it & say he must only have some part of the costs, & that the costs of his own personal matter must be borne by himself (*JAMES, L.J.*).—*WALTERS v. WOODBRIDGE* (1878), 7 Ch. D. 504; 47 L. J. Ch. 516; 38 L. T. 83; 26 W. R. 469, O. A.; *reversing S. C. sub nom. WALTERS v. WOODBRIDGE, Ex p. TEESDALE* (1872), 20 W. R. 520.

*Annotations:—**Apld. Re Dunn, Brinklow v. Singleton*, [1904] 1 Ch. 648. *Reid. Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317; *Bruty v. Edmundson*, [1917] 2 Ch. 285.

8629. — — — — — Defence not benefiting estate.]—An action was brought against a receiver & administrator *pendente lite*, charging him with fraud & misconduct while acting as administrator & receiver:—*Held*: though a receiver while acting in the discharge of his duty is entitled to be indemnified against all loss, the guiding principle laid down by *Walters v. Woodbridge*, No. 8628, *ante*, is that the defence to an action must be for the benefit of the estate, & as the defence to this action could not have resulted in any benefit to the estate, the receiver was not entitled to be indemnified against the costs incurred in successfully defending this action.—*Re DUNN, BRINKLOW*

v. SINGLETON, [1904] 1 Ch. 648; 73 L. J. Ch. 425; 91 L. T. 135; 52 W. R. 345; 48 Sol. Jo. 261.

See, further, Sub-sect. 2, B. (a), *post*.

8630. Summons adjourned into court by executor—After order made—Order affirmed.]—Testator made a voluntary settlement, which was admitted to be void against creditors. Trustee of the settlement paid £580 9s. 11d. into ct. An administration action was necessary to find out the amount of debts. The claims of the creditors were found to amount to £504 3s. 1d. The chief clerk ordered the clear balance, £76 6s. 10d., to be paid to trustee, leaving the creditors only a dividend. The summons was adjourned by deft., exor., into ct.:—*Held*: the order of the chief clerk was right, & deft. must pay the costs of the adjourned summons personally.—*Re TURNER, TURNER v. TURNER* (1884), 51 L. T. 497.

8631. Unnecessary attendance in chambers—Costs limited to fixed sum—Jurisdiction of court to limit.]—A contingent legacy to an infant was paid into ct. by exor. of the will of a testatrix. A summons was then taken out by the guardian of the infant, asking that the income of the legacy might be paid to him until the infant should attain twenty-one. An originating summons was also taken out by the next of kin of testatrix, claiming the income during the minority of the infant on the ground that it was undisposed of by the will. The two summonses were heard together before the judge in chambers, when he decided that the income until the infant should attain twenty-one was undisposed of, & that the next of kin were entitled to it. Exor.'s solr. asked that his costs of attendance, amounting to about £13, might be allowed out of the income. The judge considered the attendance of exor.'s solr. unnecessary, & declined to allow more than a fixed sum for costs, to be determined by the chief clerk. The chief clerk, without attempting to tax the bill, but acting upon what the judge had said, allowed the sum of three guineas. The matter was again referred to the judge, who confirmed the order of the chief clerk. A motion was accordingly made to vary that order:—*Held*: R. S. C., Ord. 65, r. 23, seemed to apply to the case, but in any event the ct. had power in such a case as the present to limit the amount of the costs to be allowed.—*Re WALTERS, MOORE v. BEMROSE* (1888), 58 L. T. 101.

8632. Application regarding sums lost—By failure of representative's agent—Costs not borne by the estate.]—In the course of an administration suit a question arose, in taking the accounts between the tenant for life & exors., as to two sums which had been lost through the failure of an agent of exors. An application having been made to the ct. on this question, the V.-C. directed the costs of the application to be costs in the cause:—*Held*: the costs of the tenant for life & exors. ought to be borne by themselves & not by the general estate.—*HORN v. COLEMAN* (1857), 26 L. J. Ch. 544; 29 L. T. O. S. 18; 5 W. R. 409, L. JJ.

8633. Named executor neither proving nor renouncing—Acting as executor—Adopting unsuccessful defence of co-executors.]—*VICKERS v. BELL*, No. 7582, *ante*.

8634. Costs of cross-examination on claim—No subsequent proceedings taken.]—A. being entitled to a life interest in a fund over which she had a testamentary power of appointment, borrowed, in 1871, from B. £350 on the security of

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a covenant that £1,250 should be paid one month after her death. She died in 1884, having by her will appointed exors., & directed payment of her debts, & also that C. one of exors., a solr., should be entitled to charge & receive payment for all professional business to be done by him under the will. C. was one of the attesting witnesses. In an administration action by B. on behalf of himself & all other creditors, the estate being insolvent:—**Held:** exors. could not be deprived of the costs out of the assets, of a cross-examination for the purpose of investigating B.'s claim, though no proceedings to set aside the deed were subsequently taken.—*Re BARBER, BURGESS v. VINNICOME* (1880), 31 Ch. D. 665; 55 L. J. Ch. 373; 54 L. T. 375; 34 W. R. 395.

Annotations:—*Mentd. Re Pooley* (1888), 40 Ch. D. 1; *Re White, Pennell v. Franklin* (1898), 78 L. T. 770.

iii. Severance of Defence.

See R. S. C., Ord. 65, r. 27 (8).

8635. Two sets of costs allowed—If severance justified.]—*GREENHOW v. ETHERIDGE* (1843), 1 L. T. O. S. 359.

8636. ——— Business continued at a loss by co-representatives—Dissociation of severing representative.]—In an administration suit W., exor., severed from his co-exors., & appeared by a separate solr. & counsel throughout the proceedings. Testator had given his exors. power to carry on his business, & W.'s co-exors. had, in spite of his remonstrances, carried on the business at a loss. The chief clerk by his certificate found that no profits had arisen from testator's business since his death, & H., one of co-exors., was largely indebted to the estate:—**Held:** W., who had died *pendente lite*, was justified in severing from his co-exors., & his legal personal representatives were entitled to a separate set of costs.—*MELDRUM v. HAYES* (1873), 21 W. R. 746.

8637. ——— Right of representative to justify severance.]—(1) A trustee ought not to be deprived of his costs out of the trust estate merely on the ground that he has severed from his co-trustee in his defence to an action to administer the estate. He ought to have an opportunity of explaining the reasons for his severance, so that the ct. may be able to decide judicially whether the severance was improper.

(2) The allowance of the costs of a trustee out of the trust estate is not a matter "left to the discretion of the ct." within Jud. Act, 1873 (c. 66), s. 49; consequently a trustee has a right to appeal against an order depriving him of costs out of the estate, & giving the whole of the costs to his co-trustee.—*Re ISAAC, CRONHACH v. ISAAC*, [1897] 1 Ch. 251; 66 L. J. Ch. 160; 75 L. T. 638; 45 W. R. 262; 41 Sol. Jo. 244, C. A.

, *Christmas v. Jones*,

8638. Separate admission of documents—As between co-representatives—Costs not allowed.]—*DODDS v. TUKE*, No. 8951, *post*.

8639. Severance due to co-representative absconding—Effect on right of other representative

—To whole costs.]—Two trustees, defts. in an administration suit, severed in their defence. One of them charged that his co-trustee had absconded, & that he had been obliged to sever in his defence. One set of costs only was allowed, & the ct. refused to order the whole of the costs to be paid to the one trustee, but left it to the taxing master to say how much was due to the one, & how much to the other trustee.—*COURSE v. HUMPHREY* (1859), 26 Beav. 402; 28 L. J. Ch. 327; 32 L. T. O. S. 320; 5 Jur. N. S. 615; 53 E. R. 953.

(e) Bankruptcy of Representative.

i. In General.

8640. Representative indebted to estate—Costs prior to [bankruptcy—Set-off.]—In an administration or creditors' suit against an exor. becoming bkpt. or insolvent, & who is, at the same time, indebted to the estate of testator, the costs of exor. incurred before his bkpcy. or insolvency will be set off against his debt, & the costs of same exor. incurred in the proper performance of the duties of his trust, after his bkpcy. or insolvency, will be allowed out of the estate.—*SAMUEL v. JONES* (1843), 2 Hare, 246; 12 L. J. Ch. 496; 7 Jur. 845; 67 E. R. 102.

Annotations:—*Follid. Cotton v. Clark* (1852), 16 Beav. 134. *Consd. Re Basham, Hannay v. Basham* (1883), 23 Ch. D. 195.

8641. ———.]—Exor. had retained balances in his hands, & a suit having been instituted to administer testator's estate, exor. became bkpt.:—**Held:** exor. was to be charged with interest on the balances, but was entitled to his costs. He was entitled to the costs out of the estate, & they were not to be set off against what should be found due from him in respect of interest on the balances.—*COTTON v. CLARK* (1852), 16 Beav. 134; 20 L. T. O. S. 59; 16 Jur. 879; 51 E. R. 728.

Annotation:—*Reid. Re Basham, Hannay v. Basham* (1883), 52 L. J. Ch. 408.

8642. ———.]—*WATSON v. ROW*, No. 8652, *post*.

8643. ———.]—*Re VOWLES, O'DONOGHUE v. VOWLES*, No. 8647, *post*.

8644. ——— Costs subsequent to bankruptcy—Of due performance of duties.]—*SAMUEL v. JONES*, No. 8640, *ante*.

8645. ——— As between solicitor & client.]—Deft., exor. & trustee, who is indebted to the estate & has become bkpt., is entitled to his costs of suit as between solr. & client from the date of his bkpcy.—*TURNER v. MULLINEUX* (1861), 9 W. R. 252.

Annotations:—*Follid. Bowyer v. Griffin* (1869), L. R. 9 Eq. 340. *Reid. Re Basham, Hannay v. Basham* (1882), 23 Ch. D. 195.

8646. ———.]—*Re BASHAM, HANNAY v. BASHAM*, No. 8650, *post*.

8647. ———.]—A sole exor., who was deft. to an administration action, became bkpt. after the administration judgment. He was a debtor to the estate in respect of money advanced to him by testator in his lifetime:—**Held:** exor. must have his costs subsequently to the bkpcy., but his

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B. (e) i.

before bankruptcy of ex-

Where a defaulting exor. becomes bankrupt after judgment in an administration action, he is not

entitled to his costs incurred before his bankruptcy.—*Fogo v. Nisbett* (1891), 9 N. Z. L. R. 518.—N.Z.

prior costs must be set off against the debt due from him.—*Re VOWLES, O'DONOGHUE v. VOWLES* (1886), 32 Ch. D. 243; 55 L. J. Ch. 661; 54 L. T. 846; 34 W. R. 639.

8648. Representative in default—Costs subsequent to bankruptcy—Whether entitled.]—A trustee in default to the trust estate, & having executed a creditors' deed duly registered before bill filed against him for the execution of the trusts, is entitled to his costs from the date of the registration as between solr. & client, from the party liable to the costs of the suit:—*Held*: there was no difference in this respect between an exor. & a trustee.—*BOWYER v. GRIFFIN*, [1869] L. R. 9 Eq. 340; 39 L. J. Ch. 159; 18 W. R. 227.

Annotations:—*Folld. Clare v. Clare* (1882), 21 Ch. D. 865. *Consd. Lewis v. Trask* (1882), 21 Ch. D. 862; *Re Basham, Hannay v. Basham* (1883), 23 Ch. D. 195.

8649. ———.]—In an administration action one deft. was an exor. He was a defaulting trustee under a settlement. After the action was commenced he was adjudicated bkpt. & a trustee in bkpcy. was appointed & made a deft.:—*Held*: the defaulting trustee was entitled to be paid his costs incurred after his bkpcy.—*Re CLARE, CLARE v. CLARE* (1882), 21 Ch. D. 865; 51 L. J. Ch. 553; 46 L. T. 851; 30 W. R. 789.

Annotations:—*N.F. McEwan v. Crombie, Porter v. Grant* (1883), 53 L. J. Ch. 24. *Reid. Re Basham, Hannay v. Basham* (1883), 23 Ch. D. 195.

8650. ——— Necessity to make default good.]—A defaulting exor. or trustee indebted to testator's estate, who subsequently to the commencement of an administration action becomes bkpt., is not entitled to his costs subsequent to bkpcy. until he has made good his default, unless he is kept before the ct. at the express instance of the beneficiaries.—*Re BASHAM, HANNAY v. BASHAM* (1883), 23 Ch. D. 195; 52 L. J. Ch. 408; 48 L. T. 476; 31 W. R. 743.

Annotations:—*Folld. McEwan v. Crombie* (1883), 25 Ch. D. 175; *Re Vowles, O'Donoghue v. Vowles* (1886), 32 Ch. D. 243.

8651. ———.]—(1) When it is found upon an account of an estate administered by the ct. that a sum is due to two trustees jointly, of whom one is on the other hand found to be a debtor to the estate, & has become a bkpt. since 1869, then, if the debt found due to the estate cannot be refunded owing to the insolvency of the defaulting trustee, the sum found due from the estate will not be set off against the debt, but an inquiry will be directed to ascertain whether any part of the debt from the estate is due to the defaulting trustee, & such part, if any, is all that ought to be set off against the debt due to the estate.

(2) When one of the trustees is found to be debtor to the estate, & has become a bkpt. since 1869, he is not entitled to be paid his costs of the action out of the estate until he has made good his default.

(3) When costs have been incurred under a joint retainer by trustees in an administration suit, such costs consisting in part of costs common to both trustees, & in part of costs incurred on behalf of each separately, then if one of the trustees is found to be indebted to the estate, the other trustee is entitled to his separate costs & such proportion of the costs common to both trustees as the taxing master shall apportion to him, but not to the entire costs of the trustees.

McEwan v. CROMBIE, PORTER v. GRANT (1883),

25 Ch. D. 175; 53 L. J. Ch. 24; 49 L. T. 499; 32 W. R. 115.

Annotation:—*As to* (2) *Folld. Stanlar v. Evans, Evans v. Stanlar* (1886), 56 L. J. Ch. 581.

ii. Where Co-Representative Solvent.

8652. Extent to which solvent representative entitled—Retainer of same solicitor.]—Two exors., defts. in a suit, gave a joint retainer to a firm of solrs. In the course of the proceedings it was certified by the chief clerk that one exor., who had since died insolvent, was indebted to testator's estate:—*Held*: the surviving exor. was entitled to be paid out of the estate all the costs for which he was liable, & the costs incurred for deceased exor. in taking the account of his debt must be set off against the sum found due from him.—*WATSON v. ROW* (1874), L. R. 18 Eq. 680; 43 L. J. Ch. 664; 22 W. R. 793.

Annotations:—*Consd. Burrige v. Bellew* (1875), 32 L. T. 807. *N.F. Smith v. Dale* (1881), 18 Ch. D. 516; *McEwan v. Crombie* (1883), 25 Ch. D. 175.

8653. ———.]—Two exors. in an administration suit appeared by the same solr. to whom they had given a joint retainer. One of them was a debtor to the estate, & subsequently became bkpt.:—*Held*: as to the costs incurred by them prior to bkpcy., the solvent exor. was to be allowed only his own proportion of them out of the fund, the defaulter's proportion of those costs being set off against the debt due from him. But the costs incurred subsequently to bkpcy. were allowed in full.

(2) If exor. who is not a debtor had appeared separately, he would clearly have been entitled to all his costs (*JESSEL, M.R.*).—*SMITH v. DALE* (1881), 18 Ch. D. 516; 50 L. J. Ch. 352; 44 L. T. 460; 29 W. R. 330.

Annotations:—*Consd. Re Basham, Hannay v. Basham* (1883), 23 Ch. D. 195; *McEwan v. Crombie* (1883), 25 Ch. D. 175. *Reid. Clare v. Clare* (1882), 21 Ch. D. 865; *Stanlar v. Evans, Evans v. Stanlar* (1886), 56 L. J. Ch. 581.

8654. ———.]—*McEwan v. CROMBIE, PORTER v. GRANT*, No. 8651, *ante*.

8655. ——— Appearance by separate solicitor.]—*SMITH v. DALE*, No. 8653, *ante*.

iii. Assignee of Representative.

See R. S. C., Ord. 65, r. 1.

8656. Representative indebted to estate—Costs not out of estate.]—An exor., who has assets of testator in his hands, becoming bkpt., his assignees are made parties to a suit relating to testator's property: these assignees will not be allowed their costs out of testator's estate.—*THORNE v. BALFOUR* (1823), 2 L. J. O. S. Ch. 16.

8657. ———.]—In a creditor's suit, the assignees of a bkpt. who is a defaulting exor. of deceased debtor, are not entitled to their costs of the suit out of testator's estate; but if pltf. sought to charge the assignees with the receipt of specific parts of testator's estate, & failed to do so, the assignees might be entitled to costs.—*MASSEY v. MOSS* (1842), 1 Hare, 319; 11 L. J. Ch. 299; 6 Jur. 638; 66 E. R. 1055.

8658. Charged with receipt of specific assets—Failure of charge—Costs allowed.]—*MASSEY v. MOSS*, No. 8657, *ante*.

8659. Plaintiff representative insolvent—Assignee made defendant—Separate costs.]—*CHILWELL v. HOCKNELL*, No. 8887, *post*.

See, generally, TRUSTS & TRUSTEES; PRACTICE.

EXECUTORS AND ADMINISTRATORS.

**Sect. 8.—Costs: Sub-sect. 1, B. (f), (g) & (h);
sect. 2, A.]**

(f) Representative of Defaulting Representative.

8660. Liability of representative's estate—Costs occasioned by default—Special order.]—Special order made as to the costs of the representative of a defaulting exor.—*CHARLTON v. SADLER* (1844), 4 L. T. O. S. 100

Though insufficient to remedy default.]

—The representative of a defaulting exor., fairly accounting, is entitled to deduct his costs of suit out of the assets, though they may be insufficient to repair the breach of trust.—*HALDENBY v. SPOFFORTH* (1846), 9 Beav. 195; 15 L. J. Ch. 328; 7 L. T. O. S. 155; 50 E. R. 318.

Annotations:—*Consd. Gurney v. Gurney* (1883), 48 L. T. 529. *Reid. Re Griffiths, Griffiths v. Lewis* (1884), 26 Ch. D. 465.

8662. —.]—An exor., C., died indebted to the estate of his testator A., & a suit was afterwards instituted by the administrator *de bonis non* of A. against the representatives of C. to administer his estate & to ascertain & recover the amount due to the estate of A.:—*Held*: the costs must fall on the estate of C.—*HYATT v. HYATT* (1862), 30 Beav. 630; 54 E. R. 1035.

8663. —.]—The trustee of a marriage settlement invested the trust moneys, with the consent of the husband who had a life interest under the settlement, in an unauthorised security. On the trustee's death, his widow, as his administratrix, became trustee, & on ascertaining that the settlement fund was in great danger of being lost, instituted an action for administration of the trusts of the settlement, under which the greater part of the trust fund was recovered. It was contended, on the authority of *Haldenby v. Spofforth*, No. 8661, *ante*, that pltf. was entitled to her costs of the action:—*Held*: that case must be understood to decide that the representative of a defaulting exor. is entitled to costs out of the exor.'s assets, not out of the assets of the original testator whose estate is being administered, & accordingly pltf. could not be allowed to retain her costs of the action as against the *cestui que trust*, though she was entitled to her costs, charges & expenses as trustee other than those of the action.—*GURNEY v. GURNEY* (1883), 48 L. T. 529.

8664. Representative in double capacity.—Testator's assets—Distinguished from defaulter's estate—General costs.]—An exor. died insolvent, having misapplied the assets. An administration suit having been instituted against his exors., who had received part of testator's estate, they duly accounted for what they had received:—*Held*: they were entitled to the costs of accounts against themselves, but not to costs of accounts against the estate of the insolvent exor., & as to other costs of suit, being parties in both capacities, they should have half the costs.—*PALMER v. JONES* (1874), 43 L. J. Ch. 349.

Annotations:—*Fold. Re Kitto, Kitto v. Luke* (1879), 28 W. R. 411. *Apprvd. Griffiths, Griffiths v. Lewis* (1884), 26 Ch. D. 465.

PART VIII. SECT. 8, SUB-SECT. 1.— B. (g).

8665 1. Interest charged against representative—Whether costs follow.]—Pltf., being a lunatic, & entitled to maintenance out of the income of a fund in the hands of exors., brought an action for the income, & for adminis-

tration. The master reported a balance of income in the hands of the exors., being an amount charged against them for interest upon moneys retained by them & not invested according to the terms of the will; but the conduct of the exors. was otherwise proper:—*Held*: if the question of the liability of the exors. for the interest had been

was brought for the administration of testator's estate against the extrix. of his defaulting exor. whose estate was insolvent:—*Held*: the extrix. was entitled to the costs of taking an account against herself, but to no costs of taking an account against the defaulting exor., & she should have half her general costs of action.—*Re KITTO, KITTO v. LUKE* (1879), 28 W. R.

Annotation:—*Apprvd. Re Griffiths, Griffiths v. Lewis* (1884), 26 Ch. D. 465.

8666. —.]—Where an action was brought for the administration of testator's estate against the exor. of a defaulting exor., whose estate was insolvent:—*Held*: deft. being before the ct. in a double capacity should have his costs of taking the accounts of the original testator's estate & half the rest of the costs of the action out of the estate.—*Re GRIFFITHS, GRIFFITHS v. LEWIS* (1884), 26 Ch. D. 465; 53 L. J. Ch. 1003; 51 L. T. 278, C. A.

(g) Retention of Assets by Representative.

8667. General rule—Liability for misconduct.]—*BENNETT v. ATKINS*, No. 8559, *ante*.

8668. Interest charged against representative—Whether costs follow.]—Interest against exors. for balances in their hands: with costs, upon the circumstances; not of course, merely as charged with interest.—*ASHBURNHAM v. THOMPSON* (1807), 13 Ves. 402; 33 E. R. 345.

Annotation:—*Consd. Tebbs v. Carpenter* (1816), 1 Madd. 290.

8669. —.]—*COTTON v. CLARK*, No. 8641, *ante*.

8670. —.]—*EGLIN v. SANDERSON*, No. 8598, *ante*.

8671. Retention under claim of right—For indemnity—Respecting trade contracts of testator.]—Testator left the bulk of his property, all personal, to his wife, after a few pecuniary legacies. Testator left a large contract for wheat incomplete at his death, & was the personal representative of his deceased father's & brother's estates, in respect of which there were still unsettled claims. The exors. paid the small legacies; but before paying over anything to the widow, required, as an indemnity, to have a large portion of the residue impounded for twenty years. The widow at first agreed, but afterwards withdrew her consent, & filed this bill for administration & payment over. No additional claims were established either in respect of the wheat or the estates which testator represented, or otherwise:—*Held*: though the period of twenty years was too long to ask to have the indemnity fund impounded, yet the exors., defts., were entitled to their costs.—*CAMBRAY v. DRAPER* (1852), 20 L. T. O. S. 14; 16 Jur. 735.

See, further, Part V., Sect. 1, sub-sect. 2, B., ante.

8672. Retention for seven years—Without investment—Liability to date of hearing.]—Exors. who had retained the assets in their hand for seven

the only one in the action, the exors. should have been ordered to pay the costs; but inasmuch as a general administration was unnecessarily sought by bill & granted, no costs should be awarded for or against the exors.—*MCCARDLE v. MOORE* 2 O. R. 229.—CAN.

years uninvested, there being no debts, ordered to pay the costs, to the hearing, of a legatee's suit to administer the estate.—*TICKNER v. SMITH* (1855), 3 Sm. & G. 42; 25 L. T. O. S. 44; 1 Jur. N. S. 990; 3 W. R. 224; 65 E. R. 555.

8673. Fraudulent retention — Repayment of balance—Effect on liability.]—Testator died in 1838, having appointed T. & W. his exors. Thirteen years afterwards W. died; & four years after his death a creditors' suit was instituted against T. & the representatives of W. in which accounts were taken, & it was certified that testator's estate was barely sufficient to pay his debts & legacies. Four years later a second suit was instituted by a legatee, challenging the accuracy of the accounts in the creditors' suit, & it was then ascertained that large balances had been improperly detained by T. & W. The judge having directed that, upon payment by T. of what had been found due, his costs should be paid out of the estate, & in the same event the costs of the representative of W. should be raised out of the estate & carried to a separate account, with liberty to either party to apply:—*Held*: neither T. nor the representative of W. was entitled to costs, even on the terms of paying the balance that was due from them.—*BIRKS v. MICKLETHWAIT* (1861), 31 L. J. Ch. 362; 13 L. T. 31, L. C.

Annotation:—*Reid*. *Micklethwaite v. Winstanley* (1864), 31 L. J. Ch. 281.

(h) Other Cases.

8674. Partial distribution of estate—Wrongly made—Costs apportioned.]—*HILLIARD v. FULFORD*, No. 8880, *post*.

8675. Legacy paid in court—Doubt as to who entitled—Costs out of residuary estate.]—*Re BIRKETT*, No. 8866, *post*.

SUB-SECT. 2.—COSTS OF PERSONS OTHER THAN REPRESENTATIVE.

A. In General.

See, generally, PRACTICE.

8676. General rule—In discretion of court—R. S. C., Ord. 65, r. 1.]—*Re BLAKE, JONES v. BLAKE*, No. 8135, *ante*.

8677. ———.]—An action was brought by a married woman & her infant children by their next friend against a trustee & exor., asking for administration of the trusts of a will & settlement, & for accounts of the principal & income of the trust property, making charges of misconduct against deft. & seeking to charge him with the costs of the action. At the trial an order was made for administering the trusts, with special inquiries as to the alleged acts of misconduct. On taking the accounts it appeared that deft. had before action given a correct account of the capital, but that in the accounts he had rendered of the income

he had not accounted for nearly so much as he ought. The special cases of misconduct alleged against him were not substantiated. Pltf.'s costs relating to the income account, & deft.'s costs of the rest of the action, were ordered to be taxed & set off against each other. Pltfs. appealed, asking that their costs, or at all events those incurred before R. S. C., 1883 [Ord. 65, r. 1], except those ordered to be paid by deft., might be paid out of the trust property:—*Held*: the order was not appealable, for the costs of a hostile action, seeking to charge deft. with costs on the ground of acts of misconduct, were not within the old rule of the Ct. of Ch., that pltf. in an administration action was entitled to costs out of the fund unless there were special grounds for depriving him of them, but were in the discretion of the judge.—*WILLIAMS v. JONES* (1886), 34 Ch. D. 120; 56 L. J. Ch. 1014; 56 L. T. 68, C. A.

8678. Former law — Party entitled — Unless special grounds shown.]—A married woman, who was one of the exors. of a testator & also tenant for life of the residue, filed a bill for administration of the estate. Upon the accounts being taken it turned out that the residuary estate was insufficient for payment of debts & costs, & that it would be necessary to resort to specifically bequeathed property. On further consideration, pltf. was refused any costs of the suit, & the next friend was ordered to pay the costs of taking an account of what, if anything, was due from another of the exors. on an account current between him & testator. Pltf. appealed:—*Held*: as a residuary legatee or exor. filing a bill for administration was entitled to costs out of the estate unless some special grounds were shown for depriving him of them, the costs in question were not costs in the discretion of the ct. within Jud. Act, 1873 (c. 66), s. 49, & an appeal would lie.—*FARROW v. AUSTIN* (1881), 18 Ch. D. 58; 45 L. T. 227; 30 W. R. 50, C. A.

Annotations:—*Folld*. *Re McClellan, McClellan v. McClellan* (1885), 29 Ch. D. 495. *Consd*. *Williams v. Jones* (1886), 34 Ch. D. 120; *Brown v. Burdett* (1887), 37 Ch. D. 207. *Reid*. *Turner v. Hancock* (1882), 20 Ch. D. 303.

8679. ———.]—R. S. C., 1883, Ord. 65, r. 1, directing that the costs of all proceedings in the Supreme Ct., including the administration of estates & trusts, shall be in the discretion of the ct. or a judge, applies in the case of causes & matters pending on Oct. 24, 1883, when those rules came into operation, only to the costs of proceedings taken on & after that day; & the costs incurred in proceedings taken in such causes & matters before that day, although not adjudicated upon until afterwards, are not within that rule. In an action for administration by one of several residuary legatees all the proceedings except those on subsequent further consideration were taken before Ord. 65, r. 1, came into operation, though the costs were not adjudicated upon until the order on further consideration which was made afterwards:—*Held*: an appeal would lie as to the costs of such prior, though not as to the costs of such subsequent proceedings.—*Re MCCLELLAN, MCCLELLAN v.*

PART VIII. SECT. 2, SUB-SECT. 2.—A.

b. *Costs of other litigation.*]—In an administration suit it appeared that the stepfather of one of the children of deceased, who had the care of the child, had been sued for the child's board while at school, his mother being a creditor of the estate, & neither she nor her husband having any funds to pay for such board, while

there were funds applicable thereto:—*Held*: the stepfather should be allowed the costs of such suit.—*MENZIES v. RIDLEY* (1851), 2 Gr. 544.—*CAN*.

c. *Party unnecessarily making or resisting claim.*]—The Supreme Ct., on appeal from the Probate Ct., will exercise a discretion as to costs, & will in general give costs against a

party unnecessarily making or resisting a claim.—*Re McDONALD'S ESTATE* (1853), 2 N. S. R. (James) 123.—*CAN*.

d. *Undue influence pleaded & subsequently abandoned.*]—*MOMBERG v. JONES* (1915), 32 W. L. R. 544; 9 W. W. R. 246; 25 D. L. R. 768.—*CAN*.

e. *Attorney-General.*]—The A.-G. having been served with notice of a

Sect. 8.—Costs: Sub-sect. 2, A. & B. (a).]

McClellan (1885), 29 Ch. D. 495; 54 L. J. Ch. 659; 52 L. T. 741; 33 W. R. 888; 1 T. L. R. 400, C. A.

Annotation:—*Reid. Brown v. Burdett* (1887), 37 Ch. D. 207.

8680. ————.]—**WILLIAMS v. JONES**, No. 8677, *ante*.

8681. Proceedings taken before October, 1883—Adjudication after—Not within R. S. C., Ord. 65,

No. 8679, *ante*.

8682. Proceedings beneficial to estate—Costs out of estate.]—A creditor, who proves before the master, has generally no costs. But if his proof is beneficial to the estate, as where he saves by it the expense of a suit, & there are extraordinary costs, the ct. will give them on petition (*LEACH, V.-C.*).—**HARVEY v. HARVEY** (1821), 6 Madd. 91; 56 E. R. 1025.

8683. ————.]—A suit was instituted for administering a fund settled in trust for & in which A., B., C. & D. were entitled to shares. A. had mortgaged her share for more than its value; A. died, & upon her next of kin being cited, C. took out administration:—**Held:** the costs of administration should be borne by the general fund, the administration having been taken out for the benefit of all the parties to the suit.—**COTTON v. PENROSE** (1849), 18 L. J. Ch. 128; 12 L. T. O. S. 491; 13 Jur. 761.

8684. ———— **Defence in place of representative.]—BAUER v. MITFORD**, No. 8257, *ante*.

8685. ————.]—(1) No costs ought to be given out of an estate in an administration suit, except for such proceedings as are in their origin directed for the benefit of the estate, or which have in their result conducted to that benefit.

(2) Where fraudulent charges are made against trustees, & inquiries into the truth of them are directed by the ct., if in the result it is proved that such charges were unfounded, the costs consequent upon the investigation will be thrown upon the party making them.—**BARTLETT v. WOOD** (1861), 30 L. J. Ch. 614; 4 L. T. 692; 9 W. R. 817, L. C.

Annotations:—*As to* (1) **Apld. Croggan v. Allen** (1882), 22 Ch. D. 101. **Consd. Re Ormston, Goldring v. Lancaster** (1887), 58 L. T. 74. **Reid. Re Cope, D'Angulier v. Cope** (1885), 1 T. L. R. 611; **Plumb v. Craker** (1885), 16 Q. B. D. 40; **Power v. Parker** (1887), 4 T. L. R. 143.

8686. ————.]—In an administration action no costs ought to be given out of the estate, except for those proceedings that are in their origin directed with some show of reason & a proper foundation for the benefit of the estate, or which have in their result conducted to the benefit thereof. A tenant for life under a will who had duly received the income of the estate, & whose solrs. had expressed themselves satisfied with the accounts rendered by the exors., instituted an action for the administration of the estate. The

accounts taken showed that pltf. had been slightly overpaid:—**Held:** pltf. must have no costs of the action, & must pay the costs of the rendering of the income account.—**CROGGAN v. ALLEN** (1882), 22 Ch. D. 101; 47 L. T. 437; 31 W. R. 319.

Annotations:—*Reid. Re Cope, D'Angulier v. Cope* (1885), 1 T. L. R. 611; *Re M'Clellan, M'Clellan v. M'Clellan* (1885), 1 T. L. R. 400.

8687. ————.]—An action was begun on Apr. 19, 1882, by a person who had bought a share in an estate for £55 asking that the trusts of the will of a testator might be carried into execution, & his real & personal estate administered by the ct., & that all proper accounts & inquiries might be taken & made, & directions given. No allegation was made in it of any kind of misconduct on the part of the trustees. The claim showed that the widow of testator, who, by the will was tenant for life of all the real & personal estate, was still living; there was no doubt as to who were the persons ultimately entitled. On Mar. 17, 1883, the usual judgment for administration was pronounced, & numerous accounts & inquiries were ordered to be taken & made. On Aug. 13, 1887, the chief clerk filed his certificate:—**Held:** (1) no benefit having resulted to the estate from the action, & the action being an idle & vexatious proceeding, pltf. was not entitled to his costs out of the estate; (2) pltf. must pay all the costs of this action since R. S. C., Ord. 65, r. 1, came into operation on Oct. 24, 1883.—**Re ORMSTON, GOLDRING v. LANCASTER** (1887), 58 L. T. 74; 36 W. R. 216; *affd.* (1888), 59 L. T. 594, C. A.

8688. Necessary proceedings—Properly instituted—Costs out of estate.]—Where the question at issue was the true construction of a will made by a testator, who might be said to have created in some degree the difficulty by the language he used; & where, moreover, the distribution of the estate was among the different members of a family, & it was not a case in which any one class of persons was contending against another class:—**Held:** the costs might properly be allowed to come out of the fund.

In administration suits the costs will be given out of the estate, if it appear that the suit was a necessary one, & properly brought before the ct.—**MAXWELL v. MAXWELL** (1870), L. R. 4 H. L. 506; 39 L. J. Ch. 698; 23 L. T. 325; 19 W. R. 15, H. L.; *affg. S. C. sub nom. MAXWELL v. HYSLOP* (1867), L. R. 4 Eq. 407.

8689. ————.]—**Re SLAUGHTER, WALTON v. AITCHISON**, [1907] W. N. 197.

8690. Costs of necessary party.]—In a simple administration suit, the costs of all necessary parties are payable out of the estate. But where some of the residuary legatees have assigned or incumbered their share, they & their assignees are entitled to one set of costs only, namely, the costs of the assignors; & as between the assignors & assignees, the assignees are entitled to receive such costs, in discharge of their own costs of suit, & to have the deficiency, if any, out of the share of their assignors.—**GREEDY v. LAVENDER** (1848), 11

motion for administration in goods in which the Crown had not any interest, & as to which the Crown made no case, & where other persons unsuccessfully impeached the legitimacy of deceased, is not entitled to the costs of appearing on the motion.—**REDMOND & REDMOND v. BARBER & BARBER** (1863), 11 L. T. 147.—**IR.**

1. Next of kin.]—Where the next

of kin had not disputed the will when probate was applied for in common form, but the objection to granting probate came from the ct., & the ct. ordered that an action should be commenced to establish the will in solemn form & the next of kin cited, & all that the next of kin did was to raise the point which had been raised by the ct. & to cross-examine the

witnesses:—**Held:** although the ct. decided to grant probate, the next of kin should be allowed costs.—**PUBLIC TRUSTEE v. KELLS** (1903), 23 N. Z. L. R. 605.—**N.Z.**

g. Unsuccessful plaintiff—Doubtful point of law for advice of court.]—An unsuccessful pltf. refused costs out of

Beav. 417; 18 L. J. Ch. 62; 12 L. T. O. S. 266; 50 E. R. 878.

Annotations:—*Held*. Thompson v. Tomkins (1863), 8 Jur. N. S. 185; Gee v. Mahood (1874), 23 W. R. 71. *Mentd.* Scott v. Spashett (1851), 3 Mac. & G. 599; Belcher v. Williams (1890), 45 Ch. D. 510.

8691. Issue directed to be tried—Costs of successful claimant.—*Re* DUNN, BRINKLOW v. SINGLETON (1902), 46 Sol. Jo. 432.

8692. Judgment obtained silent as to costs—Extent to which costs allowed.—Where pltf. obtains judgment in an action for administration & nothing is said about costs, he is entitled to his costs down to judgment, & he is also entitled to the costs of taking accounts after the judgment, because they are part of & parcel of the machinery of carrying out the judgment in respect of which he had already been allowed his costs.—*Re* ROBY, SHERBROOKE v. TAYLOR (1916), 60 Sol. Jo. 291.

8693. Death of party entitled to costs—Devolution of right on heir.—Where costs are decreed to all parties out of a real estate, although one of them, who was entitled to receive costs, died before they were taxed, they do not *moriuntur cum persona*, but his heir-at-law is entitled.—*BLOWER v. MORRETS* (1754), 3 Atk. 772; 1 Dick. 251; 26 E. R. 1242, L. C.

Annotations:—*Mentd.* Morgan v. Soudamoro (1796), 3 Ves. 195; Lowten v. Colchester Corpn. (1817), 2 Mer. 113.

8694. Security for costs of appeal—Whether executor entitled to demand—Where costs due to party appealing—From executor in representative capacity.—In an administration action P. was ordered to pay K. the costs of an unsuccessful appeal, but died without paying the costs, & leaving H. his devisee in trust & exor. P. had been found to be testator's heir-at-law, & K. appealed from this finding. On an application by H. for security for the costs of this appeal on the ground of the insolvency of K.:—*Held*: the fact that the costs unpaid by P. might be set off against & were sufficient to secure the costs of the appeal, was not a sufficient answer to the application of H., because as an exor. he was entitled to be indemnified, although it would have been a good answer as against P.—*Re* KNIGHT, KNIGHT v. GARDNER (1888), 38 Ch. D. 108; 58 L. T. 699; 32 Sol. Jo. 305, C. A.

Administration in county court—Discretion of court as to costs.—*See* COUNTY COURTS, Vol. XIII., p. 522, Nos. 720, 721.

Inquiries relating to persons entitled—Costs of.—*See* R. S. C., Ord. 65, r. 14B; Sub-sect. 3, G. (a).

Costs in Probate action, *see* Part II., Sect. 6, sub-sect. 9, F.

B. Proceedings Instituted by Other Persons.

(a) In General.

See, now, R. S. C., Ord. 65, r. 14A.

8695. Unsuccessful claim—Liability of claimant for costs.—*CHERRY v. MOTT*, No. 8739, *post*.

8696. ——— Discretion of court.—A testator bequeathed all the residue of the estate & effects which, at his death, he should have power to dispose of, to trustees, in trust for the separate use of a married woman for her life, with a general

power of appointment over the capital of the fund, & a limitation, in default of appointment, in trust, for such persons of her blood & kindred as would be entitled, under Stat. Distributions, to her personal estate, if she had died unmarried. By a codicil, he bequeathed an annuity & gave all his property, in houses or in the funds, or of any other sort not disposed of by his will, & which had accumulated since the making thereof, in trust for the married woman & three other legatees, equally to be divided amongst them. There was, at testator's death, no description of property not disposed of by his will or accumulated since:—*Held*: the beneficial title to testator's property was not affected by the codicil, unless in the event of the married woman's death without having fully exercised her power, & without leaving any person of her blood & kindred living at her death.

Although the ct. decides against pltf., it may order the costs of all parties to be paid out of the estate.—*LEE v. DELANE* (1850), 4 De G. & Sm. 1; 16 L. T. O. S. 102; 14 Jur. 861; 64 E. R. 707.

8697. ————The costs of an unsuccessful attempt to establish a claim as a debt against the estate of a testator in course of administration, under the direction of the ct., directed to be paid by claimant.—*Re* SEARLES' ESTATE, HATCH v. SEARLES (1854), 2 Sm. & G. 147; 2 Eq. Rep. 614; 23 L. J. Ch. 467; 22 L. T. O. S. 315; 2 W. R. 297; 65 E. R. 342.

Annotations:—*Mentd.* Carter v. White (1882), 20 Ch. D. 225; France v. Clark (1884), 26 Ch. D. 257; Faulks v. Atkins (1893), 10 T. L. R. 178.

8698. ————An alleged creditor carried in a claim, in an administration suit, for a debt alleged to be due from testator. The claim having been disallowed, claimant was ordered to pay the costs of the proceeding.—*YEOMANS v. HAYNES* (1857), 24 Beav. 127; 53 E. R. 305.

8699. ——— Claim against representative—Distinguished from claim against estate.—A person, who was not a party to the suit, came in under the usual advertisements to prefer a claim against testator's estate. The summons being adjourned into ct., the claim was disallowed. It was, however, held that the claim was good as against the extrix. of the estate, in respect of the share which she took under the will:—*Held*: the costs of so much of the summons as related to the claim against testator's estate must be paid by the party making such ineffectual claim.—*BENTLEY v. BENTLEY* (1863), 1 New Rep. 390; 7 L. T. 819.

8700. ————An appeal on the construction of a will, if unsuccessful, will in general be dismissed with costs.—*CLARK v. HENRY* (1871), as reported in 6 Ch. App. 588, L. JJ.

Annotations:—*Mentd.* Carter v. Smith (1871), 25 L. T. 555; *Re* Dowling's Trusts (1872), L. R. 14 Eq. 463; Apsey v. Apsey (1877), 36 L. T. 941; Bubb v. Padwick (1880), 13 Ch. D. 517.

8701. ————In an administration action an inquiry was ordered as to who was the heir of testator. The chief clerk found that R. was the heir, but that, in default of heirs on the paternal side, the heir-at-law was J.

J. took out a summons to vary the certificate, & the ct. held that claimant, R., had not proved his relationship to testator. The unsuccessful claimant asked for costs:—*Held*: there was no

the estate, but not ordered to pay costs, where she had taken out an originating summons to have a point

arising upon the administration of a fund determined, & the point was a doubtful one, the ct. being divided

in opinion upon it.—*RUDDENKLAU v. RUDDENKLAU* (1897), 16 N. Z. L. R. 404.—N.Z.

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general rule entitling a claimant coming in on an inquiry in chambers in an administration action, & failing, to have his costs out of the estate.—*Re KNIGHT, KNIGHT v. GARDNER* (1887), 57 L. T. 238.

8702. — Proceedings facilitating administration—Costs out of estate.]—If, through the exertions of a pltf., the ct. is enabled to distribute a fund or make a declaration of rights necessary for an administration, there, although pltf. may fail in his claim, the ct. will not permit the other parties to carry off the fruit of his exertions, without defraying his costs out of the fund.—*WEDGWOOD v. ADAMS* (1844), 8 Beav. 103; 50 E. R. 41.

Annotation:—Reid. Jones v. How (1850), 14 L. T. O. S. 504.

8703. — — — — —.]—Cases in which costs may be given to pltf. out of an estate, notwithstanding the dismissal of the bill.

LORD LANGDALE, in *Thomason v. Moses*, No. 8740, *post*, thought that the ct. had jurisdiction to give costs notwithstanding the dismissal of the bill where it had a fund to administer & the case was one in which the opinion of the ct. on the question in the cause was necessary to be taken before the exors. could properly administer the estate. . . . It was, however, a rule to be applied with caution, for in cases where exors. could not safely administer the fund without declaration of the ct., a number of bills might be filed by different legatees requiring the decision of the ct. as to the validity of their claims & if, although the claims should be disallowed, they were all to be paid their costs of the different suits, it might lead to injurious consequences (*WIGRAM, V.-C.*).—*WESTCOTT v. OULLIFORD* (1844), 3 Hare, 265; 13 L. J. Ch. 136; 8 Jur. 166; 67 E. R. 382.

Annotations:—Reid. Jones v. How (1850), 14 L. T. O. S. 504; *Wilson v. Eden* (1853), 22 L. T. O. S. 128.

8704. — — — — —.]—Pltfs., stating themselves & some of defts., to be next of kin, filed a bill for the administration of testator's estate. Their claim was displaced upon inquiries directed by the ct., & other persons, not parties to the cause, established their right & became entitled to a large residue. The case being one of great difficulty & doubt, & an investigation being absolutely necessary for the administration of the estate, pltfs. & defts. were allowed their costs out of the fund.

(2) Costs of suit apportioned between real & personal estate.—*JOHNSTON v. TODD* (1845), 8 Beav. 489; 50 E. R. 192.

Annotations:—Reid. Re Somers, Somers v. Roxburgh (1900), 44 Sol. Jo. 551. *Mentd. Lancashire v. Lancashire* (1846), 15 L. J. Ch. 293.

8705. — — — — —.]—When a bill is filed for the purpose of administering an estate, raising a question, which must have been disposed of in some suit, the ct. will consider the estate gets a benefit from the suit, & will therefore order the costs to come out of the general estate, although pltf. may fail in his suit. . . . There must of course be a real subject of contest, a *probabilis causa litigandi*, in respect of the claim. . . . It cannot

be said that, in the case of a person filing a bill, & making a claim which does not furnish a *probabilis causa litigandi*, I could deal with it as a case in which the exors. could not have acted without the opinion of the ct. (*WIGRAM, V.-C.*).—*BOREHAM v. BIGNALL* (1850), as reported in 8 Hare, 131; 68 E. R. 302.

Annotations:—Mentd. Southern v. Wollaston (1852), 16 Beav. 166; *Re Lynce's Trust* (1869), L. R. 8 Eq. 65; *Firth v. Fielden* (1874), 22 W. R. 622; *Re Drew, Drew v. Drew*, [1899] 1 Ch. 336; *Re Coley, Hollingshead v. Coley*, [1903] 2 Ch. 102.

8706. — Made on reasonable grounds—Costs out of estate.]—In a suit instituted on fair grounds to establish a claim to a residuary bequest the ct. will give pltf., though failing, his costs out of the estate.—*TURNER v. FRAMPTON* (1846), 2 Coll. 331; 6 L. T. O. S. 314; 10 Jur. 24; 63 E. R. 757.

8707. — Benefiting residue — Residuary legatees not party to claim—Costs out of residue.]—Exceptions which had been taken in the cause & overruled, & on further directions were directed to be paid out of the shares of the residuary legatees, they not having been the excepting parties; but had the exceptions been allowed, they would have had great benefit.—*TERRELL v. MATTHEWS* (1813), 1 L. T. O. S. 251.

Unsuccessful charge of misconduct.]—See Nos. 8677, 8685, *ante*; Nos. 8721, 8723, *post*.

8708. Sufficiency of plaintiff's interest—Failure of contingent interest after suit—Costs not allowed.]—A bill was filed for the administration of testator's estate, by a party entitled to a contingent reversionary interest, & a decree for an account was obtained. Before the report, pltf.'s interest wholly failed:—*Held*: pltf. was not entitled to his costs of suit either as against defts. or the fund.—*HAY v. BOWEN* (1842), 5 Beav. 610; 12 L. J. Ch. 78; 6 Jur. 1110; 49 E. R. 715.

Annotation:—Consd. Seaton v. Grant (1867), 36 L. J. Ch. 638.

8709. — Small reversionary share—Costs borne by plaintiff.]—*ACKERS v. ACKERS*, [1884] W. N. 82.

8710. — Assignee of small sum—Effect of R. S. C., Ord. 65, r. 1.]—*Re ORMSTON, GOLDRING v. LANCASTER*, No. 8687, *ante*.

(b) *Improper or Vexatious Proceedings.*

See R. S. C., Ord. 65, rr. 1, 11.

8711. Unnecessary action — Administration claimed by assignee of beneficiary.]—*CAPE v. BENT*, No. 7808, *ante*.

8712. — For account—No notice of completed appropriation—Costs of proceedings after notice.]—Exors. had made a division & appropriation of the residue. The husband of one of the residuary legatees, in ignorance of what had been done, filed a bill for an account. At the hearing, pltf., with notice of what had taken place, persevered in having the accounts taken, & no substantial variation resulted therefrom:—*Held*: pltf. was entitled to costs out of the estate, up to the hearing, but pltf.'s share alone must bear the subsequent

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B. (b).

h. *Unnecessary action.]*—Where pltf. files a bill for an administration in a case in which the decree

would have been made on notice, without a bill, he is not entitled to the increased costs thereby occasioned.—*SOVEREIGN v. SOVEREIGN* (1869), 15 Gr. 559.—*CAN.*

k. — On behalf of infant friend of infant personally liable. — the case of small estates, an administration suit can only be justified where every possible means of avoiding the

costs.—*THOMPSON v. CLIVE* (1848), 11 Beav. 475; 50 E. R. 901.

Annotations:—*Consd. Springett v. Dashwood* (1860), 3 L. T. 542. *Held. Hilliard v. Fulford* (1876), 4 Ch. D. 389.

8713. ——— **Claim by tenant for life—When all income paid.]—***OROGGAN v. ALLEN*, No. 8686, *ante*.

8714. ——— **Separate actions when one sufficient—One set of costs only.]—**Trustees of a marriage settlement transferred, contrary to the trusts, £2,000 stock, part of the trust fund, to the husband. Two of the trustees became bkpt. The remaining trustee, who was the father of the wife, by his will, gave to the trustees of the settlement £6,000 like stock, without declaring any trust of it, but directing certain bonds to be sold, for giving his daughter "her legacy of the above-mentioned £6,000 stock":—*Held*: the £6,000 was not given to the trustees beneficially, nor to the daughter exclusively, but was given upon the trusts of the settlement, & in satisfaction of the breach of trust.

The daughter & the other *cestuis que trust* under the settlement instituted one suit, & the daughter alone another against the father's exor. The former sought to have the breach of trust made good, the other sought payment of the legacy:—*Held*: one suit would have been sufficient, & the costs of one alone would be allowed.—*BENSUSAN v. NEHEMIAS* (1851), as reported in 4 De G. & Sm. R. 878.

8715. ——— **Instituted without sufficient inquiry—By next friend stranger to family.]—**A next friend having filed a bill for the administration of a testator's estate, & to protect the infants, without being a friend of the family, & without making sufficient inquiries:—*Held*: she must pay her own costs, although the suit resulted in the appointment of a new trustee, which was a protection to the estate.

The Ct. of Ch. does allow strangers, that is, persons not members of the family, to institute these suits, but only after they have made reasonable inquiries; only after they have ascertained that a suit is either necessary or at least desirable (*JESSEL, M.R.*).—*EDGLEY v. ADAMS* (1874), 31 L. T. 15.

8716. ——— **Costs out of plaintiff's share exclusively.]—**Where an administration action was unnecessarily commenced the ct. ordered pltf.'s costs of the action to be borne by pltf.'s own share of the estate exclusively.—*Re COPE, D'AUGUIER v. COPE* (1885), 1 T. L. R. 611.

8717. ——— **Costs of resulting proceedings.]—***Re BLAKE, JONES v. BLAKE*, No. 8135, *ante*.

8718. ——— **On negligent conduct of action—Entailing expense.]—***BROWN v. BURDETT*, No. 8610, *ante*.

8719. **Unnecessary evidence.]—**All costs caused by unnecessary evidence must be paid by the party offering it.—*Re LITTLEWOOD, LITTLEWOOD v. COLLINS* (1863), 1 New Rep. 457; 8 L. T. 265; 11 W. R. 387, L. JJ.

8720. **Unfounded charge of misconduct—Subse-**

quent investigation—Costs on plaintiff.]—*BARTLETT v. WOOD*, No. 8685, *ante*.

8721. ——— ———.]—An action was brought against the exor. & trustee of a will by the beneficiaries, in which they alleged he had committed certain breaches of trust, & claiming the administration of the estate, the appointment of a new trustee, & of a receiver. At the trial an order was made by consent, by which certain inquiries, consisting of the common administration inquiries, & others with reference to the alleged breaches of trust, were referred to an official referee. The referee reported altogether in favour of deft., & the cause came on for further consideration:—*Held*: pltf's. must pay all the costs of the action up to & including the hearing on further consideration, except such costs as would have been incurred in obtaining a simple administration judgment.—*Re BROOK, SYKES v. BROOK* (1881), 50 L. J. Ch. 744; 29 W. R. 821.

Annotation:—*Mentd. Cooke v. Newcastle & Gateshead Water Co.* (1882), 10 Q. B. D. 332.

8722. ——— ———.]—*WILLIAMS v. JONES*, No. 8677, *ante*.

8723. ——— ———.]—When a useless administration action had been commenced & unsupported charges made against trustees, the ct. refused to allow pltf. his costs of the action.—*POWER v. PARKER* (1887), 4 T. L. R. 143.

8724. **Provision charging costs to particular fund—No protection to plaintiff in improper action.]—**Testatrix had by her will created two residues of her estate, the one impure & the other pure personalty. Bequests to charities were made out of the pure personalty, & her debts & funeral & testamentary expenses were directed to be paid out of the impure personalty. The person interested in the pure personalty subject to the charitable gifts, brought an action against the exors. & trustees for the administration of the estate, & prayed that the costs thereof should be paid out of the impure personalty:—*Held*: (1) the action had been properly brought, & by virtue of the will the costs of the action were payable out of the impure personalty; (2) "Testamentary expenses" include the costs of such a reasonable & proper administration suit as would, in the absence of any direction by testator, have been ordered to be paid out of the general residue.

It would be the duty of the ct. to deprive any pltf. of the costs of an improper [administration] suit, notwithstanding the fact of there being such a provision in the will [that costs are to be paid out of a particular fund] (*JAMES, L.J.*).—*Re YOUNG, YOUNG v. DOLMAN* (1881), 44 L. T. 499, C. A.

Creditors proceeding after notice of deficiency.]—See Sub-sect. 2, C., *post*.

Unsuccessful proceedings.]—See Sub-sect. 2, A., *ante*.

See, generally, PRACTICE.

(c) *Unreasonable Proceedings by Creditors.*

8725. **Prosecution of action—No assets for payment of debt—Notice of insufficiency given—Costs**

456.—CAN.

PART VIII. SECT. 8, SUB-SECT. 2.—
B. (c).

8725 i. **Prosecution of action—No assets for payment of debt—Notice of insufficiency given—Costs payable by creditor.]—**In case a creditor brings

suit has been exhausted before suit brought. Where a next friend filed a bill for a minor, without having observed this rule, & the suit did not appear to have been necessary in the interests of the minor, the next friend was charged with all the costs.—*MCANDREW v. LAFLAMME* (1872), 19 Gr. 193.—CAN.

1. ———.]—When it appeared that the administration proceedings had been instituted without any show of reason, or proper foundation for the benefit of the estate, & that they had not, in their results, conduced to that benefit, pltf. was ordered to pay the costs of all parties.—*Re WOODHALL GARBUTT v. HEWSON* (1882), 2 O. R.

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payable by creditor.]—(1) In a creditor's suit, it appearing that there were no assets applicable to the payment of pltf.'s debts, pltf's. were ordered to pay the costs. (2) But other creditors, entitled to a specific lien, having proved, were ordered to pay the costs of the proceedings relative to their debts.

(3) If where exor. states on oath that there is nothing to distribute, he chooses to go on, the consequence of deciding that in such a case exor. is not to have costs would be that as other creditors may bring other suits harassing him in the same manner, he might be exposed to ruin (*PLUMER, M.R.*).—*BLUETT v. JESSOP* (1821), *Jac.* 240; 37 E. R. 840.

Annotation:—Reid. Stanton v. Hatfield (1836), 1 Keen, 358.

8726. ———.]—A simple contract creditor who had instituted & prosecuted a suit for administration, in the face of information furnished by the legal personal representative that there were no assets for the payment of simple contract debts, was ordered to pay the costs of the suit.—*KING v. BRYANT* (1841), 4 Beav. 460; 49 E. R. 417; *sub nom. KING v. HAMMETT*, 11 L. J. Ch. 14; 5 Jur. 1052.

8727. ———.]—A simple contract creditor obtained an order to administer the intestate's estate. He afterwards had notice that the estate was insufficient to pay the specialty creditor & the costs of the administratrix, but he still persisted in prosecuting the suit:—*Held*: the fund must be applied, first, in paying the costs of the administratrix, then in paying pltf.'s costs down to the notice, & the residue in payment of the specialty creditor.—*SULLIVAN v. BEVAN* (1855), 20 Beav. 399; 52 E. R. 657.

8728. ———.]—A creditor's suit having been instituted after a statement by the legal personal representatives that there were no assets, which statement turned out to be true, pltf. was ordered to pay the costs.—*FULLER v. GREEN* (1857), 24 Beav. 217; 53 E. R. 341.

Annotation:—Reid. Farrow v. Austin (1881), 45 L. T. 227.

8729. ———.]—*Re SAMSON, ROBBINS v. ALEXANDER* (1907), 123 L. T. Jo. 86.

8729a. Prosecution of action on judgment—After notice of decree—Judgment obtained before decree.]—*BOSTON v. RICHARDSON*, No. 8315a, *ante*.

8730. Claim to appropriate part of estate—For payment of debt—Costs on creditors so claiming.]—Where pltf's. in a creditors' suit claimed to have a particular part of testator's estate appropriated towards payment of their debt, the expenses attending that claim, being unconnected with the general administration of the estate, were directed to be borne by pltf's. The other creditors were not required to contribute towards them.—*DUNNING v. HARDS* (1847), 2 Ph. 294; 16 L. J. Ch. 403; 11 Jur. 549; 41 E. R. 956, L. C.

8731. Opposition to motion to dismiss action Upon payment of claim.]—The costs of pltf. in a creditor's suit, in opposing a motion to dismiss for want of prosecution by a party named exor., who

had renounced probate & disclaimed, was refused to a creditor whose bill was dismissed upon payment of his claim by acting exor.—*PENNY v. BEAVAN* (1848), 7 Hare, 133; 12 Jur. 936; 68 E. R. 51.

(d) On Construction of Will.

See R. S. C., Ord. 65, r. 1.

8732. Ambiguity resulting in proceedings—Whether costs out of estate.]—Where the suit is occasioned by a difficulty in discovering testator's meaning, the costs shall come out of the fund.—*BAUGH v. REED* (1790), 3 Bro. C. C. 192; 1 Ves. 257; 29 E. R. 484, L. C.

Annotations:—Mentd. Durham v. Wharton (1836), 10 Bl. N. S. 526; *Plunkett v. Lewis* (1844), 8 Hare, 316; *Leighton v. Leighton* (1874), L. R. 18 Eq. 458.

8733. ———.]—When testator expresses himself so ambiguously as to make it necessary to come to this ct., the costs shall be paid out of his general assets.—*JOLLIFFE v. EAST* (1789), 3 Bro. C. C. 25; 29 E. R. 387, L. C.

Annotation:—Mentd. Morley v. Bird (1798), 3 Ves. 620.

8734. ———.]—Costs of a doubt upon the meaning of the will out of the general property.—*BARRINGTON v. TRISTRAM* (1801), 6 Ves. 345; 31 E. R. 1085, L. C.

8735. ———.]—Costs of a suit for a legacy out of the residue: the suit being rendered necessary either by the conduct of the extrix., who was the residuary legatee, or by the disposition of testatrix.—*WILSON v. BROWNSMITH* (1803), 9 Ves. 180; 32 E. R. 571.

8736. ———.]—*LISTER v. SHERNINGHAM* (1816), 1 Newland's Chancery Practice, 3rd ed. at p. 592.

8737. ———.]—The principle on costs are given out of the estate is that the party was led into the suit by the state of deceased's testamentary papers.—*HILLAM v. WALKER* (1827), 1 Hag. Ecc. 71; 162 E. R. 510.

8738. ———.]—*RIPLEY v. MOYSEY*, No. 8796, *post*.

8739. ———.]—Where testator has created such a difficulty that the estate cannot be administered without coming to the ct., his estate bears the costs; but where a claim is made, which prevents the exors. acting, & which turns out unfounded, the party making the claim must bear the costs.—*CHERRY v. MOTT* (1836), 1 My. & Cr. 123; 5 L. J. Ch. 65; 40 E. R. 323.

Annotations:—Mentd. Chamberlayne v. Brockett (1872), 8 Ch. App. 206; *Biscoe v. Jackson* (1887), 35 Ch. D. 460; *Re Slevin, Slevin v. Hepburn*, [1891] 2 Ch. 236.

8740. ———.]—In a suit to obtain the decision of the ct. on a very doubtful will, pltf. turned out to have no interest. The ct. upon making a declaration of the rights ordered the costs of all parties out of the fund.—*THOMASON v. MOSES* (1842), 5 Beav. 77; 6 Jur. 403; 49 E. R. 506.

Annotations:—Consd. Westcott v. Culliford (1844), 3 Hare, 265. *Reid. Jones v. How* (1850), 14 L. T. O. S. 504; *Wilson v. Eden* (1854), 23 L. J. Ch. 105. *Mentd. Boys v. Bradley* (1853), 17 Jur. 159.

Compare No. 8703, ante.

an administration suit after being informed that there are no assets applicable to the payment of his claim, if the information appear to have been substantially correct, he may have to pay the costs of the suit.—*CITY BANK*

v. SCOTCHERD (1871), 18 Gr. 185.—*CAN.*

*m. ——— After decree for administration.]—*The fact that a creditor of an estate has proceeded at law after a decree for administration has been

obtained, is not sufficient to deprive him of his costs, either at law or of a motion in this ct. to restrain his action.—*Re LANGTRY* (1871), 18 Gr. 530.—*CAN.*

8741. — — — Claim between legatees.]—In a suit for administering a testator's estate, a legacy was claimed by two legatees adversely to each other:—*Held*: as the question arose on testator's will, the costs must be borne by his estate, & not by the legacy.—*WILSON v. SQUIRE* (1842), 13 Sim. 212; 12 L. J. Ch. 139; 60 E. R. 83.

8742. — — — Not affecting whole estate.]—Where a question is raised between specific & general residuary legatees, on the construction of part of a will whether a specific sum does or not fall into the general residue, the costs form part of the general administration costs, although in fact there is no question of an administration of the whole estate.—*LONSDALE v. BERCHTHOLD* (1857), as reported in 3 Jur. N. S. 328.

Annotations:—*Mentd.* *Re Skinner's Trusts* (1860), 1 John. & H. 102; *Re Bowes, Strathmore v. Vane*, [1896] 1 Ch. 507.

8743. — — —.]—It was a fair question of construction, & the costs must come out of the residuary estate (*LORD LYNDHURST, C.*).—*SAUMAREZ v. SAUMAREZ* (1845), 5 L. T. O. S. 261, L. C.

8744. — — —.]—Costs given to pltf. notwithstanding the bill, raising a question on the construction of a will, dismissed. Costs given to pltf. out of the fund in question directed to be set off against payments out of such fund erroneously made by the trustees to the use of the pltf.—*COOPER v. PITCHER* (1845), 4 Hare, 485; 67 E. R. 739; *on appeal* (1846), 16 L. J. Ch. 24, L. C.

Annotations:—*Mentd.* *Re Hayton's Trusts* (1864), 4 New Rep. 55; *Pringle v. Gloag* (1879), 27 W. R. 574; *Stanlar v. Evans, Evans v. Stanlar* (1886), 56 L. J. Ch. 581.

8745. — — —.]—B. devised to S. a piece of land in N.; B. then declared his desire to erect & endow almshouses in N., & he empowered his trustees so soon as land in N. shall have been legally dedicated to charitable uses, by some other person within twelve months after his decease, to pay to the trustees of the intended charity a sum of £60,000 to be devoted to the purposes of the charity, but not to be applied to the purchase of lands for same:—*Held*: as there was no question of construction occasioned by the obscurity of the will itself, the costs were ordered to come out of the fund bequeathed.—*PHILPOTT v. ST. GEORGE'S HOSPITAL (PRESIDENT & GOVERNORS), A.-G. v. PHILPOTT* (1857), 6 H. L. Cas. 338; 27 L. J. Ch. 70; 30 L. T. O. S. 15; 21 J. P. 691; 3 Jur. N. S. 1269; 5 W. R. 845; 10 E. R. 1326, H. L.; *reversg.* (1855), 21 Beav. 134.

Annotations:—*Mentd.* *Lechmere v. Curtler* (1855), 3 Eq. Rep. 938; *Hartshorne v. Nicholson* (1858), 26 Beav. 58; *Dent v. Allcroft* (1861), 30 Beav. 335; *Hall v. Warren* (1861), 9 H. L. Cas. 420; *Bowell v. Crewe-Read* (1866), L. R. 3 Eq. 60; *Cresswell v. Cresswell* (1868), L. R. 6 Eq. 69; *Re Watmough's Trusts* (1869), L. R. 8 Eq. 272; *Sinnett v. Herbert* (1871), L. R. 12 Eq. 201; *Chamberlayne v. Brockett* (1872), 21 W. R. 299; *Re Cox, Cox v. Davie* (1877), 7 Ch. D. 204; *Re Hedgman, Morley v. Coxon* (1878), 26 W. R. 674; *Re Christmas, Martin v. Lacon* (1885), 30 Ch. D. 544; *Re Holburne, Coates v. Mackillop* (1885), 53 L. T. 212; *Cotton v. Imperial & Foreign Agency & Investment Corp.*, [1892] 3 Ch. 454.

8746. — — —.]—Costs out of the estate directed to be paid to pltf. who wholly failed in her suit, the trustee, who was deft., having asked for a declaration as to the construction of the will.—*MERLIN v. BLAGRAVE* (1858), 25 Beav. 125; 53 E. R. 584.

8747. — — —.]—The costs of all parties must be paid out of testator's estate, as the difficulty was created by testator himself (*ROMILLY, M.R.*).—*M'OLURE v. EVANS* (1861), 29 Beav. 422; 30

L. J. Ch. 295; 3 L. T. 870; 9 W. R. 428; 54 E. R. 691.

8748. — — —.]—The costs of a bill filed to determine the rights of pltf. under a will of difficult construction, & to which a demurrer was allowed, given out of testator's estate.—*EVANS v. ROSSER* (1864), as reported in 3 New Rep. 685; 10 L. T. 159; 10 Jur. N. S. 385.

Annotations:—*Mentd.* *Allen v. Jackson* (1875), 1 Ch. D. 399. *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213.

8749. — — —.]—*MAXWELL v. MAXWELL*, No. 8688, *ante*.

8750. — — —.]—The bill in an administration suit raised a question regarding testatrix's will, upon the decision of which depended pltf.'s title to any interest in her estate. The decision being against pltf. taking any interest his bill was dismissed with costs.—*ANDERSON v. ANDERSON* (1872), L. R. 13 Eq. 381; 41 L. J. Ch. 247; 26 L. T. 12; 20 W. R. 313.

Annotation:—*Mentd.* *Re Trotter, Trotter v. Trotter*, [1899] 1 Ch. 764.

8751. — — —.]—*Re BUCKTON, BUCKTON v. BUCKTON*, No. 8972, *post*.

8752. — — — No directions as to expenses.]—Where the necessity for an originating summons to determine the true construction of the gift of a legacy in a will is attributable to the ambiguity of the language used by testator, & the will contains no directions as to the incidence of testamentary expenses, the costs of such summons must be borne by the residuary estate.

R. S. C., Ord. 65, r. 14B, has no application to a case where the difficulty necessitating the application to the ct. is directly applicable to the imperfect phraseology of testator himself.—*Re HALL-DARE, LE MARCHANT v. LEE WARNER*, [1916] 1 Ch. 272; 85 L. J. Ch. 365; 114 L. T. 559.

8753. — — —.]—Testatrix devised property A. to one exor. X., & property B. to another exor. Y., & owing to her ambiguous language, it was doubtful whether Blackacre was included in property A. or in property B., & also doubtful whether any part of property B. passed under the specific devise thereof at all. There being no means of issuing the ordinary exor.'s summons owing to each exor. being a specific devisee, exor. X. took out a summons against exor. Y. & the residuary devisees to determine the point of construction, & at the hearing the residuary devisees, while approving the summons as the proper method of deciding the matter, disclaimed all interest in the realty, leaving exor. X. & exor. Y. to decide about that between them:—*Held*: the point of construction had to be decided *in limine* before the estate could be administered, & the costs must come out of the residuary estate.—*Re FLECHER, KING v. KING* (1918), 62 Sol. Jo. 740.

8754. — — — After long acquiescence — Costs against parties.]—Where the parties claiming under a will had acquiesced for nine years in a particular construction of the will, & one of them then filed a bill to have it construed by the ct., the ct. refused to allow him his costs out of the estate, although the question was considered sufficiently doubtful to justify the application.—*YOCKNEY v. HANSARD* (1844), 3 Hare, 620; 8 Jur. 822; 67 E. R. 527.

8755. — — — Misdescription of nature of legacy — Costs ratably among specific legatees.]—Legacies

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of stock given by a married woman by her will, executed in pursuance of a power:—*Held*: notwithstanding the stock was misdescribed, to be specific, and the costs of a suit instituted by the extrices, who were also the residuary legatees of testatrix for the purpose of having the trusts administered, directed to be borne ratably by the specific legacies.—*WARREN v. POSTLETHWAITE* (1845), 2 Coll. 108; 14 L. J. Ch. 422; 5 L. T. O. S. 387; 9 Jur. 721; 63 E. R. 658.

Annotations:—*Reid*. *Moore v. Dickson* (1880), 29 W. R. 12; *Re Orford*, *Neville v. Cartwright*, *Cartwright v. Balzo* (1895), 73 L. T. 681. *Mentd.* *Vincent v. Sodor & Man (Bp.)* (1849), 8 C. B. 905.

8756. Trust fund separated from residue—Costs out of fund.]—Where a question arises upon the interest in a trust fund, separated from the general residue, the costs must come out of the particular fund; & having been given by the decree, as specifically prayed by the bill, out of the general personal estate, the decree, though affirmed in other respects, was corrected in that particular; being considered as relief prayed; & therefore not within the rule against appealing for costs only.—*JENOUR v. JENOUR* (1805), 10 Ves. 562; 32 E. R. 963, L. C.

Annotations:—*Consd.* *Lowton v. Colchester Corp.* (1817), 2 Mer. 113. *Foll.* *Woodmeston v. Walker* (1831), 2 Russ. & M. 197. *Consd.* *Angell v. Davis* (1839), 4 My. & Cr. 360; *Re Hall-Dare*, *Le Marchant v. Lee Warner*, [1916] 1 Ch. 272. *Reid*. *Willis v. Yates* (1834), *Coop. temp.* *Brough*, 498; *Andrews v. Lockwood & Abdy* (1846), 15 Sim. 153; *Pennington v. Buckley* (1848), 6 Hare, 451; *Martineau v. Rogers* (1856), 25 L. J. Ch. 398. *Mentd.* *Cripps v. Wolcott* (1819), 4 Madd. 11.

8757. ———.]—*WOODMESTON v. WALKER* (1831), 2 Russ. & M. 197; 9 L. J. O. S. Ch. 257; 39 E. R. 370, L. C.

Annotations:—*Mentd.* *Brown v. Pocock* (1833), *Coop. temp.* *Brough*, 70; *Knight v. Knight* (1834), 6 Sim. 121; *Massey v. Parker* (1834), 2 My. & K. 174; *Malcolm v. O'Callaghan* (1835), 5 L. J. Ch. 137; *Bradley v. Hughes* (1836), *Donnelly*, 116; *Davies v. Thornycroft* (1836), 6 Sim. 420; *Johnson v. Freeth* (1836), *Donnelly*, 16; *Stiffe v. Everitt* (1836), 5 L. J. Ch. 138; *Scarborough v. Borman* (1840), 4 Jur. 38; *Tullett v. Armstrong* (1840), 4 My. & Cr. 390; *Re Gaffee's Settlement* (1850), 1 H. & Tw. 635; *Power v. Hayne* (1869), L. R. 8 Eq. 262; *Hatton v. May* (1876), 3 Ch. D. 148.

Costs of unsuccessful party.]—*See* Nos. 8696, 8700, 8703–8706, 8736, 8740, 8744, 8746, 8748, *ante*.

Proceedings on originating summons.]—*See* Sub-sect. 6, *post*.

Effect of R. S. C., Ord. 65, r. 14B—Inquiry.]—*See* Sub-sect. 3, G. (a), (b), *post*.

See, generally, PRACTICE; WILLS.

(c) *By Debtor to Estate.*

8758. Costs set off against debt—Effect of satisfaction of debt.]—(1) In a suit for the administration of assets, a debtor to the estate, who is entitled to have his costs of suit out of the fund, will not be allowed to receive payment of them, while his debt continues unsatisfied, but the costs due to him will be set off *pro tanto* against the debt due from him. (2) Where the same solr. acts for exor. & other co-defts., the estate will be charged, in respect of exor.'s costs, only with that proportion of the sum due to the solr. from his clients, which exor., as between himself & co-defts., ought to bear.—*HARMER v. HARRIS* (1826), 1 Russ. 155; 38 E. R. 61.

Annotations:—*As to* (1) *Reid*. *Smith v. Dale* (1881), 18 Ch. D. 516; *Re Basham*, *Hannay v. Basham* (1882), 23 Ch. D. 195. *As to* (2) *Reid*. *Watson v. Row* (1874), L. R. 18 Eq. 680; *Smith v. Dale* (1881), 18 Ch. D. 516.

8759. Debtor appearing in special capacity—Husband of plaintiff.]—In a bill filed by a married woman to administer the estate of testator, & to establish her equity to a settlement to which her husband & his assignees in bkptcy. were made defts.:—*Held*: the husband was entitled to his costs, but assignees' costs were refused.—*ROTHERHAM v. BATTSON* (1854), 2 Sm. & G. App. viii.

8760. ——— Next friend of infant.]—The costs of a next friend of an infant in an administration action are treated as the costs of the infant, & accordingly they cannot be set off against a debt which the next friend owes to the estate.—*Re BARTON*, *HOLLAND v. KERSLEY* (1912), 56 Sol. Jo. 380.

Costs of overpaid beneficiary.]—*See* No. 8744, *ante*; No. 8770, *post*.

(f) *By Mortgagee.*

See R. S. C., Ord. 65, r. 1.

8761. Administration action by mortgagee—Estate deficient—Costs out of estate.]—Where a mtgee., instead of simply filing a bill to enforce his securities, institutes or adopts a suit for a general administration, & the estate proves deficient, the costs of the suit are to be paid, in the first instance, out of the estate.—*ARMSTRONG v. STORER* (1851), 14 Beav. 535; 51 E. R. 391.

Annotations:—*Distd.* *Wright v. Kirby* (1857), 23 Beav. 463. *Reid*. *Ford v. Chesterfield* (1856), 21 Beav. 426; *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601; *Re Oriental Hotels Co.*, *Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re Barne*, *Lee v. Barne* (1890), 62 L. T. 922.

8762. ——— Costs as if plaintiff in ordinary administration.]—Generally, the costs of a mtgee. are added to his security & in whatever rank or order the security stands, his costs are united to it & form part of it; but if he institute a suit for the administration of [the estate] of a deceased mtgor., his costs are those of a pltf. in an ordinary administration suit.—*WRIGHT v. KIRBY* (1857), 23 Beav. 463; 29 L. T. O. S. 46; 3 Jur. N. S. 851; 5 W. R. 391; 53 E. R. 182.

Annotation:—*Apld.* *Batten, Proffitt & Scott v. Dartmouth Harbour Comrs.* (1890), 45 Ch. D. 612.

8763. ——— Deficiency apportioned among incumbrancers.]—In an administration suit instituted by an equitable mtgee., whose security is insufficient, & deceased had several other real estates, which were subject to separate incumbrances thereon, if the personalty has been absorbed, & the proceeds of the sale of the real estate be insufficient to pay the costs of the suit & the several incumbrances of the real estate, the deficiency must be apportioned between & borne by the respective incumbrancers in proportion to the value of the estates.—*SHEPPARD v. BURBAGE* (1853), 22 L. T. O. S. 94.

8764. ——— Solicitor to testator & executor—Costs not payable from estate.]—(1) Where mtgee., who is also solr. of testator & extrix., institutes a suit, in which a common administration decree is made, he is entitled to be paid his principal & interest out of a fund in ct., but not his costs, those being costs of an administration & not mtgee.'s suit.

(2) Where mtgee., who is also solr. to extrix., files a bill, in which a common administration decree is made, & the next of kin subsequently get the conduct of the cause by reason of pltf.'s peculiar position, they must stand *pari passu* with him as to costs, both before & after the conduct

of the cause is taken away from him, & he is not liable to pay the costs of an administration summons taken out by them, though without notice of his suit.—*WALTER v. STANTON* (1862), 10 W. R. 570.

8765. ——— Conduct given to next of kin.]—*WALTER v. STANTON*, No. 8764, *ante*.

8766. Mortgage by representative—On security of beneficial interest—Mortgagee made party—Costs not out of estate.]—Administratrix borrowed money for the repairs of a leasehold house, & secured the repayment by mtge. of the shares of herself & another party in the beneficial interest. Mtgee. was made a party to a suit for the administration of the estate:—*Held*: his costs could not be paid out of the estate.—*SCURRAH v. S* (1853), 2 W. R. 53.

See, generally, MORTGAGE; PRACTICE.

(g) *Other Proceedings.*

8767. Persons unnecessarily made parties—No objection taken—Costs not allowed.]—Persons interested under a will & unnecessarily made parties to a suit for the administration of the estate were ordered to bear their own costs, they not having objected to their being parties in their answers or at the hearing.—*WILLIAMS v. WILLIAMS* (1853), 1 W. R. 237, L. J.J.

8768. Inquiries in district registry—Hearing in London—Costs taxed in London.]—Where an administration decree directed accounts & inquiries to be taken in the district registry & ordered that upon the result being reported the action should be heard in London on further consideration, the ct. refused to allow the costs of the action to be taxed in the district registry.—*IRLAM v. IRLAM* (1870), 24 W. R. 949; 3 Char. Pr. Cas. 262.

8769. Purchaser of part of estate—Unnecessarily served with notice of judgment—Objection taken.]—In an action for administration, notice of the judgment was served by pltfs., under an order of the ct., on P., a purchaser of part of testator's estate in which pltfs. were not interested. He was not a party to the action, & it did not appear from the judgment how he was affected. In order to ascertain his position, he entered an appearance under r. 41 of Ord. 16. On finding that he was not affected by the judgment, he served notice of motion on pltfs. that the order directing service might be discharged for irregularity, that the service might be declared irregular & set aside, that the appearance entered by him thereupon might be vacated, & that the costs of the application & consequent on the service might be paid by pltfs. The motion was ordered to stand over, & P. was kept in the proceedings till the hearing on further consideration, when the judge refused to give him any costs:—*Held*: P. was not a person who ought to have been served under r. 40 of Ord. 16, & the service was irregular, P. was right in appearing to the notice. His appearance must be vacated,

& pltfs. must pay the costs in both cts., including the costs of appearance & all costs consequent on the service.—*Re SYMONS, BETTS v. BETTS* (1886), 54 L. T. 501, C. A.

8770. Legatee entitled to costs—Overpaid as to amount of legacy—Costs deducted from excess.]—Where one of several beneficiaries under a will has been paid in respect of his share an amount which was not in excess of his share having regard to the value of the estate at the date of payment, if by reason of subsequent depreciation in the value of the estate it becomes impossible to pay to the remaining beneficiaries similar amounts in respect of their shares, the beneficiary who has been overpaid will not be required to repay the difference between the amount received by him, & the shares of other beneficiaries. The overpaid beneficiary will, however, not receive out of the estate his costs of an action to administer it, until, by deducting such costs from the amount received by him, his share has been reduced to an equality with the shares of the other beneficiaries.—*Re WINSLOW, FRERE v. WINSLOW* (1890), 45 Ch. D. 249; 60 L. J. Ch. 20; 63 L. T. 485; 39 W. R. 120.

Annotation:—*Consd. Re Hurst, Addison v. Topp* (1892), 67 L. T. 96.

C. *Parties in Same Interest.*

8771. Legatee & assignee—Whether legatee's costs only allowed—Right of assignee against legatee.]—*GREEDY v. LAVENDER*, No. 8690, *ante*.

8772. ——— ———.]—In an administration suit a legatee who has assigned his interest, & the assignee to whom he has assigned it, are only entitled to such an amount of costs as the legatee would have been entitled to had he made no assignment; & as between the assignor & assignee, even where the assignment includes only a part of the assignor's interest, & he therefore remains a necessary party to the suit, the assignee will be paid in full out of the amount allowed in priority to the assignor.—*TURNER v. GOWDON* (1871), 19 W. R. 403.

8773. ——— ———.]—*Re Goss, NICHOLLS v. KING*, [1884] W. N. 192.

8774. ——— ———.]—Where shares of parties beneficially interested under a will have been incumbered, one set of costs is allowed in respect of each share [in an action to administer the will], but without deducting the additional expense incurred by reason of the incumbrances.—*COATES v. COATES* (1864), 33 Beav. 249; 3 New Rep. 355; 33 L. J. Ch. 448; 9 L. T. 795; 10 Jur. N. S. 532; 12 W. R. 634; 55 E. R. 363.

Annotation:—*Apprvd. Gee v. Mahood* (1874), 23 W. R. 71.

8775. ——— Assignee's costs disallowed—Appearing separately from legatees.]—A., a legatee under the will of testator, assigned his interest to B. for the benefit of his creditors. A suit was instituted for the administration of testator's estate, to which A. & B. were made parties; A. joined with

PART VIII. SECT. 8, SUB-SECT. 2.—
B. (g).

n. *Proceedings on citation to render account.]—*Before the costs of the proceedings on citation to render an account can be allowed against an administrator personally, notice must be given, & he must appear from the evidence to have acted fraudulently.—*Re RALSTON'S ESTATE* (1857), 2

Thom. 195.—CAN.

o. *Accounts improperly kept—By representative.]—*The personal representative had kept very imperfect accounts of the estate, & those brought into the master's office had been made up partly from scattered entries & partly from memory:—*Held*: a sufficient justification for the institution of an administration suit, & pltf.

was entitled to the costs from deft. up to the hearing, although no loss had occurred to the estate.—*KILLINS v. KILLINS* (1881), 29 Gr. 472.—CAN.

p. *Action to compel legatee to execute release.]—*Where it was held that a legatee having signed a receipt, not being by law bound to execute a release, no costs were given against him in an action undefended to compel

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other legatees in his answer; B. answered separately:—*Held*: B. was not entitled to costs out of the testator's general estate.—*HEYWOOD v. GRAZEBROOK* (1849), 3 De G. & Sm. 406; 18 L. J. Ch. 303; 13 L. T. O. S. 380; 13 Jur. 619; 64 E. R. 536.

Representative & assignee.]—See No. 8887, post.

8776. One set of costs only—Settlement of beneficiaries' share—Parties claiming under settlement.]—(1) Testator gave a fund to M. for life, & if she should die without issue, which happened, then to C. & S. equally between them, or to the survivor, unless either of them should have departed this life leaving lawful issue, "in which case I give the share of him or her so dying unto his or her children, if more than one, in equal proportions." Testator died in 1813. C. died, without issue, in 1825; S. died, leaving issue, in 1851, & in 1855 M. died without issue.

S. left three children, who all appeared separately & argued on the petition:—*Held*: it being a case for costs, each interest was entitled to one set of costs.

(2) One of these three children being a married woman, whose husband had become bkpt., & she & her husband's assignees appearing by different counsel in order to argue, if it arose, her equity to a settlement:—*Held*: there could be but one set of costs allowed in respect of her share, & the husband's assignees, & not the wife, were entitled to that set of costs.—*Re LARKIN* (1856), 2 Jur. N. S. 229.

8777. —.]—Where testator left an estate to his wife, charged with legacies, & she married again & settled the estate, which was afterwards sold under the decree of the ct. for the administration of testator's estate:—*Held*: parties claiming under the settlement were entitled to their costs out of the proceeds of the sale of the estate before division amongst the legatees, but to one set of costs only.—*MUSSON v. HACKETT* (1860), 2 L. T. 593.

8778. — Persons having leave to attend.]—Where several parties in the same interest have liberty to attend the proceedings in an administration suit, they should not appear separately; & if they do, only one set of costs will be allowed.—*STEVENSON v. ABINGTON* (1863), 8 L. T. 719; 11 W. R. 936.

8779. — Residuary legatees.]—In an administration suit by a residuary legatee, other residuary legatees, served with notice of the decree & having liberty to attend the proceedings, will not be allowed their costs of attending the taking of the accounts in chambers, unless pltf. & accounting deft. employ the same solr., & in that case, will be allowed one set of costs between them.—*Re TAYLOR'S ESTATE, DAUBNEY v. LEAKE* (1866), 1 L. R. 1 Eq. 495; 35 Beav. 311; 35 L. J. Ch. 347; 14 W. R. 413; 55 E. R. 916.

Annotations:—Folld. Hubbard v. Latham (1866), 35 L. J. Ch. 402; *Wragg v. Morley* (1866), 14 W. R. 949; *Armstrong v. Armstrong* (1871), L. R. 12 Eq. 614.

him to execute a release.—*KAISER v. BOYNTON* (1884), 7 O. R. 143.—*CAN.*

q. Action by assignee in bankruptcy of representative—To administer assets of deceased.]—The assignees in bkpy. of an administratrix are not entitled to their costs of an action to

administer the assets of deceased when the administratrix is found indebted to the estate.—*JAMES v. RICHARDSON* (1882), 9 L. R. Ir. 383.—*IR.*

r. Appeal on difficult point—Not raised in court below.]—Appl. legatees

8780. — — —.]—Residuary legatees not parties to the record but having by leave of the ct. attended in chambers, held entitled to one set of costs amongst them.—*LEWIS v. MATHEWS* (1869), L. R. 8 Eq. 277; 38 L. J. Ch. 510; 20 L. T. 905; 33 J. P. 775; 17 W. R. 841. *Annotation:—Re Gardner, Long v. Gardner* (1892), 67 L. T. 552.

8781. — — —.]—*BELLEW v. BELLEW*, [1868] W. N. 253.

Annotation:—Folld. Lewis v. Matthews (1869), 38 L. J. Ch. 510.

Compare Nos. 8784, 8785, post.

8782. — Parties claiming as next of kin—Separate costs only for proving title.]—In an administration suit by the heir being one of the next of kin of testator, other persons claiming as next of kin, but appearing in separate classes by several solrs., were not allowed separate costs out of the general estate, beyond the costs of proving their respective titles.—*HUBBARD v. LATHAM* (1866), 35 L. J. Ch. 402; 14 L. T. 616; 14 W. R. 553.

Annotation:—Folld. Wragg v. Morley (1866), 14 W. R. 949.

8783. — Residuary legatees appearing on further consideration—Not parties to suit.]—The costs of residuary legatees appearing on further consideration, but not parties to the suit, will not be allowed.—*WRAGG v. MORLEY* (1866), 14 W. R. 949.

See, generally, PRACTICE.

D. Parties Having Leave to Attend.

See R. S. C., Ord. 55, rr. 40–43; Ord. 65, r. 27 (23).

8784. Whether entitled as of course—Necessity for special leave.]—To entitle a person interested in an administration action to the costs of attending proceedings in chambers under the decree, he must attend by special leave of the judge, & if he attends under the common order of course & without special leave he may be ordered to pay, in addition to his own costs, the extra costs occasioned by his attendance.—*SHARP v. LUSH* (1879), 10 Ch. D. 468; 48 L. J. Ch. 231; 27 W. R. 528.

Annotations:—Re Clemow, Yeo v. Clemow, [1900] 2 Ch. 182; *Re King, Travers v. Kelly*, [1904] 1 Ch. 363; *Re Spencer Cooper, Pot v. Spencer Cooper*, [1908] 1 Ch. 130; *Re Townend, Knowles v. Jessop*, [1914] W. N. 145.

8785. — — —.]—Mere liberty to attend the proceedings under an administration judgment does not entitle the parties having the liberty to the costs of their attendance in chambers as a matter of course. In order to entitle such parties to such costs the order giving the liberty to attend should expressly provide that they are to be entitled thereto.—*DAY v. BATTY* (1882), 21 Ch. D. 830.

Whether entitled to separate costs.]—See Nos. 8778–8781, ante.

See, generally, PRACTICE.

E. Solicitors.

See SOLICITORS.

allowed their costs of an appeal out of the estate, although they had not succeeded, the appeal being against a decision on a difficult point which had not been raised on the argument in the ct. below.—*HEENAN v. HEENAN* (1893), 12 N. Z. L. R. 111.—*N.Z.*

SUB-SECT. 3.—ASSETS OUT OF WHICH PAYABLE.

A. In General.

See R. S. C., Ord. 65, r. 14A.

8786. Personal estate exhausted—Specific legacies liable *pari passu*.]—The costs of a suit for administration held, there being no other assets, to be payable out of the specific legacies *pari passu*.—**BRISTOW v. BRISTOW** (1842), 5 Beav. 289; 49 E. R. 589.

Annotation:—**Mentd.** *Lee v. Pain* (1845), 4 Hare, 201.

8787. — Sale of realty to pay costs—Consent of parties.]—In an administration suit testator's personalty was exhausted & the costs still unpaid. Testator was seised of an undivided share of realty, which had been devised to pl'tfs. & defts. in undivided shares. Pl'tfs., with the consent of all parties interested in the estate except one deft., asked for a sale of the entirety of the estate to raise the costs. Deft., who refused his consent, offered to pay his share of the costs, or to sell enough of the land to pay the costs, but objected to selling the whole:—**Held**: the ct. could not make the order asked for without the consent of the dissentient deft.—**LEES v. LEES, LEES v. SULLIVAN** (1872), L. R. 15 Eq. 151; 42 L. J. Ch. 319; 27 L. T. 743; 21 W. R. 215.

8788. Two estates administered together—Husband's estate forming part of wife's.]—Costs, where two estates, those of testator & the exor., are administered in the same suit.

I believe I shall best consult the justice of the case by dealing with the costs as in a case in which the object in the suit is substantially to administer the wife's estate, of which the husband's estate is part & in which the costs in the master's office have been occasioned by a breach of duty on the part of the wife, & by charging the husband's estate with no costs, except the costs on further directions (**WIGRAM, V.-C.**).—**CULSHA v. CHEESE** (1849), as reported in 7 Hare, 236; 68 E. R. 97.

Annotations:—**Mentd.** *Green v. Dunn* (1855), 20 Beav. 6; *Re Currie's Settlement, Re Rooper, Rooper v. Williams*, [1910] 1 Ch. 329.

8789. — Estates unequal—Costs borne in equal shares.]—The costs of proceedings to administer two separate estates which have been dealt with as one fund, must be borne by the two estates in equal shares notwithstanding the estates are unequal.—**DEAN v. MORRIS** (1857), 5 W. R. 315.

B. Personally.

See R. S. C., Ord. 65, r. 14A.

8790. General rule.]—(1) Where real & personal estate are being administered in one action, the costs exclusively occasioned by the administration of the real estate must be borne by the real estate, the general costs of administration being borne by the personal estate, & it is the proper course for the judge to apportion the costs between the two estates, & not to leave the apportionment to the taxing master.

(2) Where testator directed his exor. to pay his testamentary expenses the term includes the costs of an action for administration of the personal,

but not of the real estate.—**PATCHING v. BARNETT** (1881), [1907] 2 Ch. 154, n.; 51 L. J. Ch. 74; 45 L. T. 292, O. A.

Annotations:—**As to** (1) **Folld.** *Re Middleton, Thompson v. Harris* (1882), 19 Ch. D. 552; *Re Copland, Mitchell v. Bain* (1895), 44 W. R. 94; *Re Jones, Elgood v. Kinderley, Elgood v. Jones*, [1902] 1 Ch. 92. **Consd.** *Re Betts, Doughty v. Walker*, [1907] 2 Ch. 149. **Refd.** *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211. **As to** (2) **Consd.** *Re Betts, Doughty v. Walker*, [1907] 2 Ch. 149. **Generally, Mentd.** *Astley v. Micklethwaite* (1880), 15 Ch. D. 59; *Re Muffett, Jones v. Mason* (1888), 39 Ch. D. 534; *Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82.

8791. Primary liability of personalty—Separate suits instituted—As to realty & personalty.]—Where two administration suits were instituted, one relating to the personal & the other to the real estate, the costs of both suits were ordered to be borne by the personal estate.—**PICKFORD v. BROWN, BROWN v. BROWN** (1850), 2 K. & J. 426; 25 L. J. Ch. 702; 27 L. T. O. S. 259; 2 Jur. N. S. 781; 4 W. R. 473; 69 E. R. 849.

Annotations:—**Consd.** *Randfield v. Randfield* (1863), 2 New Rep. 309. **Refd.** *Re Middleton, Thompson v. Harris* (1882), 19 Ch. D. 552. **Mentd.** *Chappell v. Haynes* (1858), 4 K. & J. 163.

8792. — Exoneration from payment of debts—& costs of probate.]—Costs of a suit to administer both real & personal estate, & to ascertain the rights to both, were held payable, primarily, out of the personal estate, notwithstanding the personal estate was, by the will, exonerated from payment of the debts, & the costs & charges of proving the will.—**STRINGER v. HARPER** (No. 2) (1859), 26 Beav. 585; 28 L. J. Ch. 643; 33 L. T. O. S. 232; 5 Jur. N. S. 401; 53 E. R. 1024.

Annotations:—**Consd.** *Randfield v. Randfield* (1863), 2 New Rep. 309. **Appld.** *Re Grainger, Dawson v. Higgins* (1900), 83 L. T. 209. **Refd.** *Harloe v. Harloe* (1875), L. R. 20 Eq. 471; *Re Middleton, Thompson v. Harris* (1882), 19 Ch. D. 552.

8793. —.]—(1) Costs incurred in selling real estate in an administration suit before decree charged on such real estate, & not on the personal estate.

(2) Where it is ordered that real estates which are charged with incumbrances shall contribute ratably to the payment of costs, such estates must be valued for the purposes of such contribution at the net values, after payment of incumbrances.

(3) There being no clause exonerating the personal estate, all the general costs of administration must come out of the personal estate (**KINDERSLEY, V.-C.**).—**BARNWELL v. IREMONGER** (1860), 1 Drew. & Sm. 242; 30 L. J. Ch. 13; 3 L. T. 462; 9 W. R. 88; 62 E. R. 372.

Annotations:—**Generally, Mentd.** *Day v. Day* (1866), 14 W. R. 261; *Hughes v. Twisden* (1866), 34 W. R. 498; *Re Bernstein, Barnett v. Bernstein* (1924), 69 Sol. Jo. 88.

8794. — Out of residue—Lapsed share.]—The cases in which a lapsed share of real or personal estate will be the primary fund for payment of costs of administration discussed.

No one can doubt that the residuary personal estate is primarily the fund for payment of the costs of administration, & all that I intended to decide in *Gowan v. Broughton*, No. 8838, *post*, was that where the residuary personalty is given to a person who dies in the life of testator, such

PART VIII. SECT. 3, SUB-SECT. 3.—A.

s. Testator domiciled in England—Assets in Victoria.]—An *ex p.* application for leave to pass accounts & for

commission was granted, with costs out of the estate, in a case in which appot. was the Victorian exor. of the will of testator who had died domiciled in England, leaving assets in Victoria,

& there was no person in Victoria beneficially interested under the will.—**Re MOORHOUSE**, [1917] V. L. R. 530,—AUS.

Sect. 8.—Costs: Sub-sect. 3, B., C. & D.]

personalty is no less the primary fund for payment of the costs, than it would have been if the legatee had survived (MALINS, V.-O.).—*Re JONES, JONES v. CALESS* (1878), 10 Ch. D. 40; 39 L. T. 287; 27 W. R. 108.

Lapse of share of residue.]—See
Sub-sect. 3, F., *post*.

8795. — Apportionment of costs.]—PATCHING v. BARNETT, No. 8790, *ante*.

8796. — Ambiguous will—Construction affecting realty only.]—The general personal estate of testator is liable to all costs occasioned by his mistake, or rendered necessary for the purpose of obtaining the opinion of the ct. on the construction of his will, though some of those costs may have been incurred in proceedings affecting the real estate only, & the result of which was to benefit a devisee of the real estate.—*RIPLEY v. MOYSEY* (1836), 1 Keen, 578; 48 E. R. 430.

*Annotations:—*Consd. *Stringer v. Harper* (No. 2) (1859), 26 Beav. 585. *Reid. Elborne v. Goode* (1844), 14 Sim. 166.

8797. — — — — —.]—Gift to A. & his heirs at twenty-one, & if A. shall not attain twenty-one, then over.

As to costs, they must come out of the residue, this being a suit for determining the construction of the will, although this dispute relates to real estate. The real & personal estates are given precisely in the same way (WOOD, V.-O.).—*HEPWORTH v. SCALE* (1855), 25 L. T. O. S. 328; 1 Jur. N. S. 698.

8798. — — — — —.]—A suit by the heiress of a person interested under a will, in which it was prayed that, if necessary, the personal estate might be administered & the debts paid, the sole contest being as to the construction & effect of a devise:—*Held*: to be within the general rule throwing the costs on the personal residue.—*MADDISON v. CHAPMAN* (1861), 1 John. & H. 470; 70 E. R. 831.

*Annotation:—*Mentd. *Re Thursby's Settlement, Grant v. Littledale*, [1910] 2 Ch. 181.

8799. — — — Apportionment of costs.]—Costs will be apportioned between the residuary personal estate & the real estate, where testator, by the ambiguity of his will, renders a suit necessary.—*PUXLEY v. PUXLEY* (1863), 1 New Rep. 509; 8 L. T. 570.

8800. — — — — —.]—Except in those cases where a general conversion of real & personal estate is directed so as to form a mixed fund, the whole costs of construing the will of testator, as well in reference to the devises of real estate as to the bequests of personalty therein contained, are primarily payable out of the personal estate in exoneration of the real.—*RANDFIELD v. RANDFIELD* (1863), 2 New Rep. 309; 32 L. J. Ch. 668; 9 Jur. N. S. 842; 11 W. R. 847.

Reid. Re Middleton, Thompson v. Harris

C. Realty.

8801. Costs increased by administration of realty—Increase borne by realty.]—BARNWELL v. IRMONGER, No. 8793, *ante*.

8802. — — — — —.]—(1) It is the now settled practice of the Ch. Div. that the costs of an administration action so far as they have been increased by the administration of the real estate are to be borne by that real estate. An action was brought by the heir-at-law of testatrix who had given by will certain legacies, but had died intestate as to her real estate & residuary personalty, for the administration of her real & personal estate:—*Held*: the costs of the action, so far as they had been increased by the administration of the real estate, must be borne by the real estate.

(2) When an estate is insufficient pltf. does not necessarily get his costs in priority to debts.—*Re MIDDLETON, THOMPSON v. HARRIS* (1882), 19 Ch. D. 552; 51 L. J. Ch. 273; 46 L. T. 359; 30 W. R. 293, C. A.; *reversg.* (1881), 50 L. J. Ch. 525.

*Annotations:—*As to (1) *Folld. Re Copland, Mitchell v. Bain* (1895), 44 W. R. 94. *Consd. Re Jones, Elgood v. Kinderley, Elgood v. Jones*, [1902] 1 Ch. 92. *Reid. Patching v. Barnett* (1881), 45 L. T. 292.

8803. — — — — —.]—Testatrix bequeathed a mixed fund of pure personalty & money to arise from realty directed by her will to be sold, to A. for life, & then to a charity. In a suit to administer the estate, an order on further consideration was made, which directed the costs of suit & certain legacies to be paid out of four sums of cash in ct., two of which arose from realty, & two from pure personalty, so far as they would extend, the deficiency to be raised out of a sum of stock in ct. which represented realty. There was no reservation of subsequent further consideration nor of the question how the costs should ultimately be borne. The dividends on the residue of the fund were ordered to be paid to A. for life with liberty to apply. On A.'s death testatrix's heir-at-law petitioned for the payment of the fund to him as being realty. The A.-G., for the charity, objected that the costs of administering the real estate ought to have been paid out of the proceeds of real estate, in which case there would have been left a substantial sum of pure personalty which the charity could take. The judge considered that the order on further consideration settled the question how the costs were to be borne, & ordered payment of the fund to the heir. The A.-G. appealed:—*Held*: the costs of administering the realty ought to have been paid out of the proceeds of realty, & as the order on further consideration contained no declaration as to the ultimate incidence of the costs & did not indicate any intention to decide that question, the application of the sums of cash in payment of costs & legacies must be treated as directed for convenience without any intention to alter the rights of the parties, & as the fund was still in hand, the ct., although there was no express reservation of the ultimate incidence of the costs, ought now to set the matter right.—*Re ROPER, TAYLOR v. BLAND* (1890), 45 Ch. D. 126; 63 L. T. 434; 39 W. R. 101, C. A.

*Annotation:—*Mentd. *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141.

PART VIII. SECT. 8, SUB-SECT. 3.—C.

*t. Action relating only to realty.]—*Where an administration suit in fact related only to the real estate in trust

the ct. ordered the entire costs of suit to be thrown on the realty.—*MERCALKE v. O'KENNEDY* (No. 2) (1904), 4 S. R. N. S. W. 633; 21 N. S. W. W. N. 240.—AUS.

*a. Out of rents & profits.]—*Costs of an administration suit directed to be paid out of the rents & profits of the real estate.—*BIGGAR v. EASTWOOD* (1884), 15 L. R. Ir. 219.—IR.

8804. ———.]—Where the costs of administration are increased by the administration of real estate, such increased costs must be borne by the real estate.—*Re COPLAND, MITCHELL v. BAIN* (1895), 44 W. R. 94; 40 Sol. Jo. 67.

8805. ———.]—**Notwithstanding Land Transfer Act, 1897 (c. 65).**—The settled practice of the Ch. Div., as stated in *Re Middleton, Thomson v. Harris*, No. 8802, *ante*, that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by that real estate, has not been altered or affected by the above Act.—*Re JONES, ELGOOD v. KINDERLEY, ELGOOD v. JONES*, [1902] 1 Ch. 92; 71 L. J. Ch. 6; 85 L. T. 608; 50 W. R. 215; 46 Sol. Jo. 31.

Annotation:—*Reid. Re Betts, Doughty v. Walker*, [1907] 2 Ch. 149.

8806. ———.]—(1) Testatrix died intestate as to her real estate, having by her will directed that her testamentary expenses should be paid out of her personal estate:—*Held*: although the effect of the above Act, Part I., has been to make the costs of administering real estate testamentary expenses, the ordinary practice of the Ch. Div., that the costs of administration so far as they have been increased by the administration of the real estate, shall be borne by that real estate, is nevertheless still applicable, & accordingly the costs of the inquiry as to testatrix's heir-at-law must be borne by the realty, notwithstanding the general direction contained in the will that the testamentary expenses were to be paid out of the personalty.

(2) If testator intends that the costs of administering his real estate shall be borne by his personal estate, the will must contain a specific direction to that effect.—*Re BETTS, DOUGHTY v. WALKER*, [1907] 2 Ch. 149; 76 L. J. Ch. 463; 96 L. T. 875.

8807. ———.]—**Apportionment by court.**—*PATCHING v. BARNETT*, No. 8790, *ante*.

8808. Estate insufficient—Liability of specifically devised realty.—*Re PRICE, WILLIAMS v. JENKINS*, No. 8952, *post*.

8809. Effect on liability—Of direction to pay testamentary expenses.—*PATCHING v. BARNETT*, No. 8790, *ante*.

8810. ———.]—**Necessity for specific direction.**—*Re BETTS, DOUGHTY v. WALKER*, No. 8806, *ante*.

Real estate in Scotland—Liability for costs of English suit.—*See CONFLICT OF LAWS*, Vol. XI., p. 356, No. 394.

See, generally, PRACTICE.

D. Mixed Fund.

8811. Costs ratably apportioned.—Where testator creates a mixed & general fund from real & personal estate, & directs that fund to be applied in payment of debts & legacies, the real & the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts & legacies; & if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to the heir, & as far as it is composed of personal estate, to the next of kin.

Ordered that the master do apportion the

legacies, funeral expenses, & debts of testatrix, & also the costs of this suit up to & including his further report, between testatrix's real & personal estate, in proportion to their respective values.—*ROBERTS v. WALKER* (1830), 1 Russ. & M. 752; 39 E. R. 288.

Annotations:—*Consd. Hill v. Toogood* (1837), 1 Jur. 704; *West v. Cole* (1841), 4 Y. & O. Ex. 460. *Distd. Boughton v. Boughton, Boughton v. James* (1848), 1 H. L. Cas. 406; *Blann v. Bell* (1852), 5 De G. & Sm. 658. *Apld. Cradock v. Owen* (1854), 2 Sm. & G. 241. *Consd. Bentley v. Oldfield* (1854), 19 Beav. 225; *Tatlock v. Jenkins* (1854), Kay, 654; *Simmons v. Rose* (1856), 6 De G. M. & G. 411; *Allan v. Gott* (1872), 7 Ch. App. 439. *Distd. Wells v. Row* (1879), 48 L. J. Ch. 476. *Consd. Elliott v. Dearsley* (1880), 16 Ch. D. 322. *Reid. Eyre v. Marsden* (1839), 4 My. & Cr. 231; *A.-G. v. Southgate* (1842), 12 L. J. Ch. 147; *Elborne v. Goode* (1844), 14 Sim. 165; *Shallcross v. Wright* (1850), 12 Beav. 505; *Robinson v. Geldard* (1852), 3 Mac. & G. 735; *Tench v. Cheese* (1855), 6 De G. M. & G. 453; *Percival v. R.* (1864), 3 H. & C. 217; *Disney v. Crosse, Eyre v. Parker* (1866), L. R. 2 Eq. 592; *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510; *Howard v. Dryland* (1877), 38 L. T. 24; *Re Dumble, Williams v. Murrell* (1883), 23 Ch. D. 360; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130; *Re Smith, Smith v. Smith*, [1913] 2 Ch. 216. *Mentd. Coombs v. H. M. Proctor* (1852), 2 Rob. Eccl. 547; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534.

8812. ———.]—*JOHNSTON v. TODD*, No. 8704, *ante*.

8813. ———.]—Costs of administration suit payable *pro rata* out of a mixed fund composed of realty & personalty.—*HOPKINSON v. ELLIS* (1846), 10 Beav. 169; 16 L. J. Ch. 59; 8 L. T. O. S. 490; 50 E. R. 547.

Annotation:—*Reid. Simmons v. Rose* (1856), 6 De G. M. & G. 411.

8814. ———.]—Residuary real & personal estate was devised & bequeathed upon trust for the benefit of certain parties for life, during which time the estates were to be kept separate; they were then to be blended together, & divided among a class. The gift to the class failed, & a suit was then instituted by parties who claimed both estates as personalty. The costs of the suit were directed to be borne proportionally by the real & personal estate; & that, although the title of the heir-at-law to the realty was held by the ct. to be free from any doubt.—*CHRISTIAN v. FOSTER, BUNNETT v. FOSTER* (1846), 2 Ph. 161; 2 Coop. temp. Cott. 348; 16 L. J. Ch. 119; 10 Jur. 1019; 41 E. R. 903, L. C.

Annotations:—*Reid. Pickford v. Brown, Brown v. Brown* (1856), 25 L. J. Ch. 702. *Mentd. Doody v. Higgins* (1852), 9 Hare, App. xxxii.; *Wells v. Row* (1879), 48 L. J. Ch. 476.

8815. ———.]—Testatrix, by will in 1841, gave to two devisees, who were also her exors., all her real & personal estate, upon trust for sale, & she gave out of the produce of her real & personal estate £50 to each exor. for his trouble, & other pecuniary legacies. There was no gift of the residue; & after payment of debts & legacies, a surplus remained. Testatrix left no heir-at-law or next of kin.

The ct. apportioned the legacies & costs of the suit between the proceeds of the real & personal estate, & the Crown was declared to be entitled to the surplus of the personal estate.—*CRADOCK v. OWEN* (1854), 2 Sm. & G. 241; 2 Eq. Rep. 381; 23 L. T. O. S. 19; 2 W. R. 319; 65 E. R. 382.

Annotations:—*Mentd. Re Higginson & Dean, Ex p. A.-G.*, [1899] 1 Q. B. 325; *Re Bond, Panes v. A.-G.* (1900), 82 L. T. 612.

8816. ———.]—*RANFIELD v. RANFIELD*, No. 8800, *ante*.

See, generally, PRACTICE.

*Sect. 8.—Costs: Sub-sect. 3, E. & F.]**E. Assets Charged with Testamentary Expenses.*

8817. Testamentary expenses—Direction to pay—Includes administration action.]—A direction in a will to pay testamentary expenses & debts includes the costs of an administration suit.—*HARLOE v. HARLOE* (1875), L. R. 20 Eq. 471; 44 L. J. Ch. 512; 33 L. T. 247; 23 W. R. 789.

Annotations:—Reid. Sharp v. Lush (1879), 10 Ch. D. 468. *Mentd. Ralph v. Carrick* (1877), 5 Ch. D. 984.

8818. ———.]—*PATCHING v. BARNETT*, No. 8790, *ante*.

8819. ———.]—The words “testamentary expenses” include the costs incurred by an extrix. in connection with an action brought to administer deceased’s estate by creditors, & are payable in full out of the estate.—*Re CHAPMAN, Ex p. CLARK* (1894), 71 L. T. 778; 11 T. L. R. 94; 1 Mans. 413; 15 R. 231.

8820. ——— Effect of Land Transfer Act, 1897 (c. 65).]—*Re BETTS, DOUGHTY v. WALKER*, No. 8806, *ante*.

8821. Liability of assets charged—Real estate.]—Testator devised two estates in different ways, & he charged one only with the payment of his debts, funeral & testamentary expenses. In a creditor’s suit both estates were sold for payment of the debts:—*Held*: the charged estate was primarily liable for the costs of suit.—*WILSON v. HEATON* (1849), 11 Beav. 492; 50 E. R. 907.

Annotation:—Distd. Taylor v. Linley (1859), 33 L. T. O. S. 232.

8822. ———.]—Testator devised part of his real estate in trust for sale to pay his debts “& the costs & charges of proving & attending the execution of his will & the several trusts therein contained”:—*Held*: the costs of an administration suit were charged upon this estate.—*ALSOP v. BELL* (1857), 24 Beav. 451; 53 E. R. 431.

Annotation:—Mentd. Ralph v. Carrick (1877), 5 Ch. D. 984.

8823. ——— General fund of personality.]—*LINLEY v. TAYLOR*, No. 8883, *post*.

8824. ——— Fund from which legacies payable.]—M. B. bequeathed £1,000 to D. B., one of her exors., & legacies to other persons. By codicil M. B., after stating that her intention was to give to T. W., the other exor., the residue of her estate, after payment of the legacies, free of all deductions in respect of probate duty or on any other account, declared that all the legatees should contribute ratably towards the payment of her funeral & testamentary expenses in exoneration of the residue:—*Held*: the costs of the suit for the administration of M. B.’s estate must be paid out of the residue.—*Re BIEL’S ESTATE, GRAY v. WARNER* (1873), L. R. 16 Eq. 577; 42 L. J. Ch. 556; 28 L. T. 835; 21 W. R. 808.

Annotation:—Distd. Harloe v. Harloe (1875), 44 L. J. Ch. 512.

8825. ——— Residue of personality—Bequeathed to charities.]—Testator directed his personal estate, including leaseholds, to be converted into money, & the residue of the proceeds, after payment of his funeral & testamentary expenses, debts &

legacies, to be invested, & subject to a life interest therein given to his wife, & to certain annuities & legacies including a charitable legacy of £100, bequeathed all the residue of his personal estate in equal thirds to three charitable institutions, & directed that the three last-mentioned legacies should be paid out of such part of his personal estate as could lawfully be applied to the payment thereof, & which should be reserved by his trustees for that purpose:—*Held*: the assets must be marshalled in favour of the three charities, so as to throw the debts, funeral & testamentary expenses, including costs of administration, suit & legacies, except the £100 charitable legacy, upon the impure personality, but that there could be no marshalling as against the £100 charitable legacy which must be paid in the proportion which the pure personality bore to the impure, & fail as to the residue.—*MILES v. HARRISON* (1874), 9 Ch. App. 316; 43 L. J. Ch. 585; 30 L. T. 190; 22 W. R. 441, L. C. & L. JJ.; *varying* (1873), 9 Ch. App. 318, n.

Annotations:—Consd. Willis v. Bourne (1873), L. R. 16 Eq. 487. *Appld. Harloe v. Harloe* (1875), L. R. 20 Eq. 471. *Expld. Lewis v. Boetseur* (1878), 38 L. T. 93. *Appld. Penny v. Penny* (1879), 11 Ch. D. 440. *Consd. Sharp v. Lush* (1879), 10 Ch. D. 468; *Re Young, Young v. Dolman* (1881), 44 L. T. 499; *Re Arnold, Ravenscroft v. Workman* (1888), 37 Ch. D. 637; *Re Somers-Cocks, Wegg-Prosser v. Wegg-Prosser*, [1895] 2 Ch. 449. *Reid. Re Fitzgerald, Adolph v. Dolman* (1877), 26 W. R. 53; *Ralph v. Carrick* (1877), 5 Ch. D. 984. *Mentd. Re Pitt, Lacy v. Stone* (1885), 53 L. T. 113.

8826. ——— Specific part of estate.]—Testator directed by his will that his “testamentary expenses” should be paid out of a specified part of the estate:—*Held*: the costs of a suit to administer the estate were included under “testamentary expenses.”—*PENNY v. PENNY* (1879), 11 Ch. D. 440; 48 L. J. Ch. 691; 40 L. T. 393.

8827. ——— Impure personality.]—*Re YOUNG, YOUNG v. DOLMAN*, No. 8721, *ante*.

8828. ———.]—[Under R. S. C., Ord. 85, r. 14B.] the costs of ascertaining the identity of the legatees of pecuniary bequests are testamentary expenses, & where there is a general direction to pay funeral & testamentary expenses out of the residuary estate they are payable thereout, & not out of the pecuniary legacies.—*Re BAUMGARTEN, BEVAN v. ROSENBAUM* (1900), 82 L. T. 711.

Annotations:—Reid. Re Vincent, Rohde v. Palin, [1909] 1 Ch. 810; *Re Whitaker, Denison-Pender v. Evans* (1910), 103 L. T. 657.

F. Property Undisposed of by Reason of Lapse, etc.

8829. Partial failure of gift—Apportionment of costs pro rata—Between void & effectual part of gift.]—(1) The costs of a suit, which the order of the ct. below had thrown exclusively on an excess of accumulations, arising from the annual produce of a trust estate after the period allowed by the *Thellusson Act*, 1800 (c. 98), were, upon appeal, directed to be paid out of the general estate of testator, including the fund accumulated within the permitted period, except the costs incurred in the separation of the excessive accumulations, which costs were directed to be paid out of such excessive accumulations.

PART VIII. SECT. 8, SUB-SECT. 3.—E.

b. Testamentary expenses—Direction to pay—Whether costs of administration action included.]—Testator directed that a particular portion of his estate should be applied in the

first instance in payment of his debts, funeral & testamentary expenses, & subject thereto for his widow for her absolute use & benefit. The will contained a residuary bequest in favour of testator’s sons:—*Held*: the costs of an administration suit were

properly payable out of the residuary estate & not out of the particular fund appropriated to pay testator’s debts & “funeral & testamentary expenses.”—*MULOCK v. MULOCK* (1872), 20 W. R. 696.—IR.

(2) An appeal against such an order is an exception to the ordinary rule of prohibiting appeals merely upon costs.

(3) In cases in which part of the property given to a charity becomes undisposed of from being within Mortmain Act, it has long been settled that the costs are paid, *pro rata*, out of the part so undisposed of, & the property will bequeathed to the charity (LORD COTTENHAM, C.).

(4) Where an intestacy as to part of the personal estate, arises from the intention of testator being defeated by the happening of some event or the operation of law, the part so falling to the next of kin shall, in his hands, be subject to the same liability as to costs, & to no more than it would have been subject to if the gift had taken effect (LORD COTTENHAM, C.).—*Eyre v. Marsden* (1839), 4 My. & Cr. 231; 3 Jur. 450; 41 E. R. 91, L. C.; *varying* (1838), 2 Keen, 564.

Annotations:—As to (1) Foll. Barrett v. Buck (1848) 11 L. T. O. S. 352; *Burt v. Sturt* (1853), 10 Hare, 415; *Hughes v. Perrins* (1853), 1 Eq. Rep. 385. *Apld. Oddie v. Brown* (1859), 4 De G. & J. 179. *Foll. Ralph v. Carrick* (1877), 5 Ch. D. 984. *Reid. Elborne v. Goode* (1844), 14 Sim. 165; *Christian v. Foster* (1846), 2 Ph. 161; *Re Gilles* (1886), 55 L. J. Ch. 695. *As to (3) Foll. Jauncey v. A.-G.* (1861), 3 Giff. 308. *As to (4) Foll. Maddison v. Pye* (1863), 32 Beav. 658. *Consd. Scott v. Cumberland* (1874), L. R. 18 Eq. 578. *Apld. Luckcraft v. Pridham* (1879), 48 L. J. Ch. 636; *Hurst v. Hurst* (1884), 28 Ch. D. 159. *Reid. Gowan v. Broughton* (1874), L. R. 19 Eq. 77. *Generally, Reid. Pickford v. Brown, Brown v. Brown* (1850), 25 L. J. Ch. 702; *Trethewy v. Helyar* (1870), 46 L. J. Ch. 125; *Patching v. Barnett* (1881), 45 L. T. 292; *Re Hall-Dare, Le Marchant v. Lee Warner*, [1916] 1 Ch. 272. *Mentd. Ellis v. Maxwell* (1841), 3 Beav. 587; *Goodman v. Goodman* (1847), 1 De G. & Sm. 695; *Nettleton v. Stephenson* (1849), 3 De G. & Sm. 366; *Smith v. Palmer* (1849), 7 Hare, 225; *Bourne v. Buckton* (1851), 2 Sim. N. S. 91; *Barrington v. Liddell* (1852), 2 De G. M. & G. 480; *Jones v. Maggs* (1852), 9 Hare, 605; *Middleton v. Losh* (1852), 1 Sm. & G. 61; *Edwards v. Tuck* (1853), 2 De G. M. & G. 40; *Tench v. Cheese* (1854), 19 Beav. 3; *Re Clulow's Trust* (1859), 1 John. & H. 639; *Re Corbett's Trusts* (1860), John. 591; *Watt v. Wood* (1862), 31 L. J. Ch. 338; *Dutton v. Crowdy* (1863), 33 Beav. 272; *Re Arnold's Trusts* (1870), L. R. 10 Eq. 252; *Simmons v. Pitt* (1873), 8 Ch. App. 978; *Talbot v. Jevers* (1875), L. R. 20 Eq. 255; *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261; *Re Walker, Walker v. Walker* (1886), 54 L. T. 792; *Re Bowman, Re Lay, Whytehead v. Boulton* (1889), 41 Ch. D. 525; *Re Parry, Powell v. Parry* (1889), 60 L. T. 439; *Wharton v. Masterman*, [1895] A. C. 186; *Inderwick v. Tatchell, Tatchell v. Tatchell, Inderwick v. Inderwick*, [1901] 2 Ch. 738; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345; *Re Hawkins, White v. White*, [1916] 2 Ch. 570; *Re Elliott, Public Trustee v. Pinder*, [1918] 2 Ch. 150.

8830. ——— Gift of mixed fund of realty & personalty.]—The costs of an action for executing the trusts of a will which bequeaths realty & personalty together as a mixed fund by a disposition that fails as to part, are borne, according to *Eyre v. Marsden*, No. 8829, *ante*, ratably by the part effectually given & that which lapses; & this notwithstanding that the whole may be vested in trustees.—*LUCKCRAFT v. PRIDHAM* (1879), 48 L. J. Ch. 636.

8831. Excessive accumulation under Thellusson Act—Costs out of general estate—Except costs of separating excess.]—*Eyre v. Marsden*, No. 8829, *ante*.

8832. ———.]—*BURT v. STURT* (1853), 10 Hare, 415; 22 L. J. Ch. 1071; 22 L. T. O. S. 54; 17 Jur. 728; 1 W. R. 145; 68 E. R. 989.

Annotations:—Consd. Scott v. Cumberland (1874), L. R. 18 Eq. 578. *Mentd. Edwards v. Tuck* (1853), 17 Jur. 921; *Drewett v. Pollard* (1859), 27 Beav. 196; *Watt v. Wood* (1862), 3 De G. & Sm. 56; *Mathews v. Keble* (1868), 3 Ch. App. 691; *Re Walker, Walker v. Walker* (1886), 54 L. T. 792; *Re Elliott, Public Trustee v. Pinder*, [1918] 2 Ch. 150.

8833. ———.]—*ODDIE v. BROWN* (1859), 4 De G. & J. 179; 28 L. J. Ch. 542; 33 L. T. O. S.

174; 5 Jur. N. S. 635; 7 W. R. 472; 45 E. R. 70, L. C. & L. JJ.

Annotations:—Foll. Ralph v. Carrick (1877), 5 Ch. D. 984. *Reid. Scott v. Cumberland* (1874), L. R. 18 Eq. 578; *Re Wood, Tullett v. Colville*, [1894] 2 Ch. 310. *Mentd. Williams v. Lewis* (1859), 6 H. L. Cas. 1013; *Talbot v. Jevers* (1875), L. R. 20 Eq. 255; *Wharton v. Masterman* (1895), 43 W. R. 449.

8834. ———.]—Testator directed that the division of his residuary estate among his relatives should not be made till two years after his wife's death:—*Held*: the accumulation ceased at the period provided for by Accumulations Act, 1800 (c. 98), & the income was payable to the real & personal representatives respectively of testator from that period up to the death of the widow, as under an intestacy, & the person claiming under the intestacy took the void accumulations free from all costs of the suit, which were to come out of the general fund.—*RALPH v. CARRICK* (1877), 5 Ch. D. 984; 46 L. J. Ch. 530; 37 L. T. 112; 25 W. R. 530; *on appeal* (1879), 11 Ch. D. 873, C. A.

Annotations:—Mentd. Woodhouse v. Spurgeon (1883), 52 L. J. Ch. 825; *Re Judd's Trusts*, [1884] W. N. 206; *Re Morgan, Morgan v. Morgan* (1893), 69 L. T. 407; *Re Springfield, Chamberlin v. Springfield*, [1894] 3 Ch. 603; *Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200; *Re Willatts, Willatts v. Artley*, [1905] 1 Ch. 378; *Re Rawlinson, Hill v. Withall*, [1909] 2 Ch. 36; *Re Embury, Page v. Bowyer* (1913), 109 L. T. 511; *Re Timson, Smiles v. Timson*, [1918] 2 Ch. 362; *Re Burnham, Carrick v. Carrick*, [1918] 2 Ch. 196; *Re Swain, Brett v. Ward*, [1918] 1 Ch. 399.

8835. ——— Whether costs apportioned pro rata—Between residue & lawful & unlawful accumulation.]—A fund arisen from accumulations of testator's estate made after the period prescribed by the above Act was claimed by the residuary legatees & by the next of kin, adversely to each other. The ct. decided in favour of the next of kin, & ordered the costs of suit to be paid out of the fund composed of the capital of the residue & the lawful accumulations, & out of the fund in dispute, *pro rata*.—*ELBORNE v. GOODE* (1844), 14 Sim. 165; 13 L. J. Ch. 394; 8 Jur. 1001; 60 E. R. 320.

Annotations:—Reid. Barrett v. Buck (1848), 11 L. T. O. S. 352; *Gowan v. Broughton* (1874), 31 L. T. 533; *Scott v. Cumberland* (1874), L. R. 18 Eq. 578; *Trethewy v. Helyar* (1876), 4 Ch. D. 53. *Mentd. Tench v. Cheese* (1855), 6 De G. M. & G. 453; *Oddie v. Brown* (1859), 4 De G. & J. 179; *Mathews v. Keble* (1867), L. R. 4 Eq.

8836. ———.]—In a suit for the administration of testator's estate, consisting of the proceeds of realty, & the accumulations of interest thereon for upwards of twenty-one years after testator's death:—*Held*: such excess of accumulations was not liable to a *pro rata* contribution to the costs of the suit, but that such costs were to be paid in the first instance out of the general fund, exclusive of the excess of accumulations.—*BARRETT v. BUCK* (1848), 11 L. T. O. S. 352; 12 Jur. 771.

8837. Lapse of gift of personalty—Extent of liability for costs—Of amount so given.]—*Eyre v. Marsden*, No. 8829, *ante*.

8838. ———.]—Testatrix, being possessed of personal estate, gave to her niece, subject to all legacies & bequests, the residue of her estate up to the end of the year 1855; & she gave all accumulations from that date equally between her great-nephews. The share of residue to the niece lapsed by her death in the lifetime of testatrix:—*Held*: (1) the only residue was that

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given to the niece which lapsed & was liable to all expenses & debts.

Semble: (2) whenever there is a lapsed share of residuary estate, whether personal or real, the lapsed share is the primary fund for payment of debts & expenses.—*GOWAN v. BROUGHTON* (1874), L. R. 19 Eq. 77; 44 L. J. Ch. 275; 31 L. T. 533; 23 W. R. 332.

Annotations:—As to (2) *N.F. Trethewy v. Helyar* (1876), 4 Ch. D. 53; *Blann v. Bell* (1877), 7 Ch. D. 382. *Expiid.* *Re Jones, Jones v. Caless* (1878), 10 Ch. D. 40. *Generally*, *Reid. Shepherd v. Beetham* (1877), 46 L. J. Ch. 763; *Hurst v. Hurst* (1884), 28 Ch. D. 159.

8839. — — — — —.] — Testatrix, after directing payment of her just debts, funeral & testamentary expenses, gave her residuary & personal estate amongst four persons by name, one of whom died in her lifetime:—*Held*: the lapsed share was not primarily liable for the costs of an administration suit but the costs must be paid before the residue was divided.

Until you have paid the costs you do not arrive at the residue. Then it is distributed according to law (*JESSEL, M.R.*).—*TRETHEWY v. HELYAR* (1876), 4 Ch. D. 53; 46 L. J. Ch. 125.

Annotations:—*Apld.* *Fenton v. Wills* (1877), 7 Ch. D. 33. *Follid.* *Re Giles* (1886), 55 L. J. Ch. 695. *Reid.* *Re Jones, Jones v. Caless* (1878), 10 Ch. D. 40; *Re Hall-Dare, Le Marchant v. Lee Warner*, [1916] 1 Ch. 272; *R. v. Income Tax Special Comrs., Ex p. Barnardo's Homes National Incorporated Assocn.*, [1920] 1 K. B. 468. *Mentd.* *Re Clay, Clay v. Clay* (1884), 32 W. R. 516.

8840. — — — — —.]—Testator bequeathed a sum of consols & the residue of his personal estate to trustees to hold in equal fifths upon certain trusts. One fifth share lapsed. In a suit for the administration of testator's real & personal estate:—*Held*: the costs of the suit were payable out of the general personal estate, & not primarily out of the lapsed share.—*FENTON v. WILLS* (1877), 7 Ch. D. 33; 47 L. J. Ch. 191; 37 L. T. 373; 26 W. R. 130.

Annotation:—*Reid.* *Re Jones, Jones v. Caless* (1878), 10 Ch. D. 40.

8841. — — — — —.]—*Re JONES, JONES v. CALESS*, No. 8794, *ante*.

8842. Maximum legacy to charity—Out of residue of impure personalty—Residue not exhausted—Liability for costs of surplus.—Testatrix being possessed of personal estate of two classes viz. pure personalty & that which savoured of realty, made a mixed fund of the residue, & bequeathed so much thereof as she could lawfully give to charitable uses to a charity. The rest was undisposed of. An administration summons having been taken out:—*Held*: as between the charity & the next of kin, the costs of the suit must be paid wholly out of the impure personalty, which was undisposed of by the will.—*TAYLOR v. MOGG* (1858), 27 L. J. Ch. 816; 32 L. T. O. S. 220; 5 Jur. N. S. 137.

8843. Realty descending to heir—Liability for costs—Descent by reason of lapse.—*GOWAN v. BROUGHTON*, No. 8838, *ante*.

8844. — — — — —.] **Where personalty exhausted.**—*MORLEY v. TUNSTALL* (1859), L. R. 7 Eq. 416, n.

Annotation:—*Consd.* *Scott v. Cumberland* (1874), L. R. 18

8845. — — — — —.] **In priority to realty devised.**—Where the personal estate of testator has been exhausted in the payment of his debts,

the costs incurred in an administration suit will be borne by the real estate descended to the heir, in priority to the real estate specifically devised. As between the tenants for life & the tenants in fee under the will, the costs will be borne ratably.—*Row v. Row* (1869), L. R. 7 Eq. 414; 17 W. R. 485.

Annotations:—*Consd.* *Scott v. Cumberland* (1874), L. R. 18 Eq. 578. *N.F. Luckcraft v. Pridham* (1879), 48 L. J. Ch. 636. *Consd.* *Hurst v. Hurst* (1884), 28 Ch. D. 159.

8846. — — — — —.] **Descent through forfeiture.**—Testator devised his real estate to trustees, upon trust to permit his son J. to receive the rents of certain specified freeholds during his life, with remainder to his children, with a clause of forfeiture in case J. should incur his life estate. J., a bachelor, incumbered his life estate, which thereupon descended to J. as heir-at-law, the will containing no residuary devise. A suit having been instituted to administer testator's estate, the costs of which the personal estate was insufficient to pay:—*Held*: as between the heir-at-law & the specific devisees, these costs must be borne ratably; & the forfeited life estate was not primarily liable.—*HURST v. HURST* (1884), 28 Ch. D. 159; 54 L. J. Ch. 190; 33 W. R. 473.

8847. — — — — —.] **Suit to administer real estate—Apportionment between descended & devised realty.**—An estate was devised for sale & a portion undisposed of descended on the heir:—*Held*: the costs of a suit to administer the real estate fell on the devisees & heir *pari passu*.—*MADDISON v. PYE* (1863), 32 Beav. 658; 55 E. R. 258.

Annotation:—*N.F. Scott v. Cumberland* (1874), L. R. 18 Eq. 578.

devised a freehold estate to the use of his son for life & after his decease to the use of the children of his son who should attain twenty-one or die under that age leaving issue & the heirs & assigns of such children in equal shares. Testator had mortgaged part of the devised estate & at his death, the legal estate was outstanding in the mtgees. The son died leaving four infant children:—*Held*: as to the mortgaged portion of the estate the contingent remainders were preserved from failure by the legal estate outstanding in the mtgees., but as to the remaining unmortgaged portion, the remainders failed on the death of testator's son.

As to the costs, I shall apply the principle I acted on in *Scott v. Cumberland*, No. 8851, *post*. That seems to me a reasonable rule & I must hold that the costs are to be apportioned between the specifically devised estate & the residuary estate (*MALINS, V.C.*).—*ASTLEY v. MICKLETHWAIT* (1880), 15 Ch. D. 59; 49 L. J. Ch. 672; 43 L. T. 58; 28 W. R. 811.

Annotations:—*Mentd.* *Re Frome, Frome v. Logan*, [1891] 3 Ch. 167; *Re Robson, Douglass v. Douglass*, [1916] 1 Ch. 116.

—.]—Where, in a suit for general administration, it was found upon the usual accounts & inquiries that there was no personalty, & that there were no debts; but questions had arisen in the suit as between the devisees *inter se* & the heir-at-law:—*Held*: the administration being for the benefit of all parties, the costs of the suit must be borne by the descended & devised estates *pro rata*, including some portions of the estates as to which no question had arisen in the suit.—*BAGOT v. LEGGE* (1864), 2 Drew. & Sm. 259; 5 New Rep. 5; 34 L. J. Ch. 156; 11

L. T. 263; 10 Jur. N. S. 1092; 13 W. R. 1; 62 E. R. 620.

Annotations:—*N.F. Jackson v. Pease* (1874), L. R. 19 Eq. 96. *Consd. Scott v. Cumberland* (1874), L. R. 18 Eq. 578.

8850. ————.]—In a suit to administer specifically devised real estate a question was raised as to whether certain land was comprised in the devise or passed to the heir-at-law. It was held to be comprised in the devise, but there were other lands which descended:—*Held*: the costs of the suit could not be thrown on the descended estates in exoneration of the devised estate, since the descended estates were not being administered in the suit; but the heir-at-law might be ordered to pay a proportional amount of the costs of the suit, corresponding to the value of the descended estates.—*HARDWICK v. HARDWICK* (1873), as reported in 42 L. J. Ch. 636.

Annotations:—*Mentd. Keogh v. Keogh* (1874), 22 W. R. 508; *Whitfield v. Langdale* (1875), 1 Ch. D. 61; *Homer v. Homer* (1878), 8 Ch. D. 758; *Re Bright-Smith, Bright-Smith v. Bright-Smith* (1886), 31 Ch. D. 314; *Re Smith* (1886), 2 T. L. R. 230; *Re Brockett, Dawes v. Miller*, [1908] 1 Ch. 185.

8851. ———— In priority to legacies effectually bequeathed—Descent through lapse immaterial.]—The rule that in providing for the costs of an administration suit real estate undisposed of must be applied for that purpose in priority to personal estate effectually disposed of, applies equally to real estate which descends by reason of lapse & to that as to which no disposition has been attempted.—*SCOTT v. CUMBERLAND* (1874), L. R. 18 Eq. 578; 44 L. J. Ch. 226; 31 L. T. 26; 22 W. R. 840.

Annotations:—*Consd. Gowan v. Broughton* (1874), L. R. 19 Eq. 77. *Distd. Re Jones, Jones v. Calless* (1878), 39 L. T. 287. *Apld. Astley v. Micklethwait* (1880), 15 Ch. D. 59. *Distd. Hurst v. Hurst* (1884), 28 Ch. D. 159. *Refd. Trethewy v. Helyar* (1876), 4 Ch. D. 53. *Mentd. Shephard v. Beetham* (1877), 16 L. J. Ch. 763.

8852. ———— By failure of charitable gift—Costs out of general estate.]—A gift of a share of real & personal residue to a charity having failed except as to pure personalty:—*Held*: the costs of an administration suit ought nevertheless to be borne by the general estate.—*BLANN v. BELL* (1877), 7 Ch. D. 382; 47 L. J. Ch. 120; 26 W. R. 165.

Annotation:—*Expld. Luckcraft v. Pridham* (1879), 48 L. J. Ch. 636.

G. Funds Affected by Particular Proceedings.

(a) Inquiry as to Persons Entitled.

8853. Under R. S. C., Ord. 65, r. 14B—Discretion of court.]—It may be that the existence of this [the above] rule brings before the mind of the judge, who has to deal with the costs, that he ought not to be too ready, as was perhaps the case before that order was passed, to direct that the costs of inquiries as to particular shares should come out of the corpus of the estate (*STIRLING, J.*).—*GRAHAM v. CLINTON (LORD)* (1899), 81 L. T. 717; 44 Sol. Jo. 88.

8854. ———— Inquiry due to ambiguity of will—Costs out of residue.]—Testator bequeathed the residue of his estate to his trustees & directed that out of the proceeds they should pay his funeral & testamentary expenses, debts & legacies. By a codicil he bequeathed £4,000 to his trustees, on trust to pay the annual income thereof to his son R. who was in his uncontrolled discretion, to apply the same for the benefit of testator's son W. & his two children by his late wife; &, after the death of W., the trustees were to stand possessed of the

capital & income of the £4,000 in trust for "the two children of W., in equal shares as tenants in common to be paid to them on their respectively attaining the age of twenty-one years or marrying under that age." At the date of the codicil there were living four children of W. by his late wife. In an action by the trustees after W.'s death to determine which of his four children were entitled to the £4,000:—*Held*: the costs of the action ought to be paid out of the residue of the estate & not out of the £4,000, & if the above rule applied, a direction should be given for the payment of the costs out of the residue.

Here the question has been how to apply the law when a difficulty has arisen from the language used by testator (*NORTH, J.*).—*Re GROOM, BOOTY v. GROOM*, [1897] 2 Ch. 407; 66 L. J. Ch. 778; 77 L. T. 154.

Annotations:—*Consd. Re Whitaker, Denison-Pender v. Evans* (1910), 103 L. T. 657. *Refd. Re Baumgarten, Bevan v. Rosenbaum* (1900), 82 L. T. 711; *Re Hall-Dare, Le Marchant v. Lee Warner*, [1916] 1 Ch. 272.

8855. ————.]—*Re HALL-DARE, LEE MARCHANT v. LEE WARNER*, No. 8752, *ante*.

8856. ———— Direction to pay testamentary expenses in will—Costs out of residue.]—*Re BAUMGARTEN, BEVAN v. ROSENBAUM*, No. 8828, *ante*.

8857. ————.]—*Re LACY, DYSON v. SPEIGHT* (1908), 124 L. T. Jo. 293.

8858. ————.]—By his will testator gave his residuary real & personal estate to trustees upon trust for sale & conversion & to invest the proceeds after payment thereof of his funeral & testamentary expenses, debts, & legacies & to pay the income to his wife, & after her death to raise certain legacies, & upon further trust to raise £6,000 for the benefit of a class of persons therein described, & to pay the ultimate residue to his brother & sisters in equal shares. Testator died in 1891, & his widow in 1905. In Nov. of that year an order was made directing an inquiry who were the beneficiaries composing the class entitled to the £6,000. The inquiry was completed, & the trustees now asked for taxation of costs & a declaration that the costs down to the order of Nov. 1905, should be paid out of the ultimate residue, & that the subsequent costs should be paid out of the funds representing the £6,000:—*Held*: the costs of the inquiry were testamentary expenses & ought to be paid out of residue; the above rule had not put an end to the power of the ct. to make an order carrying out the intention of testator; & all the costs of ascertaining the members of the class, except so far as they had been increased by incumbrances on the shares, must be paid out of the residue & not out of the £6,000.—*Re VINCENT, ROHDE v. PALIN*, [1909] 1 Ch. 810; 78 L. J. Ch. 455; 100 L. T. 957.

Annotation:—*Consd. Re Whitaker, Denison-Pender v. Evans* (1910), 103 L. T. 657.

8859. ———— Whether sufficient to relieve legacy of costs.]—Testatrix, after giving a general direction for the payment of her testamentary expenses, etc., out of personalty, divided her real & personal residuary estate into thirds, with a direction that, on the happening of certain events, which had occurred, one of these shares should be further subdivided into moieties. The trusts of this last third having been administered by the ct.:—*Held*: each moiety of the third, & not the third as a whole, constituted a share within the above rule; there were no special circumstances in the case, notwithstanding the presence of the

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general direction for the payment of testamentary expenses out of personalty, to justify the ct. in interfering with the ordinary operation of the rule; &, accordingly, the costs of ascertaining the beneficiaries of each separate moiety must be borne by each moiety respectively.—*Re WHITAKER, DENISON-PENDER v. EVANS*, [1911] 1 Ch. 214; 80 L. J. Ch. 63; 103 L. T. 657.

8860. ———.—*Re TOWNEND, KNOWLES v. JESSOP*, [1914] W. N. 145.

8861. Several persons entitled—Inquiry as to one share only—Costs apportioned.—Several defts. entitled to a fund in equal shares, & long inquiries being necessary as to one share only, the costs were apportioned.—*BASEVI v. SERRA* (1807), 3 Mer. 674; 14 Ves. 313; 36 E. R. 258.

Annotations:—*Distd. Shuttleworth v. Howarth* (1841), Cr. & Ph. 228. *Mentd. Corsbie v. Free* (1840), Cr. & Ph. 64.

8862. Bequest to next of kin—Of proceeds of sale of realty—Costs out of estate.—Testator devised his real estate to a trustee for 1,000 years, to raise, by sale or mtge., £2,000, "to be equally divided amongst such of his next of kin, both maternal & paternal, as should be living at the time of his death." The devisee filed his bill, asking for an inquiry to ascertain the parties entitled to the £2,000. Various proceedings were taken in the Master's office, in the course of which the sum of £2,000 was raised; the Master made his first report, finding who were the next of kin *ex parte paternâ*, & also stating that C. B. was one of the next of kin *ex parte maternâ*; but upon a subsequent reference he found C. B. to be the only next of kin *ex parte maternâ*:—*Held*: testator's estate was, from the first liable to the costs of the inquiry, & the money being raised & set apart before the next of kin were ascertained made no difference, & the costs must be raised out of testator's estate.—*DUGDALE v. DUGDALE* (1849), 12 Beav. 247; 19 L. J. Ch. 42; 15 L. T. O. S. 178; 14 Jur. 234; 50 E. R. 872.

8863. Inquiry as to incumbrances—By direction in decree—Costs out of estate.—If in an administration suit an inquiry be directed in chambers, as to incumbrances by persons interested under the will, the costs of such inquiry must be treated as part of the general costs of the suit, & be paid out of the estate.—*GEE v. MAHOOD* (1874), 23 W. R. 71.

8864. Ascertainment of class—Entitled to share of residue—Costs out of residue.—At the death of the tenant for life the residuary estate was divisible into shares, some of which were given to individuals, & others to classes:—*Held*: the costs of ascertaining the classes were costs of administration, & as such payable out of the residuary estate, & not out of the shares of the classes.—*Re REEVE'S TRUSTS* (1877), 4 Ch. D. 841; 46 L. J. Ch. 412; 36 L. T. 906; 25 W. R. 628.

8865. Adverse claimants to legacy—Amount paid into court under Trustee Relief Act—Whether legacy burdened with costs.—Where an exor., who was also residuary legatee, paid into ct. under the Trustee Relief Act the amount of a legacy, the title to which by reason of an ambiguity of construction of the will was in dispute, & it appeared that there was a residue of substantial amount:—*Held*: the ct. had jurisdiction to order the exor. to pay the costs of a petition for payment of the legacy, such costs being taxed as between party & party.

—*Re TRICK'S TRUSTS, Ex p. WILLOBY* (1869), 5 Ch. App. 170; 39 L. J. Ch. 201; 21 L. T. 739; 18 W. R. 123, L. J.

Annotation:—*Consd. Re Gibbons' Will* (1887), 36 Ch. D. 486.

8866. ———.—*Bequest to the incumbent for the time being of U. of £500, the income to be applied, when necessary, in keeping in repair the grave & the railing & tombstone of A., & the remainder of such income to be applied in providing wine & bread for the sick poor of U., with a gift of the residue to the exor. in trust for B. The exor. paid the legacy into ct. under Trustee Relief Act. On petition by the incumbent:—Held*: the first purpose of the gift being invalid, the whole of the income was applicable to the charity; & the sum should be paid to the official charity trustee to invest & pay the income to the incumbent of U. for the time being to be applied by him for the sick poor of the parish, as in the will directed; the exor.'s costs not to be allowed out of the fund, though he might take them out of the residue.

Seemle: under the present practice, when it is doubtful to whom a legacy is payable, the better course is not by payment into ct. under Trustee Relief Act, but by an administration summons, waiving accounts, simply for the purpose of obtaining the decision of the judge, or after taking out such summons, where both parties agree, by submitting a statement of facts in the nature of a special case for the opinion of the judge. If the exor. does pay it in he will be left to take his costs out of the residuary estate & will not have them out of the legacy.—*Re BIRKETT* (1878), 9 Ch. D. 576; 47 L. J. Ch. 816; 39 L. T. 418; 43 J. P. 111; 27 W. R. 161.

Annotations:—*Consd. Re Gibbons' Will* (1887), 36 Ch. D. 486. *Reid. Re Vaughan, Vaughan v. Thomas* (1886), 33 Ch. D. 187; *Re Parker's Will Trusts* (1888), 58 L. J. Ch. 23; *Re Taylor, Martin v. Freeman* (1888), 58 L. T. 538; *Re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715.

8867. ———.—*Exors. by payment into ct. under Trustee Relief Act of a sum to answer a legacy to a class, cannot thereby relieve the general residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled under the bequest.*—*Re GIBBONS' WILL* (1887), 36 Ch. D. 486; 56 L. J. Ch. 911; 58 L. T. 8; 36 W. R. 180.

Annotation:—*Reid. Re Whitaker, Denison-Pender v. Evans* (1910), 103 L. T. 657.

(b) Proof of Title.

8868. Legatee proving relationship—Costs of making out pedigree—Not paid from general assets.—*WALLIS v. WILLIAMS* (1794), Beames on Costs, App. I. p. 341.

8869. Proof by next of kin—Not parties to suit—Costs out of estate.—In a suit for the distribution of an intestate's estate certain persons, not parties to the suit, proved themselves to be next of kin, before the master:—*Held*: they were entitled to be paid the costs of so doing out of the intestate's estate.—*BENNETT v. WOOD* (1837), 7 Sim. 522; 6 L. J. Ch. 330; 58 E. R. 937.

Annotations:—*Fold. Bakewell v. Tagart* (1838), 3 Y. & C. Ex. 173. *Reid. Grace v. Terrington* (1845), 6 L. T. O. S. 70.

8870. ———.—*In a suit for the distribution of the estate of a person who died partially intestate, certain persons, not parties to the suit, who had proved themselves next of kin before the master, were allowed their costs of so*

doing out of the estate of deceased.—**BAKEWELL v. TAGART** (1838), 3 Y. & C. Ex. 173; 2 Jur. 699; 160 E. R. 661.

8871. ———.—]—The next of kin, as well not parties to the cause as parties to the cause, to have their costs of making their title out before the master.—**HUTCHINSON v. FREEMAN** (1839), 4 My. & Cr. 490; 3 Jur. 694; 41 E. R. 189, L. C.

Annotations:—**Folld. Shuttleworth v. Howarth** (1840), 4 My. & Cr. 492. **Reid. Grace v. Terrington** (1845), 2 Coll. 53.

8872. ———.—]—Persons who, as members of a very numerous class, were interested in a residuary estate administered in a suit but who were not parties to the suit, were allowed their costs of proceedings in the master's office to establish their claims, & of their subsequently intervening in the suit, & applying for such costs in like manner as other members of the same class who had been made parties.—**SHUTTLEWORTH v. HOWARTH, SHUTTLEWORTH v. HARGREAVES** (1840), 4 My. & Cr. 492; 10 L. J. Ch. 2; 5 Jur. 2; 41 E. R. 190, L. C.
Annotation:—**Reid. Grace v. Terrington** (1845), 2 Coll. 53.

8873. ———.—]—A suit having been instituted to administer testator's estate, in which an inquiry was directed as to the persons entitled as descendants under the will, a large number of individuals established their claims as such descendants before the master:—*Held*: they were all entitled to the costs of establishing their claims in the master's office, out of the general estate.—**SHUTTLEWORTH v. HOWARTH, SHUTTLEWORTH v. HARGREAVES** (1841), Cr. & Ph. 228; 5 Jur. 499; 41 E. R. 477, L. C.

Annotations:—**Reid. Hawkins v. Hawkins** (1842), 1 Harc. 543; **Swift v. Swift** (1859), 1 L. T. 150; **Trethewy v. Helyar** (1876), 4 Ch. D. 53; **Re Reeve's Trusts** (1877), 25 W. R. 628.

8874. ———.— **Under issue directed — Whether money advanced for that purpose—Out of fund affected.**]—Pltfs. claimed, as next of kin of an intestate, a fund which was in the possession of deft. as the nominee of the Crown, & after the master had reported against pltfs.' title, the ct. directed certain issues for the purpose of trying it. Pltfs. applied for an advance out of the fund, to enable them to try the issues; but this, which was opposed by the Crown, the ct. refused.—**NYE v. MAULE** (1839), 4 My & Cr. 342; 8 L. J. Ch. 329; 3 Jur. 669; 41 E. R. 133, L. C.

Annotations:—**Reid. Johnston v. Todd** (1841), 3 Beav. 218. **Mentd. Coombs v. Brookes** (1849), 13 Jur. 784.

8875. ———.— **Against the Crown as administrator Costs out of estate.**]—(1) Where pltf. succeeds in establishing his title as next of kin to an intestate against the Crown as administrator, the costs of the suit must come out of the estate, the Crown, as in the case of an ordinary administrator, not paying any costs.

(2) Where in a suit against the Crown pltf. succeeds, & the Crown appeals & fails, it can have no costs of such appeal.—**PARTINGTON v. REYNOLDS** (1858), 6 W. R. 615.

Annotation:—*As to* (1) **Reid. A.-G. v. Kohler** (1861), 5 L. T. 5.

8876. Proof by heir-at-law—Costs out of estate.]—The heir-at-law of testator was served with notice of the decree in an administration suit, & the costs of proving his pedigree were directed to be paid out of testator's estate.—**SWIFT v. SWIFT** (1859), 1 De G. F. & J. 160; 29 L. J. Ch. 121; 1 L. T. 150; 8 W. R. 100; 45 E. R. 320, L. C.

Annotation:—**Mentd. Holmes v. Sayer-Milward** (1878), 38 L. T. 381.

8877. ———.—]—In an administration suit an heir-at-law is entitled to have his costs of establishing his heirship paid out of the estate.—**SINGLETON v. TOMLINSON** (1878), 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722, H. L.

Annotations:—**Mentd. Smith v. Conder** (1878), 9 Ch. D. 170; **Re Boyes, Boyes v. Carritt** (1884), 26 Ch. D. 531; **Durham v. Northen** (1893), 69 L. T. 691; **Re Deprez, Henriques v. Deprez**, [1917] 1 Ch. 24.

(c) Undistributed Residue.

8878. Action for account by infants entitled—Accounts correct—Costs out of infants' share.]—A residuary estate was divisible amongst several persons. An account was made up, & the adults received their shares. The infants filed a bill for an account against the exors. & the other residuary legatees. The latter being satisfied, deprecated the proceedings. The accounts turned out to be substantially correct:—*Held*: the costs were payable out of pltfs.' share alone.—**MACKENZIE v. TAYLOR** (1844), 7 Beav. 467; 49 E. R. 1146.

Annotations:—**Consd. Hilliard v. Fulford** (1876), 4 Ch. D. 389. **Reid. Re Cope, D'Auguler v. Cope** (1885), 1 T. L. R. 611.

8879. ———.—]—The exors. of a testator accounted for the residuary estate to such of the residuary legatees as were adults: &, after setting apart a portion of such estate as an indemnity fund against certain possible claims, they paid the adult legatees their shares of the residue, they retained their own shares, & they invested the share of each infant legatee in their own names & the name of the infant entitled thereto. Afterwards an administration suit was instituted on behalf of certain of the infants, the result of which was to establish the substantial accuracy of the accounts rendered by the exors.:—*Held*: the costs must be paid out of the undistributed residuary estate; neither the residuary legatees who had been paid their shares, nor, in the first instance, the exors. were to receive any costs unless they respectively accounted for the shares they had received or retained, & contributed to the costs; but after payment of the costs of pltfs., & any other parties entitled thereto, out of the indemnity fund (which had been brought into ct.), the surplus thereof should be paid to the exors. towards payment of their costs.—**Re TANN, TANN v. TANN, GRAVATT v. TANN** (No. 2) (1869), L. R. 7 Eq. 436; 38 L. J. Ch. 459.

Annotation:—**Reid. Hilliard v. Fulford** (1876), 25 W. R. 161.

8880. Action by legatees entitled—Accounts correct—Costs out of legatee's shares.]—Where exors. have made a right partial distribution & have properly accounted, & the remaining legatees then bring an action for administration, the costs will be borne by the shares remaining undistributed. But where exors. had made a wrong partial distribution, on the assumption that the estate was divisible into five shares instead of six, & their accounts were also incorrect, the costs of a subsequent administration suit were ordered to be paid out of the whole estate, as if no distribution had taken place, so as to charge the exors. with the share of costs attributable to the distributed shares of the estate.—**HILLIARD v. FULFORD** (1876), 4 Ch. D. 389; 46 L. J. Ch. 43; 35 L. T. 750; 25 W. R. 161.

Annotations:—**Appld. Re Bell's Estate, Bath v. Bell** (1878), 39 L. T. 422. **Reid. Re Giles** (1886), 55 L. J. Ch. 695.

8881. ———.— **Accounts incorrect—Costs out of estate.**]—**HILLIARD v. FULFORD**, No. 8880, *ante*.

Sect. 8.—Costs: Sub-sect. 3, G (d); sub-sect. 4, A. (a) & (b).]

(d) Other Cases.

8882. Charitable bequest—Proceedings to determine validity—Costs apportioned.]—JOHNSON v. WOODS (1840), 2 Beav. 409; 9 L. J. Ch. 244; 48 E. R. 1240.

*Annotations:—*Mentd. A.-G. v. Southgate (1842), 12 L. J. Ch. 147; Boughton v. Boughton, Boughton v. James (1848), 1 H. L. Cas. 406; Fitch v. Weber (1848), 6 Hare, 145.

8883. ———.]—Testator directed "all his just debts & funeral & testamentary expenses to be paid by his exors. out of such part of his estate as could not by law be bequeathed for charitable purposes"; & then devised & bequeathed all his real & personal estate which he could not bequeath for charitable purposes to legatees, & bequeathed all that could be lawfully bequeathed for charitable purposes to a charity:—*Held*: the charity was not relieved from the costs of an administration suit in which a question was raised as to whether certain part of the property, from its nature, was bequeathable to the charity or not; & the costs must be apportioned between the two funds.—LINLEY v. TAYLOR (1859), 1 Giff. 67; 28 L. J. Ch. 686; 65 E. R. 828; *sub nom.* TAYLOR v. LINLEY, 33 L. T. O. S. 232; 5 Jur. N. S. 701; *on appeal, sub nom.* TAYLOR v. LINLEY (1860), 2 De G. F. & J. 84, L. C.

*Annotations:—*Reid. Shephard v. Beetham (1877), 6 Ch. D. 597. *Mentd.* Holdsworth v. Davenport (1876), 3 Ch. D. 185. *Re* Hollon, Forbes v. Hardcastle (1893), 68 L. T. 160.

8884. ——— General estate not affected by result.]—Where a legacy has been severed from the general estate, & becomes the subject of a suit, by the result of which the estate will not be affected, the costs of the suit are borne by the fund constituting the legacy, but the appropriation or investment by the exor. of a particular sum to answer the legacy, where the question which arises upon it is a question between the general estate & the legacy, does not relieve the general estate from the costs of the suit.—A.-G. v. LAWES (1849), 8 Hare, 32; 19 L. J. Ch. 300; 14 Jur. 77; 68 E. R. 261.

*Annotations:—*Consd. Fraser v. Murdoch (1881), 6 App. Cas. 855. *Reid.* Robinson v. Murdoch (1881), 30 W. R. 162; *Re* Hall-Dare, Le Marchant v. Lee Warner, [1916] 1 Ch. 272.

8885. Payment of income from fund—Proceedings to enforce—Costs out of income.]—The costs of a petition in an administration suit for the payment of the income of a fund to petitioner must be borne by the income, & not by the corpus. *Secus*, in the case of a petition under Trustee Relief Act.—EADY v. WATSON (1864), 33 Beav. 481; 10 L. T. 285; 10 Jur. N. S. 982; 12 W. R. 682; 55 E. R. 454.

*Annotation:—*Reid. *Re* Turnley's Trusts (1866), 35 L. J. Ch. 1.

SUB-SECT. 4.—SCALE OF COSTS.

A. As between Solicitor and Client or Party and Party.

(a) Representative.

8886. As between solicitor & client.]—A married

PART VIII. SECT. 8, SUB-SECT. 4.—
A. (a).

*c. As between party & party.]—*Where an exor. & trustee named in a will had acted as such to the advantage of the estate, without having proved

the will, he was allowed his costs, as between party & party, of an administration suit to which he was a party deft., excepting some costs which he had needlessly incurred.—SUNLEY v. MCCRAE (1867), 2 Ch. Ch. 231.—CAN.

woman being entitled to a share of a residue for her life, with remainder to her children, who were infants, a bill was filed by her & her husband & their children, by their father as their next friend, against the exor. & the co-residuary legatees, for the administration & distribution of testator's estate. When the exor. put in his answer, a balance was due from him, & he paid it into ct. Afterwards, he paid the whole of testator's debts remaining unsatisfied, some of them before & the rest after the usual decree; whereby a balance greater than the fund in ct. became due to him, & the master so found. After the report had been absolutely confirmed, the husband died, & his widow having declined to take any step towards the further prosecution of the suit, the exor. filed a supplemental bill, praying to have the fund in ct. exempt from all costs, paid to him, in part of the balance found due by the master. The ct. ordered the exor.'s costs of both suits, as between solr. client, to be first paid out of the fund, then the costs of debts. the co-residuary legatees of both suits, & lastly, the costs of the widow & children of the supplemental suit, but not of the original suit.—JACKSON v. WOOLLEY (1841), 12 Sim. 12; 10 L. J. Ch. 197; 59 E. R. 1034.

*Annotation:—*Reid. Hearn v. Wells (1844), 1 Coll. 323.

8887. ———.]—Where in consequence of the insolvency of pltf., who was an exor. in an administration suit, it became necessary to make his assignees parties:—*Held*: they were entitled to separate costs.

The costs of pltf. & deft., his co-exor., will be as between solr. & client, & those of the assignees of the insolvent exor., as between party & party (WOOD, V.-C.).—CHILWELL v. HOCKNELL (1854), 2 Eq. Rep. 1106; 2 W. R. 630.

8888. ——— From date of bankruptcy.]—TURNER v. MULLINEUX, No. 8615, *ante*.

8889. ———.]—BOWYER v. GRIFFIN, No. 8648, *ante*.

8890. ——— Estate deficient.]—WETENHALL v. DENNIS, No. 8949, *post*.

8891. ——— Unless guilty of misconduct.]—One of two exors. & trustees commenced an action against the other for the administration of the estate, & a decree was made. There was no allegation of any misconduct on the part of deft.:—*Held*: a trustee is entitled to costs as between solr. & client in an administration action, unless a case of misconduct is made out against him, & deft. must have costs as between solr. & client.—*Re* LOVE, HILL v. SPURGEON (1885), 29 Ch. D. 348; 54 L. J. Ch. 816; 52 L. T. 398; 33 W. R. 449, C. A.

*Annotation:—*Reid. *Re* Jones, Christmas v. Jones (1897), 45 W. R. 598.

8892. ———.]—*Re* BARNE, LEE v. BARNE, No. 8963, *post*.

8893. ——— For part of costs only—Assets not accounted for.]—*Re* HARRYS, HARRYS v. HOWELLS, [1900] W. N. 147.

(b) Creditors.

8894. Estate insufficient to pay debt—Scale as between solicitor & client.]—Costs, as between solr.

PART VIII. SECT. 8, SUB-SECT. 4.—
A. (b).

8894 i. Estate insufficient to pay debt—Scale as between solicitor & client.]—Pltf., a creditor, allowed costs in an

& client, will be allowed to pltf. in a creditor's suit, where there is a deficient fund.—HOOD v. WILSON (1831), 2 Russ. & M. 687; 39 E. R. 557, L. C.

Annotation:—*Reid*. *Re* New Zealand Mid. Ry., *Smith v. Lubbock*, [1901] 2 Ch. 357.

8895. ———.]—In a creditor's suit, pltf. are entitled to their costs, as between solr. & client, where the fund is insufficient to pay the debts.—TOOTAL v. SPICER (1831), 4 Sim. 510; 58 E. R. 191.

Annotation:—*Reid*. *Re* New Zealand Mid. Ry., *Smith v. Lubbock*, [1901] 2 Ch. 357.

8896. ———.]—The insufficiency of the fund to pay the debts is the only case in which pltf. in a creditor's suit is entitled to his costs as between solr. & client.—BRODIE v. BOLTON (1835), 3 My. & K. 168; 40 E. R. 64.

Annotation:—*Reid*. *Re* McRea, *Norden v. McRea* (1886), 54 L. T. 728.

8897. ———.]—In a creditor's suit, costs as between solr. & client cannot be given, even with the consent of all parties, unless it clearly appears, that the estate is insufficient for the payment of the debts.—BLACKETT v. BLACKETT (1836), 5 L. J. Ch. 213.

8898. ———.]—In a suit instituted by a creditor of testator, to make testator's real estate available for the payment of his debts, where the clear proceeds arising from the sale thereof were not, after payment of the costs as between party & party of pltf. & debts., the exors., more than sufficient for payment of testator's debts:—*Held*: pltf. was entitled to his costs out of the fund, as between solr. & client, & the residue was directed to be apportioned in payment of the debts due to pltf. & testator's other creditors.—SUTTON v. DOGGETT (1840), 3 Beav. 9; 9 L. J. Ch. 335; 4 Jur. 959; 40 E. R. 4.

Annotation:—*Reid*. *Re* McRea, *Norden v. McRea* (1886), 32 Ch. D. 613.

8899. ———.]—In a suit by creditors to administer the realty, there being no personalty, & the realty proving deficient, the ct. ordered the costs of pltf. & of debts., who were beneficial devisees, to be taxed as between party & party, & paid *pari passu* out of the fund & the balance of the fund then remaining to be applied in payment of pltf.'s extra costs between solr. & client, & then in payment of debts.—HENDERSON v. DODDS (1866), L. R. 2 Eq. 532; 14 L. T. 752; 14 W. R. 908.

Annotation:—*Folld*. *Ferguson v. Gibson* (1872), L. R. 14 Eq. 379.

8900. ———. **Creditor to whom conduct of proceedings given.**—(1) The rule that pltf. in a creditor's suit is allowed his costs as between solr. & client, if the estate has proved insufficient, extends to parties to whom the conduct of the proceedings has been given.

(2) Pltf. who has been removed from the conduct of a creditor's suit will be allowed his costs of appearing at the hearing on further consideration to ask for costs due to him before his removal, but will not be allowed his costs of attending the taking of the accounts in chambers subsequently to his removal.—JOSEPH v. GOODE, JOSEPH v. GOODE, FISHER v. GOODE (1875), 23 W. R. 225.

8901. ———. **Legatee's action.**—The rule that a creditor who brings an action on behalf of

himself & all other creditors for the administration of an estate which turns out to be insufficient for the payment of debts is entitled to his costs as between solr. & client, applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin.

In a next of kin's suit, or in a legatee's suit, where the estate is insufficient for payment of debts, pltf. is not entitled to solr. & client costs (JESSEL, M.R.).—*Re* RICHARDSON, *RICHARDSON v. RICHARDSON* (1880), 14 Ch. D. 611; 49 L. J. Ch. 612; 43 L. T. 279; 28 W. R. 942.

Annotation:—*Consd*. *Re* New Zealand Mid. Ry., *Smith v. Lubbock*, [1901] 2 Ch. 357.

8902. ———.]—In an action by a separate creditor, on behalf of himself & all other the creditors of testator, who was one of a firm of traders, for a general administration of testator's estate, the general estate was realised, & turned out sufficient to pay in full the separate creditors, but insufficient to pay in full the joint creditors of testator:—*Held*: pltf. was entitled to costs out of the estate as between solr. & client.—*Re* McREA, *NORDEN v. McREA* (1886), 32 Ch. D. 613; 55 L. J. Ch. 708; *sub nom.* *Re* McREA, *NARDEN v. McREA*, 54 L. T. 728.

Annotations:—*Consd*. *Re* New Zealand Mid. Ry., *Smith v. Lubbock*, [1901] 2 Ch. 357. *Reid*. *Re* Queen's Hotel Co., *Cardiff*, *Re* Vernon Tin Plate Co., [1900] 1 Ch. 792.

8903. ———.]—A practice has been for many years established that where a creditor or legatee brings an action for the administration of an estate of a deceased person, & the fund realised proves insufficient for payment of the debts or of the legacies, as the case may be, in full, pltf. is allowed his costs as between solr. & client; but where the fund realised is more than sufficient for payment of the debts or legacies, as the case may be, in full, then pltf. as a general rule is only allowed costs as between party & party (STIRLING, L.J.).—*Re* NEW ZEALAND MIDLAND RY. CO., *SMITH v. LUBBOCK*, [1901] 2 Ch. 357; 70 L. J. Ch. 595; 84 L. T. 852; 49 W. R. 529; 45 Sol. Jo. 519; 8 Mans. 363, C. A.

Annotations:—*Mentd*. *Re* Glasdir Copper Mines, *English Electro-Metallurgical Co. v. Glasdir Copper Mines*, [1906] 1 Ch. 365; *Re* Horne, *Horne v. Horne*, [1906] 1 Ch. 271; *Re* Boynton, *Hoffman v. Boynton*, [1910] 1 Ch. 519.

8904. Specialty debts not satisfied—Simple contract & specialty creditors—Simple contract creditors entitled as between solicitor & client.—Costs as between solr. & client given out of the fund to a simple contract creditor who was pltf. in a suit to administer his deceased debtor's estate, although the assets had proved insufficient to satisfy the specialty creditors.—BARKER v. WARDLE (1835), 2 My. & K. 818; 39 E. R. 1157.

Annotations:—*Reid*. *Stanton v. Hatfield* (1836), 1 Keen, 358; *Richardson v. Jenkins* (1853), 17 Jur. 446; *Re* McRea, *Norden v. McRea* (1886), 32 Ch. D. 613.

8905. ———.]—A simple contract creditor, who files a bill for the administration of testator's assets, is entitled to have his costs out of the estate, though the assets prove insufficient for the payment of the specialty creditors.—LARKINS v. PAXTON (1835), 2 My. & K. 320; 39 E. R. 965.

8906. ———.]—In an administration suit by a simple contract creditor, he is entitled to his costs as between solr. & client, though the assets are insufficient for payment of the specialty

administration suit, commenced by | client, where the fund realised was | —*Re* FLYNN, *GUY v. M'CARTHY* (1886),
summons, as between solicitor & | insufficient to pay the creditors in full. | 17 L. R. Ir. 457.—IR.

Sect. 8.—Costs: Sub-sect. 4, A. (b), (c) & (d), & B.; sub-sect. 5, A.]

creditor.—**JENKINS v. ROBERTSON** (1853), as reported in 1 Eq. Rep. 123; 22 L. J. Ch. 874; 23 L. T. O. S. 203; 1 W. R. 298; *sub nom.* **RICHARDSON v. JENKINS**, 17 Jur. 446.

Annotations:—Mentd. **Holland v. Holland** (1869), 4 Ch. App. 449, n.; **Re Butten** (1913), 57 Sol. Jo. 579; **Re A Debtor**, [1913] 3 K. B. 11.

8907. Estate satisfying debts in full—Scale as between party & party.]—BRODIE v. BOLTON, No. 8896, *ante*.

8908. ———.]—Where in a creditor's suit a fund had been realised by the diligence of pltf., & the assets were more than sufficient for payment of the debts, the costs of pltf. as between party & party were ordered to be paid out of the general fund, & the extra costs of pltf. were, under the circumstances directed to be paid *pro rata* by all the creditors who partook of the benefit of the suit.—STANTON v. HATFIELD (1836), 1 Keen, 358; 5 L. J. Ch. 301; 48 E. R. 344.

Annotations:—Refd. **Goldsmith v. Russell** (1855), 5 De G. M. & G. 547; **Re New Zealand Mid. Ry., Smith v. Lubbock**, [1901] 2 Ch. 357.

8909. ——— Notwithstanding consent of all parties—For scale as between solicitor & client.]—BLACKETT v. BLACKETT, No. 8897, *ante*.

8910. ———.]—Re DREW, SIMMONS & SIMMONS v. DREW (1913), 135 L. T. Jo. 323.

(c) Legatees.

8911. Action between residuary legatees—Costs as between solicitor & client—Not without consent.]—A bill by one of two residuary legatees, the other being a deft. The usual decree was made & held, on further directions, that costs could not be given out of the fund in ct. as between solr. & client, without the consent of deft.—FENNER v. TAYLOR (1821), 5 Madd. 470; 6 Madd. 3; 56 E. R. 975.

8912. ———.]—BLENKINSOP v. FOSTER, No. 8570, *ante*.

8913. Estate insufficient for debts—Costs as between party & party.]—In a suit by a residuary legatee against the exor. of the will testator's estate proved insufficient to pay his debts:—Held: pltf. was entitled to his costs, not as between solr. & client, but as between party & party only.—WESTON v. LOWES (1847), 15 Sim. 610; 60 E. R. 757.

Annotations:—Folld. **Wetenhall v. Dennis** (1863), 33 Beav. 285. **Consd.** **Re Richardson, Richardson v. Richardson** (1880), 14 Ch. D. 611.

8914. ——— Except so far as estate benefited by proceedings.]—In a suit instituted by a residuary legatee the assets proved insufficient for the payment of the expenses & the general legacies:—Held: pltf. was not entitled to his costs as between solr. & client, except so far as the general estate had been increased by the proceeding.—WROUGHTON v. COLQUHOUN (1847), 1 De G. & Sm. 357; 63 E. R. 1103.

Annotations:—Mentd. **Daniell v. Daniell** (1849), 3 De G. & Sm. 337; **Todd v. Bielby** (1859), 27 Beav. 353; **Gratrix v. Chambers** (1860), 2 Giff. 321; **Re Edwards, Ex p. Shand** (1867), 16 L. T. 208; **Re Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair**, [1897] 1 Ch. 921; **Re Ross, Ashton v. Ross** (1900), 170 L. T. 192; **Re Robbins, Robbins v. Buckland v.**

8915. ———.]—WETENHALL v. DENNIS, No. 8949, *post*.

8916. ———.]—Re RICHARDSON, RICHARDSON v. RICHARDSON, No. 8901, *ante*.

8917. Estate insufficient for legacies—Costs as between solicitor & client.]—Costs as between solr. & client will be allowed to pltf. in a legatee's suit where there is a deficient fund.—BURKITT v. RANSOM (1846), 2 Coll. 536; 63 E. R. 850.

Annotation:—Consd. **Re Richardson, Richardson v. Richardson** (1880), 14 Ch. D. 611.

8918. ——— Benefit to estate by proceedings.]—WROUGHTON v. COLQUHOUN, No. 8914, *ante*.

8919. ———.]—In a legatees' suit on behalf, etc., the assets were insufficient for payment:—Held: pltf. was entitled to his costs out of the fund, as between solr. & client.—CROSS v. KENNINGTON (1848), 11 Beav. 89; 50 E. R. 750.

Annotations:—Folld. **Waldron v. Frances** (1853), 10 Hare, App. I. x; **Thomas v. Jones** (1860), 1 Drew. & Sm. 134; **Wetenhall v. Dennis** (1863), 33 Beav. 285. **Refd.** **Re McRea, Norden v. McRea** (1886), 32 Ch. D. 613.

8920. ———.]—Costs given to pltf. in a legatees' suit, as between solr. & client, where the fund is insufficient to pay the legacies in full.—WALDRON v. FRANCES (1853), 10 Hare, App. I. x; 1 Eq. Rep. 52; 1 W. R. 324; 68 E. R. 1118.

Annotation:—Folld. **Bisset v. Burgess** (1856), 23 Beav. 278.

8921. ———.]—Where a legatee files a bill for the administration of testator's estate, whether it is expressed that he does so on behalf of himself & the other legatees or not, he does in fact represent them, & when all the debts are paid, the fund belongs to the legatees, & pltf. is entitled to his costs of suit, as between solr. & client, the fund not being sufficient to pay all the legacies in full.—THOMAS v. JONES (1860), 1 Drew. & Sm. 134; 29 L. J. Ch. 570; 2 L. T. 77; 6 Jur. N. S. 391; 8 W. R. 328; 62 E. R. 329.

Annotations:—Folld. **Wetenhall v. Dennis** (1863), 33 Beav. 285. **Appld.** **Re Richardson, Richardson v. Richardson** (1880), 14 Ch. D. 611; **Re New Zealand Mid. Ry., Smith v. Lubbock**, [1901] 2 Ch. 357. **Refd.** **Re McRea, Norden v. McRea** (1886), 32 Ch. D. 613.

8922. ——— Economic conduct of suit.]—Where pltf. in a suit for administering as insufficient estate for the benefit of others, had commenced the suit in the least expensive way possible, he was allowed his costs as between solr. & client.—Re BURRELL, BURRELL v. SMITH (1870), 1 L. R. 0 Eq. 443; 22 L. T. 263.

Annotation:—Consd. **Re Richardson, Richardson v. Richardson** (1880), 14 Ch. D. 611.

8923. ——— Provided debts satisfied.]—A residuary legatee, pltf. in an administration action, is entitled to his costs as between solr. & client where the estate is insufficient for payment of legacies, provided it is sufficient for payment of debts, but not otherwise.—Re HARVEY, WRIGHT v. WOODS (1884), 26 Ch. D. 179; 53 L. J. Ch. 544; 50 L. T. 554; 32 W. R. 765.

8924. ———.]—It is the settled rule that pltf. in a legatee's administration action is, when the estate is insufficient to pay the legacies in full, entitled to receive his costs out of the fund as between solr. & client, & this rule applies even when there is a contest between him and another legatee as to the proper mode of dividing the fund.—Re WILKINS, WILKINS v. ROTHERHAM (1884), 27 Ch. D. 703; 54 L. J. Ch. 188; 33 W. R. 42.

Annotation:—Mentd. **Re Turnbull, Skipper v. Wade**, [1906] 1 Ch. 726.

8925. Legatee also a creditor—Whether sufficient

for costs as between solicitor & client.]—In an administration suit by legatees, the fact of one of the legatees being a large creditor will not entitle him to costs as between solr. & client.—*HORNE v. HORNE* (1866), 14 W. R. 957.

(d) *Other Persons.*

8926. Assignee of defaulting representative—As between solicitor & client.]—*CHILWELL v. HOCKNELL*, No. 8887, *ante*.

8927. Railway company — Ascertainment of testator's shares—As between party & party.]—A railway co. made a debt., in order to ascertain the amount of shares belonging to testator's estate, will only have party & party costs on being dismissed.—*DE COMBE v. DE COMBE* (1857), 30 L. T. O. S. 31 ; 3 Jur. N. S. 712.

8928. Heir-at-law—Estate insufficient to pay debts—As between solicitor & client.]—Where, in an administration suit, the whole of the intestate's real estate is found to belong to the creditors, the heir-at-law is entitled to his costs out of the estate as between solr. & client.—*TARDREW v. HOWELL, PARRY v. HOWELL* (1861), 2 Giff. 530 ; 30 L. J. Ch. 191 ; 3 L. T. 661 ; 7 Jur. N. S. 937 ; 9 W. R. 296 ; 66 E. R. 222.

Annotation :—*Folld. Shittler v. Shittler* (1864), 4 New Rep. 475.

8929. — — —.]—An heir-at-law pltf. to a suit for the administration of an intestate's estate is allowed costs as between solr. & client where the estate is deficient.—*SHITTLER v. SHITTLER* (1864), 4 New Rep. 475 ; 10 L. T. 833.

8930. Next of kin—Opposition to charitable legacy—Unsuccessful action.]—Next of kin opposing a charitable bequest, & failing :—*Held* : not entitled to costs as between solr. & client.—*WILKINSON v. BARBER* (1872), L. R. 14 Eq. 96 ; 41 L. J. Ch. 721 ; 26 L. T. 937 ; 20 W. R. 763.

8931. — — Estate deficient.]—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, No. 8901, *ante*.

Next friend of infant.]—*See* INFANTS.

On originating summons.]—*See* No. 8753, *ante* ; Nos. 8971, 8972, *post*.

B. Higher or Lower Scale.

See, now, R. S. C., Ord. 65, rr. 9, 10.

8932. Estates over one thousand pounds—Higher scale applicable.]—*Re REECE'S ESTATE, GOULD v. DUMMETT*, No. 8934, *post*.

8933. — — —.]—In administration actions, where the gross value of the estate to be administered amounts to £1,000 at the time of the institution of the action, the higher scale of costs applies : & in estimating such value where the estate to be administered comprises an equity of redemption, the value of the equity of redemption only, & not of the entire mortgaged estate, is to be regarded. If, however, in such a case the equity of redemption has been valued at the time of the institution of the action at such a sum as, with the rest of the estate to be administered, amounts to £1,000 or upwards, but it afterwards turns out, on a sale by the mtgees., that the proceeds of such sale, together with the rest of the estate to be administered, amount to less than £1,000, the lower scale applies.—*Re SANDERSON* (1877), 7 Ch. D. 176 ; 38 L. T. 379 ; 26 W. R. 309.

8934. Time for valuation.]—In administration suits, where the gross value of the estate to be administered amounts to £1,000 at the time of the institution of the suit, the higher scale of costs applies. Under the regulations of the ct., solrs. are entitled to charge for settling the minutes of orders, although no minutes are issued.—*Re REECE'S ESTATE, GOULD v. DUMMETT* (1866), L. R. 2 Eq. 609 ; 14 L. T. 881 ; 12 Jur. N. S. 614 ; 14 W. R. 1008.

Annotations :—*Expld. Re Sanderson* (1877), 7 Ch. D. 176. *Refd. Underwood v. Secretary of State for India* (1868), 16 W. R. 926.

8935. — — —.]—In estimating the value of an estate of testator for the purpose of ascertaining whether costs are to be paid on the higher or lower scale, the value of the estate at the death of testator is to be looked at, although the costs of a suit to get in part of the assets may reduce that amount.—*STEWART v. NURSE* (1874), 43 L. J. Ch. 384.

8936. — — Subsequent depreciation—Effect.]—*Re SANDERSON*, No. 8933, *ante*.

8937. Mortgaged property — How valued.]—*Re SANDERSON*, No. 8933, *ante*.

Taxation of costs.]—*See* PRACTICE ; SOLICITORS.

SUB-SECT. 5.—PRIORITY.

A. In General.

8938. Costs first charge on estate.]—In a suit by a specialty creditor for the administration of a testator's real & personal estate, the costs of the exor. are to have precedence of all other claims, &, after them, the costs of pltf. creditor.

The devisee cannot retain his debt in priority to the costs of the suit, because the costs of the suit are to be considered as expenses in administering the estate, & are the first charge upon an estate whether administered in or out of ct. (*LEACH, V.-C.*).—*LOOMES v. STOTHERD* (1823), 1 Sim. & St. 458 ; 1 L. J. O. S. Ch. 220 ; 57 E. R. 183.

Annotation :—*Consd. Re Hayward, Tweedie v. Hayward*, [1901] 1 Ch. 221.

8939. — — —.]—In an administration suit, all proper & necessary parties have their costs prior to the administration of the fund.—*FORD v. CHESTERFIELD (EARL)* (No. 3) (1856), 21 Beav. 426 ; 52 E. R. 924.

Annotations :—*Folld. Wright v. Kirby* (1857), 23 Beav. 463. *Refd. Batten, Proffitt & Scott v. Dartmouth Harbour Comrs.* (1890), 45 Ch. D. 612.

8940. — — —.]—A bill was filed by an administrator against the solr. of the intestate, who claimed a mtge. on his estate & against others, for administration & to ascertain the mtge. The solr. claimed £1,492, but his mortgage debt was ascertained to be £924 only. The assets consisted nearly wholly of the produce of the mortgaged estate :—*Held* : the costs of the suit were first payable out of that fund.

In an administration suit you pay in the first instance the costs of all parties properly incurred (*ROMILLY, M.R.*).—*WHITE v. GUDGEON* (1862), 30 Beav. 545 ; 54 E. R. 1001.

8941. — — Mortgaged estate insufficient—Costs of mortgagee's executors.]—Testator's estate proving insufficient :—*Held* : exors. of a mtgee., in whom the legal estate was vested, were entitled to a first charge

Sect. 8.—Costs: Sub-sect. 5, A. & B. (a) & (b).

suit.—*HABERGHAM v. RIDEHALGH* (1870), L. R. 9 Eq. 395; 39 L. J. Ch. 545; 23 L. T. 214; 18 W. R. 427.

Annotations:—Mentd. Re Speakman, Unsworth v. Speakman (1876), 4 Ch. D. 620; *Re Gilbert, Daniel v. Matthews* (1886), 54 L. T. 752; *Re Hannam, Haddelsey v. Hannam*, [1897] 2 Ch. 39.

8942. Administration of mortgaged property—Costs of suit postponed.]—A mtgee. filing a bill for the benefit of himself & the other creditors of deceased, is entitled to payment of his mortgage-money out of the mtged. estate, before payment of the costs of suit.—*ALDRIDGE v. WESTBROOK, PARSONS v. WESTBROOK* (1842), 5 Beav. 188; 40 E. R. 549.

Annotations:—Folld. Hepworth v. Heslop (1844), 3 Hare, 485. *Reid. Ford v. Chesterfield* (No. 3) (1856), 21 Beav. 426.

See, further, Sub-sect. 5, B. (b), post.

See, generally, MORTGAGE; PRACTICE.

B. As between Parties.

(a) Representatives.

8943. Representative entitled to priority.]—*LOOMES v. STOTHERD*, No. 8938, *ante*.

8944. — Effect of denial of assets—When not justified.]—*LODGE v. PRITCHARD*, No. 8236, *ante*.

8945. — As of right.]—A husband, whose wife was the extrix. & residuary legatee of her father, opened an account at his bankers in the name of his wife as such extrix. He afterwards closed his separate account, but moneys belonging to him were from time to time paid in to the wife's account, & the wife drew against it cheques for the payment of the husband's debts & of household expenses. The account remained for six years, when the husband died. The wife died shortly afterwards:—*Held*: the representative of the husband & the wife must have his costs of two suits for administering their respective estates, in priority to the costs of the other parties, for the right of priority rested upon principle, & was not within the discretion of the judge.—*LLOYD v. PUGHE, EVANS v. PUGHE* (1872), 42 L. J. Ch. 282; 28 L. T. 250; 21 W. R. 346, L. C. & L. J.J.

Annotations:—Mentd. Re Eykyn's Trusts (1877), 6 Ch. D. 115; *Parker v. Lechmere* (1879), 12 Ch. D. 256.

8946. — Fund insufficient.]—*JACKSON v. WOOLLEY*, No. 8886, *ante*.

8947. — — —.]—Where the fund is deficient, the exors.' costs of an administration suit are paid thereout in priority of those of the other parties.—*TANNER v. DANCEY* (1846), 9 Beav. 339; 50 E. R. 374.

8948. — — —.]—An estate was devised subject to the payment of legacies to pltf's. The devisee died before testatrix, & her heir-at-law entered into possession of the property, & in 1847 devised the same to defts., upon certain trusts. Defts. having refused to pay the legacies, the estate was, on claim filed by the legatees, ordered to be sold, & the proceeds paid into ct. The fund

produced by the sale was not sufficient to pay the legacies & the costs of pltf's.:—*Held*: defts. were entitled to their costs out of the fund in priority to pltf's.—*WOOLIATT v. WOOLIATT* (1858), 4 Jur. N. S. 1292.

8949. — — —.]—In a bill by a legatee for the administration of an estate, it was probable that the assets would not even be sufficient to pay the costs:—*Held*: the costs were payable in the following order: first, the costs of the legal personal representative as between solr. & client; secondly, the costs & expenses of pltf. in selling & getting in the estate, & the costs of the heir in executing deeds; & thirdly, the other costs of all parties as between party & party *pari passu*.—*WETENHALL v. DENNIS* (1863), 33 Beav. 285; 9 L. T. 361; 12 W. R. 66; 55 E. R. 377; *sub nom. WETTENHALL v. DAVIS*, 9 Jur. N. S. 1216.

Annotations:—Consd. Henderson v. Dodds (1866), L. R. 2 Eq. 532. *Folld. Re Spensley's Estate, Spensley v. Harrison* (1872), L. R. 15 Eq. 16. *Reid. Re Richardson, Richardson v. Richardson* (1880), 14 Ch. D. 611; *Re Middleton, Thompson v. Harris* (1882), 19 Ch. D. 552.

8950. — — —.]—An exor. voluntarily confessed judgments, which he paid, & afterwards, in an administration suit, the assets were insufficient to pay the remaining debts:—*Held*: the exor. was still entitled to priority for his costs of suit.—*SANDERSON v. STODDART* (1863), 32 Beav. 155; 7 L. T. 662; 9 Jur. N. S. 1216; 11 W. R. 275; 55 E. R. 61.

Annotation:—Reid. Re Middleton, Thompson v. Harris (1882), 46 L. T. 359.

8951. — — —.]—(1) If, in an action by *cestuis que trust* under a creditors' trust deed against their trustees for accounts, & to have the rights of the parties ascertained, the costs of all parties are ordered to be paid out of the trust fund, & it appears probable that the fund will not be sufficient for payment of all the costs in full, the trustees are entitled to a direction for payment of their cost, charges, & expenses in priority to the costs of all other parties.

(2) Admissions between co-defts., under R. S. C., 1883, Ord. 32, r. 2, to which pltf. is not a party, cannot be entered as evidence against pltf., & therefore cannot be included in an order for taxation & payment of the general costs of the action.—*DODDS v. TUKE* (1884), 25 Ch. D. 617; 53 L. J. Ch. 598; 50 L. T. 320; 32 W. R. 424.

8952. — — —.]—Testator by his will made several specific legal devises of real estate of which one was to J. one of his exors., & another was to L. He devised the remainder of his real estates & bequeathed his personal estate to trustees, upon trusts for sale & conversion, & to stand possessed of the proceeds upon trust, after payment of his debts, & funeral & testamentary expenses, to pay certain pecuniary legacies, & he gave the residue of the trust moneys, unto & equally between his paternal next of kin. J. alone proved the will. The estates devised to J. & L. had, under the provisions of a settlement, been respectively liable to have two sums of £3,000 & £1,200 respectively raised out of them. The right to those sums had become vested in testator. An action to administer testator's

PART VIII. SECT. II, SUB-SECT. 5.— **B. (a).**

8946 I. Representative entitled to priority—Fund insufficient.]—In a creditor's administration suit, in which the general assets turned out to be in-

sufficient to pay the costs of suit in full, defts., exors. of deceased, claimed priority for their costs of suit, as against a secured creditor who had established a charge upon a fund which had been realised in connection with a sale in another suit, & had been

brought into ct., & carried to a separate account:—*Held*: they could only claim priority for such of their costs of suit as were relative to the separate account.—*BELL v. BUTTERLY*, [1911] 1 L. R. 312.—*IR.*

estate was brought by W. one of the residuary legatees against J. & L. the only question in dispute being whether the two sums of £3,000 & £1,200 were raisable as part of testator's personal estate. It was held that they were not raisable, but that they had become merged in the estates on which they were respectively charged. The result of this decision was that the personal estate was deficient. An action had been previously brought in the Probate Div. by W. & another residuary legatee against J., impeaching the validity of testator's will. The ct. pronounced for the validity of the will but ordered that the costs of all parties in the action, should be paid out of the personal estate. On the further consideration of the administration action:—*Held*: (1) the personal estate & the proceeds of the sale of the residuary real estate must be applied in paying: (a) the costs, as between solr. & client, of the exor., & his costs, charges & expenses properly incurred, including his costs of the probate action; (b) the costs, as between party & party of pltf. & deft. L. ratably; & there being a deficiency the costs of the action, so far as not provided for, must be borne by the specifically devised real estates ratably, according to their respective values at the time of testator's death; (2) there was no jurisdiction to charge the costs of the probate action, other than the exor.'s costs, on the real estate; (3) the above order could be made, though some of the specific devisees were not before the ct.

Qu.: whether the order could be enforced against the absent specific devisees.—*Re PRICE, WILLIAMS v. JENKINS* (1886), 31 Ch. D. 485; 55 L. J. Ch. 501; 54 L. T. 416; 34 W. R. 291.

Annotation:—*Reid. Re Prince, Godwin v. Prince*, [1898] 2 Ch. 225.

8953. ———.]—An action was brought in the Probate Div. by an exor. to propound a will. The ct. pronounced in favour of the validity of the will, & ordered deft. to pay the costs, which he failed to do. Subsequently a creditor brought an action for the administration of testator's real & personal estate, to which the exor. was made a deft. It then appeared that testator had left no personal estate, but only real estate, which was insufficient to satisfy the creditors in full:—*Held*: (1) the exor. was not entitled to be paid his costs incurred in the probate action in priority to the debts; (2) the estate was distributable in paying (a) the exor.'s costs in the administration action as between solr. & client; (b) pltf.'s costs in that action as between solr. & client; (c) the debts.—*Re PEARCE, McLEAN v. SMITH* (1887), 56 L. T. 228; 35 W. R. 358.

8954. ———. **Against joint creditor—Of solvent partner's estate.**]—*LODGE v. PRITCHARD*, No. 8236, *ante*.

8955. Order for payment out of particular fund—Whether representative's priority affected.]—By the decree on further directions, in a creditor's suit, the costs of all parties were directed to be taxed as between solr. & client, & paid out of a fund in ct. The fund proving insufficient to pay the costs, debts, the heir & administrator of debtor, petitioned to be paid their costs, in the first instance. But the ct. directed the fund to be divided amongst all the parties, in proportion to their costs.—*SWALE v. MILNER* (1834), 6 Sim. 572; 58 E. R. 708.

Annotations:—*N.F. Gaunt v. Taylor* (1843), 2 Hare, 413; *Re Griffith, Jones v. Owen*, [1904] 1 Ch. 807.

8956. ———.]—Notwithstanding an order on further directions in a creditor's suit that the costs of all parties should be taxed as between solr. & client, & paid out of a fund in ct., the fund proving insufficient to pay all the costs, the ct. ordered the costs of the exors. to be paid in the first place.—*GAUNT v. TAYLOR* (1843), 2 Hare, 413; 67 E. R. 170.

Annotations:—*Appld. Jennings v. Rigby* (1863), 33 Beav. 198. *Consd. Stanlar v. Evans, Evans v. Stanlar* (1886), 34 Ch. D. 470. *Follid. Re Griffith, Jones v. Owen*, [1904] 1 Ch. 807.

8957. ———.]—An order on the further consideration of an administration action that the costs of all parties are to be paid out of a fund in ct. does not amount to a direction that they are to be paid equally. If the fund turns out insufficient to pay all the costs, the costs of administrators must be paid in priority to those of other parties.—*Re GRIFFITH, JONES v. OWEN*, [1904] 1 Ch. 807; 73 L. J. Ch. 464; 90 L. T. 639.

8958. Mortgagee's costs of sale—Whether postponed to representative costs of suit—When assets deficient.]—In an administration suit by a mtgee. who has obtained an order for sale of the real & leasehold estate for payment of his debts, the personal representatives of testator are entitled, in case of deficiency of assets, to their own costs, charges & expenses, in priority to pltf.'s costs of the sale.—*Re SPENSLEY'S ESTATE, SPENSLEY v. HARRISON* (1872), L. R. 15 Eq. 16; *sub nom. Re SPENSLEY'S ESTATE, HARRISON v. SPENSLEY*, 42 L. J. Ch. 21; 27 L. T. 600; *sub nom. Re SPENSLEY, SPENSLEY v. SPENSLEY*, 21 W. R. 95.

8959. ———.]—In a suit by a legal mtgee. for a sale & general administration of the deceased mtgor.'s estate, the ct. refused to vary the minutes by directing, in case of deficiency of assets, the costs of suit of the exors. & devisees of the mtgor. to be paid in priority to the mtgee.'s costs of sale.—*PINCHARD v. FELLOWS* (1874), L. R. 17 Eq. 421; 43 L. J. Ch. 227; 29 L. T. 882; 22 W. R. 612.

(b) Mortgagees.

See, generally, MORTGAGE.

8960. Mortgagee not party to suit—Consenting to sale of mortgaged property—Right to priority not waived.]—Suit by a creditor for the administration of his deceased debtor's estate. The estate being insolvent, pltf. obtained a decree for sale of the real estate, subject to certain mtges. with which it was encumbered, or free from incumbrance with the consent of the mtgees. Under this decree the real estate was sold, with the consent of the mtgees., who were not parties to the suit. Upon petition by the mtgees. for payment of their costs, charges, & expenses out of the proceeds of the sale:—*Held*: by consenting to the sale, they had not waived their right to be paid their principal, interest, & costs in priority to the costs of pltf's. in the cause.—*HEPWORTH v. HESLOP* (1844), 3 Hare, 485; 9 Jur. 796; 67 E. R. 472.

Annotations:—*Consd. Ford v. Chesterfield* (1856), 21 Beav. 426. *Reid. Armstrong v. Storer* (1851), 14 Beav. 535; *Ward v. Mackinlay* (1864), 10 Jur. N. S. 1063.

8961. ———.]—*Semble*: a mtgee. not a party to an administration suit, but who consents to a sale of the mortgaged property in the suit, is entitled to be paid his principal, interest, & costs out of the produce of the sale in priority to the costs of the parties to the suit.—*Re MACKINLAY, WARD v. MACKINLAY* (1864), 2 De G. J. & Sm.

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358; 5 New Rep. 28; 34 L. J. Ch. 52; 11 L. T. 326; 10 Jur. N. S. 1063; 13 W. R. 65; 40 E. R. 414.

Annotation:—Refd. Re Oriental Hotels Co., Perry v. Oriental Hotels Co. (1871), L. R. 12 Eq. 126.

See, also, Nos. 8958, 8959, ante.

8962. Proceedings by mortgagee—Concurrence in sale of mortgaged property—Payment of mortgage debt in priority to costs.]—A creditor's bill was filed by a mtgee. who was also a simple contract creditor of testator in the cause, & in the course of the suit the mortgaged estate was sold, with the concurrence of the mtgee. & the purchase money paid into ct.:—*Held*: notwithstanding the nature of the suit, & that the mtgee. had proved his debt before the master, he was entitled to have the whole of the proceeds of the mortgaged estate applied, in the first instance, in payment of his principal debt & interest, before the payment of the costs of the suit.—*ALLEN v. ALDRIDGE* (1842), 6 Jur. 159.

8963. — Extent of priority—Dependent on propriety of proceedings.]—Where a puisne incumbrancer brought an action against other incumbrancers & the trustees of a will for administration of the estate:—*Held*: (1) so far as the administration proceedings were proper, & also for the benefit of the prior mtgees., pltf. was entitled to his costs of such proceedings out of the estate in priority to the prior mtgees. but must add the rest of the costs to his security; (2) the trustees' costs of the action, so far as such costs were costs of administration of which the prior mtgees. had had the benefit, must come out of the fund as between solr. & client.—*Re BARNE, LEE v. BARNE* (1890), 62 L. T. 922.

8964. — — —.]—So far as administration proceedings are necessary to enable mtgees. to realise their security, mtgees. will be entitled to add to their security their administration costs in the action so far as they relate to their security, & be paid the same in priority to the administration costs of the mtgor.'s exor.—*Re BANKS, DAWES v. SLADEN* (1896), 75 L. T. 387; *sub nom. Re BANKS, DAWES v. BANKS*, 45 W. R. 206.

Costs of mortgagee's representatives.]—*See No. 8911, ante.*

(c) *Other Persons.*

See R. S. C., Ord. 65, r. 1.

8965. Plaintiff—Creditor.]—*LOOMES v. STOTHERD*, No. 8938, *ante*.

8966. — Legatee—Getting in estate.]—*WETENHALL v. DENNIS*, No. 8949, *ante*.

8967. —.]—*Re MIDDLETON, THOMPSON v. HARRIS*, No. 8802, *ante*.

8968. Heir-at-law—Executing deeds.]—*WETENHALL v. DENNIS*, No. 8949, *ante*.

8969. Person standing in place of representative—Company.]—In an action to administer the estate of testator, the conduct was given to a co.

who were large creditors. The co., having taken out a summons with the approval of the judge to recover from the solrs. who had acted for the exor. a sum of money received by them out of the estate for their costs, were ordered to pay the solrs. their costs of the summons, which was dismissed; the co. was shortly afterwards ordered to be wound up by the ct., & had no means of paying the amount. A small sum, not enough to pay in full either the co.'s or the solrs.' costs of the summons, remained in ct. to the credit of the action:—*Held*: the solrs. were entitled, by subrogation to the right of the co., who stood in the shoes of the exor., to be indemnified out of the estate, & as the co. had been ordered to pay costs to the solrs., the latter had a right to be paid such costs out of the fund in ct., prior to the right of the co. to be paid thereout their own costs of the same proceedings.—*Re BLUNDELL, BLUNDELL v. BLUNDELL* (1890), 44 Ch. D. 1; 59 L. J. Ch. 269; 62 L. T. 620; 38 W. R. 707, C. A.

See, generally, PRACTICE.

SUB-SECT. 6.—PROCEEDINGS ON ORIGINATING SUMMONS.

8970. Summons under R. S. C., Ord. 55, r. 3—Discretion of court as to costs.]—*Re MEDLAND, ELAND v. MEDLAND*, No. 8568, *ante*.

8971. Summons for benefit of estate—By beneficiary or representative—Costs of all parties out of estate—As between solicitor & client.]—It has been my practice on the hearing of an originating summons, brought by trustees, or brought by a beneficiary adopted by trustees, as useful for solving questions in the administration of their trust, to allow the costs of all parties out of the estate as between solr. & client (*KEKEWICH, J.*).—*Re BRADSHAW, BRADSHAW v. BRADSHAW*, [1902] 1 Ch. 436; 71 L. J. Ch. 230; 86 L. T. 253; *subsequent proceedings* (1906), 50 Sol. Jo. 439, C. A.

Annotations:—Mentd. Re Beale's Settlement, Barrett v. Beales, [1905] 1 Ch. 256; *Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191; *Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 288; *Re Evered, Molinoux v. Evered* (1910), 79 L. J. Ch. 465; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1; *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492; *Cochrane v. Cochrane* (1922), 127 L. T. 737; *Re Cooke, Winckley v. Winterton*, [1922] 1 Ch. 292.

8972. — — —.]—All the costs of applications by originating summons in matters arising under wills or settlements, if made for the benefit of the estate, whether made by the beneficiaries or by the trustees, ought to be allowed out of the estate; but all the costs of such applications, if made by beneficiaries as adverse litigants, ought to fall on the unsuccessful party, with the possible exception of those of the trustees.

In one class of cases, the application is made by a beneficiary who makes a claim adverse to other beneficiaries, & really takes advantage of the convenient procedure by originating summons to get a question determined which but for this procedure, would be the subject of an action commenced by writ, & would strictly fall within the description of litigation. When once convinced that I am determining rights between

PART VIII. SECT. 8, SUB-SECT. 5— B. (c).

d. *Heir at law—When necessary party—Action by creditor.]—*Where in

an administration suit instituted by a creditor of a deceased debtor, it is necessary to make the heir-at-law a party deft., he is entitled to be paid his costs, as between solr. & client,

in priority to all other claims, although the estate may be insufficient to pay the debts proved against it.—*HART-RICK v. QUIGLEY* (1874), 21 Gr. 287.—*CAN.*

adverse litigants, I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, & order the unsuccessful party to pay the costs (KEKEWICH, J.).—*Re BUCKTON, BUCKTON v. BUCKTON*, [1907] 2 Ch. 406; 76 L. J. Ch. 584; 97 L. T. 332; 23 T. L. R. 692.

Annotations:—*Appld. Re Halston, Ewen v. Halston*, [1912] 1 Ch. 435. *Refd. Re Flecher, King v. King* (1918), 62 Sol. Jo. 740.

8973. ———.]—*Re FLECHER, KING v. KING*, No. 8753, *ante*.

8974. By beneficiaries as adverse litigants—Costs against unsuccessful party.]—*Re BUCKTON, BUCKTON v. BUCKTON*. No. 8972, *ante*.

8975. ———.]—Upon a summons by the legal personal representatives of testator to decide who was entitled, deft. & three co-heiresses-at-law of testator were made resps., but only one of the co-heiresses asserted a claim & appeared to support it:—*Held*: the costs of the successful resp. must be paid by the unsuccessful resp.—*Re HALSTON, EWEN v. HALSTON*, [1912] 1 Ch. 435; 81 L. J. Ch. 265; 106 L. T. 182; 56 Sol. Jo. 311.

See, generally, PRACTICE.

SUB-SECT. 7.—CONCURRENT ACTIONS.

A. Costs where Action Stayed.

8976. Costs of action stayed—Made costs in action proceeding.]—*LADBROKE v. SLOANE*, No. 8066, *ante*.

8977. ———.]—*GWYER v. PETERSON, PETERSON v. PETERSON*, No. 8089, *ante*.

8978. ———.]—*KENYON v. KENYON*, No. 8070, *ante*.

8979. ———.]—*Re WILLIAMS, JONES v. JONES*, [1882] W. N. 6.

8980. Stay after decree in one action—Costs allowed to notice of decree.]—A legatee agreeing, after a decree for the administration of the estate obtained in Chancery by another legatee, to stop proceedings in a suit previously instituted by him in the Exchequer, allowed his costs up to the time of his having notice of that decree.

Qu.: whether, after a decree for administration of assets, a legatee will be restrained on motion from suing for his legacy. *Qu.*: whether one ct. of equity will prevent a party from suing in another ct. of equity.—*JACKSON v. LEAF* (1820), 1 Jac. & W. 229; 37 E. R. 362, L. C.

8981. ———.]—After a decree for the administration of a testator's estate in England & Ireland, an incumbrancer upon the Irish estate having come in & proved his debt, restrained from proceeding in a creditor's suit, instituted by him in the Ct. of Ch. in Ireland, receiving the costs up to the time of his having notice of the decree, & paying the costs of the application.—*BEAUCHAMP v. HUNTLEY (MARQUIS), CLARKE v. ORMONDE (EARL)* (1822), Jac. 546; 37 E. R. 956, L. C.

Annotation:—*Refd. Carron Iron Co. v. Maclaren* (1855), 5 H. L. Cas. 416.

8982. ———.]—Creditor proceeding at law against the exor., after a decree, allowed his costs at law incurred previous to notice of the decree, but not his costs of the motion to restrain his pro-

ceedings.—*ANON.* (1825), 2 Sim. & St. 424; 57 E. R. 408.

8983. ———.]—*HAYWARD v. CONSTABLE*, No. 8055, *ante*.

8984. ———.]—Except costs of unsuccessful claim against executor.]—*TAYLOR v. SOUTHGATE*, No. 8061,

8985. ———.]—Where pltf., a creditor of testator, is proceeding at law for recovery of his debt, after a decree obtained in a creditors' suit in this ct., the order restraining the proceedings ought to direct payment of the creditors' costs of the proceedings at law, up to the time of notice of the decree, where there are assets in ct. sufficient to pay the same.—*TURNER v. DORGAN* (1842), 11 L. J. Ch. 126; 6 Jur. 356, L. C.; *subsequent proceedings, sub nom. TURNER v. DORGAN, MYATT v. DORGAN*, 12 Sim. 504.

8986. ———.]—*ROUSE v. JONES*, No. 8062, *ante*.

8987. ———.]—Subsequent costs refused—Whether plaintiff subjected to costs of other parties.]—*PORTARLINGTON (EARL) v. DAMER, LEWIS v. DAMER*, No. 8064, *ante*.

8988. ———.]—*TURNER v. CONNOR*, No. 8325, *ante*.

8989. ———.]—*WEST v. SWINBURNE* (1849), 19 L. J. Ch. 81; 15 L. T. O. S. 43; 14 Jur. 360. *Annotations*:—*Expld. Davey v. Plestow* (1850), 19 L. J. Ch. 491. *Refd. Cumberland v. Clark* (1869), 17 W. R. 524.

8990. ———.]—*MACMULLEN v. ACRES*, No. 8326, *ante*.

8991. Costs of application to stay.]—*BEAUCHAMP v. HUNTLEY (MARQUIS), CLARKE v. ORMONDE (EARL)*, No. 8981, *ante*.

8992. ———.]—*Semble*: a creditor proceeding at law, & who has notice of a decree against the exor., is not entitled to his costs of the exor.'s application for an injunction.—*ANON.* (1825), 3 L. J. O. S. Ch. 227.

8993. ———.]—*HAYWARD v. CONSTABLE*, No. 8055, *ante*.

8994. ———.]—*TURNER v. CONNOR*, No. 8325, *ante*.

8995. ———.]—*GRAHAM v. MAXWELL*, No. 8327, *ante*.

8996. ———.]—*BUSH v. WINDEY*, No. 8065, *ante*.

8997. ———.]—*WEST v. SWINBURNE* (1849), 19 L. J. Ch. 81; 15 L. T. O. S. 43; 14 Jur. 360.

Annotations:—*Expld. Davey v. Plestow* (1850), 19 L. J. Ch. 491. *Refd. Cumberland v. Clark* (1869), 17 W. R. 524.

8998. ———.]—*SALTER v. TILDESLEY, TILDESLEY v. TILDESLEY*, No. 8069, *ante*.

8999. Costs immediately payable—If assets admitted—Otherwise added to claim.]—*WEST v. SWINBURNE* (1849), 19 L. J. Ch. 81; 15 L. T. O. S. 43; 14 Jur. 360.

Annotations:—*Expld. Davey v. Plestow* (1850), 19 L. J. Ch. 491. *Refd. Cumberland v. Clark* (1869), 17 W. R. 524.

9000. ———.]—Where two suits are instituted by different creditors for the administration of the estate of deceased debtor, the form of order as to the payment of the costs of pltf. in the suit which is stayed is, that the exor. shall pay them if he have assets in hand; but if he have not, then that pltf. shall add them to his debt &

Sect. 8.—Costs: Sub-sect. 7, A. & B.; sub-sects. 8 & 9, A. & B.]

prove for his debt & the amount of his costs in the other suit.—*CANHAM v. NEALE*, *CORBOLD v. NEALE* (1858), 26 Beav. 266; 28 L. J. Ch. 69; 32 L. T. O. S. 189; 5 Jur. N. S. 52; 53 E. R. 900.

Annotation:—*Folld. Mosely v. Mosely* (1861), 4 L. T. 239.

9001. ———.]—MOSELY v. MOSELY (1861), 4 L. T. 239.

9002. ——— Debt undisputed.]—KING v. KING, No. 9004, *post*.

9003. Claim disputed—Costs reserved.]—Where a decree for the general administration of an estate has been made, & the ct. upon that ground restrains the proceedings in another, a creditor's suit, the question of payment of the costs of pltf. in such creditors' suit will be reserved, if the debt be disputed by the exors.—*DAVEY v. PLESTOW* (1850), 19 L. J. Ch. 491; 14 Jur. 388.

Annotation:—*Reid. King v. King* (1864), 10 L. T. 832.

9004. ———.]—Where, after an administration decree, a creditor is restrained from further prosecuting an action, the order usually provides for the immediate payment of his costs; but if his debt is disputed, payment will be postponed until it has been established in the suit.—*KING v. KING* (1864), 31 Beav. 10; 4 New Rep. 474; 34 L. J. Ch. 195; 10 L. T. 832; 10 Jur. N. S. 762; 12 W. R. 1095; 55 E. R. 535.

Annotation:—*Mentd. Re Life Assn. of England* (1864), 10 Jur. N. S. 762.

9005. Payable out of estate.]—RITCHIE v. BERSTONE (1853), 22 L. J. Ch. 1006; 17 Jur. 756.

9006. ———.]—WHEELHOUSE v. CALVERT, No. 8068, *ante*.

9007. No priority over costs in action proceeding.]—W. filed a creditor's bill to administer C.'s estate. An administration decree having shortly afterwards been made in a second suit, an order was made staying proceedings in the first suit, & directing W.'s costs to be taxed, & to be paid by the extrix. out of the assets. An order on further consideration was made in the second suit, ordering payment, first of the costs of the extrix., & then of pltf., but not providing for W.'s costs. W. then applied by summons for an order for payment of his costs of the first suit. He was offered an order for payment of them *pari passu* with the costs of pltf., but declined it. Upon which his application was refused. W. then appealed:—*Held*: the order for payment of W.'s costs by the extrix. out of the assets did not give them priority over the costs of the second suit; & as W. had refused to accept an order giving him all he was entitled to, his appeal must be dismissed.—*Re CLARK, CUMBERLAND v. CLARK* (1869), 4 Ch. App. 412; 17 W. R. 524, L. J.

generally, PRACTICE.

B. Costs where No Stay.

9008. Costs against plaintiff—Action for payment of legacy.]—PACKWOOD v. MADDISON, No. 8623, *ante*.

9009. Decree made in second suit—First suit

continued for further relief—Costs of first suit from assets of second.]—COSTERTON v. COSTERTON, CLARKE v. WENN, No. 8057, *ante*.

9010. Costs after notice of decree—Whether plaintiff entitled.]—(1) A creditors' suit coming on for further directions, the fund applicable to the payment of the debts being small, a reference to the master to apportion it between the creditors was dispensed with, & the apportionment directed to be made by affidavit.

(2) A creditor, who had brought an action against the exor. of a debtor, received notice of a decree for the administration of his estates. After this notice, & before any application was made to stay his proceedings, he went on with the action, & obtained judgment:—*Held*: he was entitled to the costs of his proceedings after notice of the decree.—*BEAR v. SMITH* (1851), 5 De G. & Sm. 92; 21 L. J. Ch. 176; 16 Jur. 708; 64 E. R. 1033; *sub nom. BARE v. SMITH*, 18 L. T. O. S. 219.

9011. ———.]—A suit was instituted by a creditor for the administration of a testator's estate, & another creditor sued the administratrix at law for the debt. Notice of a decree in the suit was given to pltf. in the action, who nevertheless continued the action & obtained a verdict for his debt & costs:—*Held*: the creditor was not entitled, as against the other creditors in the suit, to his costs in the action after notice of decree.—*SHARROD v. WINGFIELD* (1855), 25 L. J. Ch. 176; 26 L. T. O. S. 175; 1 Jur. N. S. 1154.

See, generally, PRACTICE.

8. — TAXATION OF COSTS.

See, generally, SOLICITORS.

SUB-SECT. 9.—APPEAL AS TO COSTS.

A. By Representative.

See Judicature Act, 1873 (c. 66), s. 40.

9012. Appeal maintainable—Unless costs in discretion of court—Through misconduct of representative.]—FARROW v. AUSTIN, No. 8678, *ante*.

9013. Appeal as to misconduct—Whether appeal as to costs.]—A creditor's bill was filed after notice of a decree in a simple administration suit by one of the next of kin of the intestate, but the decree was at that time imperfect in not containing the usual preliminary inquiries: the frame of the creditor's suit was also different in making the heir-at-law a party, & in containing charges as to real estate, & as to the destruction of documents. The creditor's suit having been brought to a hearing, the ct. made an order directing pltf. to pay a stated sum to the heir-at-law in lieu of costs, & ordered the administratrix to pay pltf.'s costs of suit:—*Held*: (1) inasmuch as the creditor might have obtained all the relief to which she was entitled in the former suit, the bill ought to

PART VIII. SECT. 8, SUB-SECT. 9.—A.

6. Additional costs incurred through representative's conduct.]—In an administration action commenced by

writ, pltf. was allowed upon taxation only such costs as would have been taxed had he begun his proceedings by a summary application under rule 965. Deft. claimed to have taxed to

him & set off his additional costs incurred by reason of the less expensive procedure not having been adopted. He had not in the action admitted the right of pltf. to an account, but had

have been dismissed, with costs; (2) under the circumstances, the appeal did not fall within the rule precluding an appeal for costs.—*MENZIES v. CONNOR* (1851), 3 Mac. & G. 648; 18 L. T. O. S. 337; 42 E. R. 409, L. C.

9014. ———.]—Exors. of sole exor. of a deceased sole trustee whose sole exor. had never acted in the trust, were applied to in Apr. 1883, to take steps to enable the tenant for life of a small sum of stock standing in the name of the deceased trustee to receive the dividends. In May, 1883, exors. handed to the solr. of the tenant for life the probate of testator's will, that he might produce it at the Bank of England, which he did. After some correspondence, in the course of which exors. asked for evidence of the title of the *cestuis*

which did not appear to have been produced, the solr. of the tenant for life about the end of May sent a power of attorney to be executed by exors. to enable her to receive the dividends. Exors. did not execute or return the power. In July the solr. of the tenant for life applied to exors. to appoint new trustees under Conveyancing Act, 1881 (c. 41), to which exors. replied, stating their ignorance of the title of the *cestuis que trust*. Ultimately, in Nov. 1883, the *cestuis que trust* presented a petition for the appointment of new trustees & a vesting order:—*Held*: (1) the representative of a deceased trustee is not bound at the request of the *cestuis que trust* to exercise the power of appointing new trustees given by above Act; the refusal to do so was not a sufficient reason for ordering exors. to pay the costs of a petition for the appointment of new trustees; (2) the conduct of exors., who on the materials before him appeared to have accepted the trust by taking a transfer of the stock into their own names, had been vexa-

tious, & they must pay the costs which would have been occasioned by a petition simply asking for payment of dividends to the tenant for life, & they could not be allowed any costs out of the fund. Exors. appealed:—*Held*: (3) an objection that this was an appeal for costs only was not sustainable; (4) as the *cestuis que trust* had not taken proper steps to satisfy exors. as to their title, exors. had not been guilty of any such misconduct as is necessary to deprive a trustee of his right to costs out of the trust fund, & they must have their costs below, but as the Ct. of Appeal was not satisfied with their conduct they ought to have no costs of their appeal.

A trustee is entitled to costs unless it is adjudicated against him that he has been guilty of misconduct & until that is adjudicated his costs are not within the discretion of the ct. whether he has been guilty of misconduct is a matter on which an appeal must lie (*COTTON, L.J.*).—*Re KNIGHT'S WILL* (1884), 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417, C. A.

Annotation:—*Generally, Reid. Re Carthew, Re Paull* (1884), 51 L. T. 435.

Compare Nos. 8561, 8637, ante.

B. By Other Persons.

9015. No right to appeal—Where costs in discretion of court.]—*Re McCLELLAN, McCLELLAN v. McCLELLAN*, No. 8679, *ante*.

9016. ———.]—*WILLIAMS v. JONES*, No. 8677, *ante*.

9017. Costs ordered out of specific fund—Excess of accumulation under Accumulation Act, 1800 (c. 98)—Right of appeal.]—*EYRE v. MARSDEN*, No. 8829, *ante*.

pleaded a release, & had not objected to the procedure adopted:—*Held*: deft.'s additional costs had not been incurred by reason of pltf.'s improper

or unnecessary proceedings, but by his own conduct in not admitting the right to an account, & in not objecting to pltf.'s manner of proceeding at the

earliest possible stage; & the case therefore did not come within rule 1195.—*MOON v. CALDWELL* 15 P. R. 159.—*CAN.*

EXECUTORY DEVISE.

See REAL PROPERTY AND CHATTELS REAL ; TRUSTS AND TRUSTEES ; WILLS.

EXHIBITS.

See EVIDENCE.

EXONERATION OF REAL OR PERSONAL ESTATE.

See EXECUTORS AND ADMINISTRATORS.

EXPECTANT HEIRS.

See FRAUDULENT AND VOIDABLE CONVEYANCES ; MONEY AND MONEY-LENDING.

EXPIRING LAWS.

See STATUTES.

EXPLOSIVES.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

EXTENT.

See CROWN PRACTICE ; EXECUTION ; PRACTICE AND PROCEDURE.

EXTERRITORIALITY.

See ALIENS ; CONSTITUTIONAL LAW ; DEPENDENCIES ; FISHERIES.

EXTORTION.

See CRIMINAL LAW AND PROCEDURE.

EXTRADITION AND FUGITIVE OFFENDERS.

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<i>Aliens</i>	<i>See</i> ALIENS.	<i>Habeas Corpus generally</i>	<i>See</i> CROWN PRACTICE.
<i>Colonies</i>	DEPENDENCIES.	<i>Home Secretary</i>	CONSTITUTIONAL
<i>Conflict of Laws</i>	CONFLICT OF LAWS.		LAW.
<i>Courts</i>	COURTS; MAGIS- TRATES.	<i>Prisons</i>	PRISONS.
<i>Criminal Procedure</i>	CRIMINAL LAW.	<i>Punishment for Criminal</i> <i>Offences</i>	CRIMINAL LAW.
<i>Foreign Jurisdiction of the</i> <i>Crown</i>	CONSTITUTIONAL LAW.	<i>Secretaries of State</i>	CONSTITUTIONAL LAW.
		<i>Summary Jurisdiction,</i> <i>Courts of</i>	MAGISTRATES.

Part I.—Extradition to Foreign Countries.

SECT. 1.—EXTRADITION TREATIES.

SUB-SECT. 1.—IN GENERAL.

Extradition treaties in force.]—*See* Index to Statutory Rules & Orders in Force on June 30, 1924, pp. 284, 285.

1. Conditions precedent to extradition—Foreign law provision for extradition crime—Extradition Act, 1870 (c. 52), s. 3 (2).]—B. was arrested in the island of Jersey, under a warrant issued pursuant to above Act, & was sent to prison, there to remain for fifteen days, after which he was to be surrendered to the French authorities. He had been condemned by a French ct., upon a judgment for three separate offences, one of which, *abus de confiance*, was not within the existing extradition treaty between this country & France, nor within above Act. By above sub-sect. "a fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded":—*Held*: under the existing law of France such a provision is made, & therefore B. was not entitled to be discharged.

Semble: sect. 27 of above Act has the effect of keeping in full force the treaty, though it repeals the Act passed to give it effect.—*RE DOUVIER*

(1872), 42 L. J. Q. B. 17; 27 L. T. 844; 12 Cox, C. C. 303.

2. ———.]—Upon the committal of a fugitive criminal under sect. 10 of above Act, upon alleged charges of forgery committed in the State of New York, it was suggested that, upon being extradited, the prisoner might be tried in America for some charge other than the alleged charges of forgery in respect of which she had been surrendered, & accordingly a rule *nisi* for *habeas corpus* was granted:—*Held*: the rule must be discharged, since the Govt. of the United States of America had made provision for above sub-sect. of above Act, & a fugitive criminal would be tried there solely for the offence in respect of which he had been surrendered.—*Re WOODHALL* (1888), 57 L. J. M. C. 72; 59 L. T. 549; 52 J. P. 646; 4 T. L. R. 532; 16 Cox, C. C. 478, D. C.

3. Treaty incorporated with Extradition Act—Limitation of operation of Act.]—*R. v. WILSON*, No. 9, *post*.

SUB-SECT. 2.—APPLICATION OF EXTRADITION ACTS BY ORDER IN COUNCIL.

4. How limited—Subject to terms of treaty.]—*R. v. WILSON*, No. 9, *post*.

———.].—*See* Extradition Act, 1870 (c. 52), s. 4.

Application to British Dominions & Possessions.]

—*See* PART III., SECT. 1, SUB-SECT. 1.

PART I. SECT. 1, SUB-SECT. 1.

a. Conditions precedent to extradition.]—Independent of special compact, no State is bound to deliver up fugitives from justice upon the demand of a foreign State, & there is no rule of the law of nations which requires the Supreme Ct. of Queensland to assist the police of a foreign dominion in bringing foreigners to justice.—*R. v. KING, Ex p. KING* (1860), 1 Q. S. C. R. 1.—AUS.

b. Whether liberal interpretation of treaties proper.]—*R. v. MORTON* (1868), 19 C. P. 9.—CAN.

c. Extradition to United States—Application of Imperial Acts.]—40 Vict. c. 25 (D), is not in force, but the law & practice relating to the extradition of fugitive criminals between the United States & Canada, is to be found in the Ashburton Treaty, Art. X., 31 Vict. c. 94 (D), 33 Vict. c. 25 (D), & the Imp. Acts, 33 & 34 Vict. c. 52, & 36 & 37 Vict. c. 60.—*R. v. BROWNE* (1871), 31 C. P. 484;

■ A. R. 386.—CAN.

d. East Indian possessions—Whether included in treaty with France.]—By the treaty with France, 1878, the East Indian possessions of the two countries are excluded therefrom, & are not a "Foreign State" within Indian Extradition Act (XV. of 1903), s. 2 (a), & Chapter II., the provisions of which are not, therefore, applicable to such possessions.—*RAHAMAT ALI v. R.* (1919), 1 L. R. 47 Calc. 37.—IND.

e. ———.]—Chandernagore is a "Foreign State" as defined by Indian Extradition Act, s. 2 (c), & the provisions of Chapter II. thereof must be followed before a fugitive can be surrendered to the French authorities. The concluding portion of Art. XVI. of the treaty with France of 1876 does not exclude its East Indian possessions, but is a saving clause intended to preserve intact the special arrangement established by Art. IX. of the Treaty of 1815. The

Order in Council of May 16, 1878, applied the English Extradition Acts, 1870, 1873, to the case of France & therefore, by reason of Extradition Act, 1870, s. 25, to the East Indian possessions of France as part thereof.—*Re CULLINGTON* (1920), 1 L. R. 48 Calc. 328.—IND.

PART I. SECT. 1, SUB-SECT. 2.

4 i. How limited—Subject to terms of treaty.]—The ordinary meaning of the language used in a treaty between two powers cannot be regulated by the special meaning given by such language by an Act of Parliament passed by one of them. The effect of an Order in Council in pursuance of Extradition Act, 1870, s. 2, directing that the Act shall apply to an extradition treaty with a foreign State, is not that the treaty is to be construed as if it were part of the Act, or that the statutory interpretation applying to the Act shall be applied to the treaty.—*Re GERHARD* (No. 2) (1901), 27 V. L. R. 484.—AUS.

SECT. 2.—APPLICATION OF EXTRADITION ACTS.

SUB-SECT. 1.—PERSONS.

Fugitive criminal—Definition.]—See Extradition Act, 1870 (c. 52), s. 26.

5. ——— **Convicted “par contumace” —In France.]—***Re COPPIN*, No. 100, *post*.

See, now, Extradition Act, 1870 (c. 52), s. 26.

6. ——— **Offender outside state seeking surrender—Fraud by post.]—***R. v. JACOBI & HILLER*, No. 49, *post*.

7. ——— ——— ———.]—*N.*, being in Southampton, wrote & sent certain letters containing alleged false pretences to certain persons carrying on business within the jurisdiction of the German Empire, thereby inducing them to part with certain goods & deliver them to his order to certain persons in Hamburg. *N.* also sent to the same persons certain alleged forged cheques in payment:—*Held*: *N.* was a fugitive criminal within the Extradition Act, 1870 (c. 52), s. 26, & was rightly committed by the police magistrate to await the warrant of the Secretary of State for his extradition.—*R. v. NILLINS* (1884), 53 L. J. M. C. 157, D. C.

Annotation:—*Folld. R. v. Godfrey*, [1923] 1 K. B. 24.

8. ——— ——— **False pretence through partner.]—**By Extradition Act, 1870 (c. 52), s. 26, a fugitive criminal is defined as “any person accused . . . of an extradition crime . . . who is in” this country.

Appct. was charged with obtaining goods by false pretences in Switzerland, the false pretences being alleged to be made in that country by a partner at the procuration in this country of *appct.* The latter was not physically in Switzerland at the time when the pretences were made nor had he been there since. He was arrested in England:—*Held*: he was a “fugitive criminal” within above sect., & accordingly, he could be extradited.—*R. v. GODFREY*, [1923] 1 K. B. 24; 92 L. J. K. B. 205; 128 L. T. 115; 86 J. P. 219; 39 T. L. R. 5; 67 Sol. Jo. 147; 27 Cox, C. C. 338, D. C.

9. ——— **British subject—Treaty with Switzerland—Extradition Act, 1870 (c. 52), s. 2.]—**A treaty having been made between this country & the Swiss Govt. under above Act, which provided that no Swiss should be delivered up by Switzerland to the govt. of the United Kingdom, & no subject of the United Kingdom should be delivered up by the govt. thereof to Switzerland; & an Order in Council having been made, which directed that above Act should apply in the case of the treaty:—*Held*: the treaty must be taken to be incorporated with, & to limit the operation of above Act, & no British subject in this country could be surrendered to the Swiss govt.

I cannot entertain a shadow of doubt that, in accordance with the special provision in Extradition Act of 1870, by which Her Majesty may make the treaty & the application of the Act subject to any terms & conditions that she may think proper: the Order in Council must be co-extensive with & limited by, the treaty. I must therefore take it that the Order in Council has embodied the terms

of the treaty & that the Act is only applicable so far as it can be applied consistently with the terms & conditions therein contained (*COCKBURN*, C.J.).

The Act proceeds upon the fact that there has been some arrangement between this country & a foreign state & accordingly we find that in this particular case a previous arrangement had been made which is stated in the Orders in Council & yet [counsel] asks us to disregard this arrangement altogether, & to hold that the Act applies in its entirety, although the arrangement itself contains an exception & condition. The Act declares that certain crimes shall or shall not be the subject of extradition. Suppose that by the treaty certain crimes were omitted, could it be contended that, although the Order in Council recited the treaty in terms yet still the Act applied (*FIELD*, J.).—*R. v. WILSON* (1877), 3 Q. B. D. 42; 48 L. J. M. C. 37; *sub nom. Re WILSON*, 37 L. T. 354; 41 J. P. 708; 26 W. R. 44; 13 Cox, C. C. 630, D. C.

Annotations:—*Consd. R. v. Ashforth* (1892), 8 T. L. R. 283; *Re Galwey*, [1896] 1 Q. B. 230. *Distd. R. v. Brixton Prison*, [1911] 2 K. B. 82.

10. ——— ——— **Onus of proof of nationality.]—**The prisoner asserts that he is a British subject. The *onus* rested upon him of showing that he is a British subject—that is, either born in this country, or, if born abroad, born of parents of British nationality (*LORD COLERIDGE*, C.J.).—*Re GUERIN* (1889), 5 T. L. R. 188, D. C.

11. ——— ——— **Treaty with Belgium, 1887—Discretion of Secretary of State.]—**(1) By a treaty made between this country & Belgium the contracting parties undertook to deliver up to each other reciprocally fugitive offenders accused of certain specified offences; but it was expressly provided that “in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalisation.” The surrender of a British subject was demanded by the Belgian Govt. in respect of certain extradition offences of the commission of which there was sufficient *prima facie* evidence to justify his extradition, & an order for his committal was made by a magistrate with a view to his surrender:—*Held*: the accused, although a British subject, was a person “liable to be surrendered” within Extradition Act, 1870 (c. 52), s. 6, & the order of committal was rightly made.

(2) Under the provisions of the treaty with Belgium, the ordinary proceedings in extradition may be taken in the case of a British subject; it is not necessary that in each particular case the surrender should be the result of negotiations between the respective Govts. & of an express consent by the British Govt. to the extradition.

(3) The surrender of a British subject to Belgium under Extradition Act, 1870 (c. 52), now rests in the discretion of the Secretary of State.—*Re GALWEY*, [1896] 1 Q. B. 230; 65 L. J. M. C. 38; 73 L. T. 756; 44 W. R. 313; 12 T. L. R. 150; 40 Sol. Jo. 213; 18 Cox, C. C. 213; *sub nom. R. v. GALWEY*, 60 J. P. 87, D. C.

12. ——— **Subject of foreign state—Treaty with the Netherlands.]—**(1) An extradition treaty

PART I. SECT. 2, SUB-SECT. 1.

1. **Fugitive criminal—British subject.]—**Art. 2 of the Extradition Treaty between England & France which provides that native born or

naturalised subjects of either country are excepted from extradition, limits the operation of Extradition Act, 1870, & under that Act an Englishman who has been convicted in France & transported to New Caledonia, &

escapes to this colony, cannot be surrendered.—*Ex p. MARKS* (1894), 15 N. S. W. L. R. 179; 10 N. S. W. W. N. 224.—AUS.

g. Criminals from United States
Z 2

Sect. 2.—Application of Extradition Acts: Sub-sects. 1 & 2, A.]

between the United Kingdom & the Netherlands provided that the Govts., parties to the treaty, reciprocally deliver up to each other any persons who, being accused of any of certain specified crimes committed within the jurisdiction of the party requiring the extradition, should be found in the territories of the other party. The treaty further provided that neither of the contracting govts. should be bound to deliver up its own subjects, & that a person arrested under the treaty in either country should be discharged, if within fourteen days a requisition should not have been made for his surrender by the diplomatic agent of "his" country:—*Held*: the provisions for the extradition of criminals under the treaty were not confined to persons who were subjects of the state requiring the extradition, but applied to all persons who had committed any of the specified crimes within the jurisdiction of such state of whatever nationality they might be, except subjects of the state from which extradition was required.

(2) A document produced before a magistrate as the "foreign warrant" of arrest under Extradition Act, 1870 (c. 52), s. 10, was sealed with the seal of the department of justice at the Hague, & purported to be a copy of the record or minutes of a certain order or decree of the Criminal Ct. of Justice there, setting forth the charges against the criminal whose extradition was sought, & authorising proceedings against him & his arrest:—*Held*: the production of such a document before the magistrate was a sufficient compliance with the provisions of Extradition Act, 1870 (c. 52), s. 10, which provides that the magistrate may commit the criminal to prison, if, *inter alia*, the foreign warrant authorising his arrest is duly authenticated.—*R. v. GANZ* (1882), 9 Q. B. D. 93; 51 L. J. Q. B. 419; 46 L. T. 592, D. C.

Annotations:—As to (1) *Consd. R. v. Brixton Prison, R. v. Holloway Prison*, [1912] 2 K. B. 578. *As to (2) *Reid. Ex p. Plot* (1883), 48 L. T. 120. Generally, *Mentd. R. v. Brixton Prison, Ex p. Savarkar*, [1910] 2 K. B. 1056.*

.]—*See, also*, Treaty with Ecuador, 1880; Treaties with United States of America, &, generally, Treaties with particular States requisitioning.

13. — Extradition proceedings abroad invalid—Subsequent proceedings in England.]—

(1) Habeas Corpus Act, 1679 (c. 2), s. 6, only applies where the return to the second writ of *habeas corpus* raises for the opinion of the ct. the same question with regard to the validity of the grounds of detention as the first. Therefore, where a prisoner, a German subject, was discharged from custody upon directions given by a High Ct. of Judicature in India in the nature of *habeas corpus* on the ground that his detention was illegal in consequence of an informality in the course of proceedings before a magistrate for the extradition of the prisoner from India to Germany:—*Held*: he could be re-arrested in England & committed by a magistrate for extradition to Germany in proceedings validly conducted before him upon the same charge as that which formed the subject of the invalid extradition proceedings in India.

—**Application of Dominion statute.]—**The only existing law as to the extradition of criminals between the United States & Canada is Imperial Act, 1870 (33 & 34 Vict. c. 53), modified by 31

Vict. c. 91 (D), & 33 Vict. c. 25 (D). Canadian Extradition Act, 1877, 40 Vict. c. 25 (D), does not apply to criminals from the United States, as the operation of Imperial Act, 1870,

By art. 4 of the Extradition Treaty with Germany, 1872, extradition is not to take place if the person claimed has already been "tried & discharged":—*Held*: the prisoner had not been "tried & discharged" in India, inasmuch as the word "tried" in the treaty is used in the strict sense of the term, & does not include a preliminary investigation as to whether there is sufficient evidence for extradition.

(3) The prisoner was charged with obtaining money & goods by false pretences from D. There was evidence that the prisoner, D., & a third person played a game of cards [*rouge et noir*] at which the prisoner & the third person in collusion cheated D. As the result of the play a sum of 80,000 marks, about £4,000, was won from D. by the third person. The third person drew some blank bill forms out of his pocket, & the prisoner requested D. to accept one. D. accordingly wrote his acceptance upon it, & it was subsequently signed by the third party as drawer & endorsed by him & the prisoner:—*Held*: there was evidence upon which the prisoner could properly be charged with obtaining money & goods by false pretences, & as that crime is included in the Extradition Treaty with Germany, 1872, an order could be made for the extradition of the prisoner from England to Germany.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. STALLMANN*, [1912] 3 K. B. 424; 82 L. J. K. B. 8; 107 L. T. 553; 77 J. P. 5; 28 T. L. R. 572; 23 Cox, C. C. 192, D. C.

14. Discharged criminal—Treaty with Netherlands, 1874, Art. 4.]—*R. v. HOLLOWAY PRISON (GOVERNOR), Ex p. BUDDENBORG*, No. 115, *post*.

15. — Treaty with Germany, 1872, Art. 4.]—By art. 4 of the Treaty between Great Britain & Germany for the Mutual Surrender of Fugitive Criminals of May 14, 1872, it is provided that extradition shall not take place if the person claimed has already been tried & discharged. By art. 5 of the Treaty extradition shall not take place if exemption from prosecution or punishment has been acquired by lapse of time according to the laws of the State applied to. A criminal was by a competent ct. in Germany sentenced to a term of imprisonment for several extradition crimes. Before the term had expired he was, under an article of the Criminal Procedure Ordinance of the German Empire, released from custody on account of his health, but with the liability to be called upon subsequently to serve the residue of the term of imprisonment. At a subsequent date, when the term of imprisonment, if it had been served continuously, would have expired, the criminal was called upon by the competent authority in Germany to serve the residue of the term:—*Held*: (1) he had not been discharged within the meaning of art. 4 of the treaty; & (2) exemption from punishment had not been acquired by lapse of time according to the laws of the State applied to within the meaning of art. 5 of the treaty; & the criminal was liable to be extradited.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. CALBERLA*, [1907] 2 K. B. 861; 76 L. J. K. B. 1117; 98 L. T. 100; 71 J. P. 509; 23 T. L. R. 737; 51 Sol. Jo. 721; 21 Cox, C. C. 544, D. C.

16. — —.]—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. STALLMANN*, No. 13, *ante*.

has not "ceased or been suspended within Canada."—*Re WILLIAMS* (1878), 7 P. R. 275.—CAN.

h. Accessory to crime.]—An accessory before the fact is liable to

17. Escaped convict—Treaty with France, 1876, Art. 1.]—Appct., a French subject, was convicted in France of robbery with violence, a crime specified in the Extradition Treaty between Great Britain & France, & sentenced to a term of imprisonment. While undergoing his sentence he broke out of prison & escaped to England. An order having been made by a police magistrate committing appct. for extradition to France as having been convicted of the crime, a rule for a writ of *habeas corpus* was applied for, appct. contending that neither Extradition Act, 1870 (c. 52), nor the Extradition Treaty with France applied to the case of a convict who broke out of prison, & that the offence of prison breach was not an extraditable offence:—*Held*: the committal for extradition was right as appct. was “a fugitive criminal alleged to have been convicted of an extradition crime” within Extradition Act, 1870 (c. 52), s. 10, & a person “convicted of a crime” within Art 1 of the Extradition Treaty with France.—*Ex p. MOSER*, [1915] 2 K. B. 698; 84 L. J. K. B. 1820; 113 L. T. 496; 31 T. L. R. 384, 438; 25 Cox, C. C. 69, D. C.

18. Accessory to crime—Married woman—Husband's fraudulent bankruptcy.]—*Re COUNHAYE*, No. 103, *post*.

—*See, now*, Extradition Act, 1873 (c. 60), s. 3.

19. Political offenders — Anarchist.] — *Re MEUNIER*, No. 37, *post*.

See, further, Sub-sect. 2, B., *post*.

20. Nationality of accused—Issue ordered to decide.]—*Re GUERIN*, No. 59, *post*.

SUB-SECT. 2.—OFFENCES.

A. In General.

See, generally, Extradition Act, 1870 (c. 52), sched. 1; Extradition Act, 1873 (c. 60), s. 8, & sched., & Treaties with particular States requisitioning.

21. General rule.]—(1) The offence in English law of fraudulent falsification of accounts by a director, public officer, or member of a public co. is an offence within the French Code Penal, art. 147, & is covered by the expression “*faux en écritures de commerce*” in that art. Although it may not amount to forgery according to English law, that offence is an extradition crime within the French version of art. 3 (2) of the extradition treaty with France, & within the English version of art. 3 (18) of the same treaty, & also within the Extradition Acts.

The conditions of extradition, the fulfilment of which we have in this case to consider, are the

following: The imputed crime must be within the treaty; it must be a crime against the law of the country demanding extradition; it must be a crime within the English Extradition Acts; & there must be such evidence before the committing magistrate as would warrant him in sending the case for trial if it were an ordinary case in this country (LORD RUSSELL, C.J.).

(2) I think I have correctly stated the view of the facts taken by the learned chief magistrate. We are not a ct. of appeal on questions of fact from him. We have only to see that he had such evidence before him as gave him authority & jurisdiction to commit. But lest there should be any misapprehension, I think it well that the view of the ct. should be presented to him & that the order of committal should be remitted to him in order that it may be made clear in respect of what crime of “*faux*.” A. is committed (LORD RUSSELL, C.J.).—*Re ARTON* (No. 2), [1896] 1 Q. B. 509; 65 L. J. M. C. 50; 74 L. T. 249; 60 J. P. 132; 44 W. R. 351; 12 T. L. R. 189; 40 Sol. Jo. 258; 18 Cox, C. C. 277, D. C.

Annotations:—*As to* (1) *Consd. R. v. Dix* (1902), 18 T. L. R. 231; *R. v. Brixton Prison, Ex p. Stallmann*, [1912] 3 K. B. 424. *Reid. R. v. Holloway Prison* (1900), 16 T. L. R. 247; *R. v. Brixton Prison, Re Percival* (1907), 76 L. J. K. B. 619. *As to* (2) *Consd. R. v. Holloway Prison, Re Silletti* (1902), 71 L. J. K. B. 935; *R. v. Brixton Prison, Ex p. Servini*, [1914] 1 K. B. 77; *R. v. Brixton Prison, Ex p. Perry*, [1924] 1 K. B. 455.

22. Inclusion in treaty—Inclusion in Act.]—*R. v. WILSON*, No. 9, *ante*.

23. — — —.]—*Re ARTON* (No. 2), No. 21, *ante*.

24. Offence constituting crime—By law of both countries—Forgery under local but not under general law of state.]—(1) Extradition Act, 1843 (c. 76), between this country & the United States of America, following the language of a treaty between them, enacts that all persons “charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper,” may be delivered up to justice:—*Held*: this must be understood to mean such acts as amount to any of those offences according to the law of England & the general law of the United States, & does not comprise offences which are only such by the local legislation of some particular state of the American Union.

(2) A. was paying teller of a bank at New York, & as such was accountable for the cash at the bank. He kept the usual paying teller's book called the proof book, & proved his cash by it every day. From this book the general bookkeeper took his figures to show the condition of the bank on the general ledger from day to day. The book in question was one of the books of account of the bank, & the property of the bank. In it he entered by the paying teller from the receiving teller's books, or from the lists of deposits, the money

extradition, but an accessory after the fact is not.—*R. v. BROWN* (1881), 6 A. R. 386; 31 C. P. 484.—CAN.

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21 i. General rule.]—“The offence for which he was surrendered” within the Extradition treaty with U.S.A., refers to the specific offence with which the accused was charged in the complaint upon which his extradition was obtained.—*R. v. BUCK*, [1917] 3 W. W. R. 117; 111 Can. Crim. Cas. 45.—CAN.

k. Offence constituting crime — By law of both countries.] — *R. v. MACDONALD, Ex p. STRUTT* (1901), 11 Q. L. J. 85.—AUS.

l. — — —.] — *Ex p. WORMS* (1876), 22 L. C. J. 109.—CAN.

m. — — —.] — *Re MURPHY* (1895), 22 A. R. 386.—CAN.

n. — — — Offence referred to by wrong name.]—Where there is evidence of the commission of an act which is recognised as a crime by the

law of Canada & the law of the country demanding the extradition of the accused person, extradition will lie, though in the proceedings therefor the offence is referred to by the wrong name.—*Re GROSS* (1898), 25 A. R. 83.—CAN.

o. — — —.] — Where the demanding country is one of the United States, it is sufficient if the imputed crime be a crime according to the law of that State, although not an offence against the general laws of the United States.—*Re COLLINS* (1905), 11

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received each day, & also the amounts paid out by the paying teller, or amounts for which the bank was responsible each day. The proof book also contained a statement of the assets of the bank in coin & cash, so that the proof books should each show each day the exact amount of money in the bank. A. falsely & with intent to defraud entered a certain sum in this book as assets of the bank:—*Held*: this was not a forgery by the law of England or the general law of the United States, and therefore that he could not be given up under Extradition Act, 1843 (c. 76).—*Re WINDSOR* (1865), 6 B. & S. 522; 6 New Rep. 96; 34 L. J. M. C. 163; 12 L. T. 307; 29 J. P. 327; 11 Jur. N. S. 807; 10 Cox, C. C. 118; 122 E. R. 1288; *sub nom.* R. v. WINDSOR, 13 W. R. 655.

25. ——— Piracy *jure gentium*.]—A.-G. FOR COLONY OF HONG KONG v. KWOK-A-SING, No. 32, *post*.

26. ——— Technical name of crime—Equivalent for foreign term.]—*Re ARTON* (No. 2), No. 21, *ante*.

27. ——— ——— ———.]—The first point arose on the information for larceny. In that information it was alleged that the prisoner had received deposits when the bank was insolvent or in failing circumstances. The A.-G. at once conceded that there was not an offence by the law of England. Accordingly the proper course to take would be that pointed out by *Re Arton* (No. 2), No. 21, *ante*. The order of committal should be remitted to the magistrate in order that it might be made clear to the magistrate that the prisoner was not to be extradited in respect of the offence alleged in the information for larceny. . . . The essential thing was to see whether what the evidence showed *prima facie* that the prisoner had done was a crime in both countries & within the treaty. . . . It was not essential that the offence should be called by the same name in both countries (DARLING, J.).—*R. v. DIX* (1902), 18 T. L. R. 231, D. C.

28. Offences committed before Act passed—Whether extraditable.]—It appeared to him very doubtful whether under this treaty a merchant committing forgery of a bill of exchange in the United States with the intention of providing for it at maturity, & coming over here *animo revertendi*, & therefore not a fugitive from justice, could be taken & given up to the American Government.

B. C. R. 436; 2 W. L. R. 164; 10 Can. Crim. Cas. 70.—CAN.

p. ———.]—Before a person can be committed for extradition it must be established that the offence with which he is charged is one against the law, not only of the demanding country, but also of Canada.—*Re STAGGS* (1912), 22 W. L. R. 853; 5 Alta. L. R. 350.—CAN.

q. ———.]—*R. v. FLANNERY*, [1923] 3 W. W. R. 97; 3 D. L. R. 689; 40 Can. Crim. Cas. 263.—CAN.

r. ———.]—If the particular act with which prisoners are charged appears to be such an offence as will fall within the terms of the Ashburton Treaty expounded in the sense of English law, it is, *prima facie*, to be taken to amount to the offence according to the law of the country demanding extradition. That is the presumption,

but prisoner is at liberty to rebut it if he can by giving evidence of the foreign law.—*Re KING, THE WILLIAM TAPSCOTT CASE* (circa 1873), 1 J. R. 83.—N.Z.

s. *Must be extraditable*.]—D. an American citizen, escaped from Mozambique while in custody serving a sentence of imprisonment for murder, & was arrested in Durban, under a warrant issued by a local magistrate, at the instance of the Portuguese consul. He was charged with escaping from lawful custody, & was committed by the magistrate to prison to await his surrender to the Portuguese authorities.—*Held*: the offence charged against D. was not extraditable, & the proceedings before the magistrate should be set aside, & D. released from custody.—*McDAVID v. R.* (1921), 42 N. L. R. 362.—S. AF.

“Being fugitive,” meant being so at the time when the law was to be put in force. If so, then it would appear that the word “committing” meant committing after the treaty. That must be the construction of the treaty, & the construction of the Act of Parliament must correspond; for they were bound to advert to the treaty to discover the meaning & intention of the Act of Parliament; & therefore, the word “committed” could not be referred to transactions before the date of the treaty (PLATT, B.).—*Ex p. CLINTON* (1845), 6 State Tr. N. S. App. A. 1105; *sub nom.* R. v. CLINTON, 6 L. T. O. S. 66.

29. ———.]—*Re COUNHAYE*, No. 103, *post*.

30. Offences committed before treaty made—Whether extraditable.]—*R. v. ASHFORTH*, No. 53, *post*.

B. Particular Offences.

For list of specific offences, see Extradition Act, 1870 (c. 52), sched.; Extradition Act, 1873 (c. 60), s. 8, & sched.

31. Piracy *jure gentium*—Jurisdiction of requisitioning state excluded.]—*Re TIVNAN*, No. 43, *post*.

32. ———.]—By an ordinance of Hong Kong, No. 2 of 1850, it is enacted that magistrates may issue warrants for the apprehension of Chinese subjects in the colony charged with “any crime or offence against the laws of China,” & the magistrate may, on ascertaining probable cause for the charge, commit such persons until the gaoler shall receive orders from the Governor relative to further detention, or to transmission of such persons to the Chinese authorities:—*Held*: (1) the words “crime or offence” in the above ordinance must be confined to those ordinary crimes & offences which are punishable by the laws of all nations, & which are not peculiar to the laws of China: (2) murder by a subject of China of a person not a subject of China, committed outside Chinese territory, was not a crime against the laws of China within the meaning of the ordinance; (3) there being sufficient *prima facie* evidence before the magistrate that resp. had committed an act of piracy *jure gentium* to justify his committal for trial, it was the duty of the magistrate to have committed him for trial at Hong Kong; & a warrant by which the magistrate authorised the Governor, if he thought fit, to deliver resp. to the Chinese authorities, was illegal, & beyond the jurisdiction of the magistrate.—A.-G. FOR COLONY OF HONG KONG v. KWOK-

PART I. SECT. 2, SUB-SECT. 2.—B.

t. *Arson*.]—P. was sentenced in France to 10 years hard labour & 10 years surveillance for arson, which sentence according to the law of France involved banishment to New Caledonia for life. After the sentence of 10 years' hard labour & 10 years' surveillance had expired P. escaped to this colony:—*Held*: he could be extradited, as when he escaped he was still undergoing that portion of his sentence which necessitated his remaining in New Caledonia for the rest of his life.—*Ex p. PETITOT* (1895), 16 N. S. W. L. R. 275; 12 N. S. W. W. N. 37.—AUS.

u. *Larceny*.]—M. was sentenced in France to relegation for life in New Caledonia. The fifth offence for which the sentence of relegation was imposed was larceny:—*Held*: M.

A-SING (1873), L. R. 5 P. C. 179; 42 L. J. P. C. 64; 29 L. T. 114; 37 J. P. 772; 21 W. R. 825; 12 Cox, C. C. 565, P. C.

Annotations:—As to (1) *Reid. R. v. Brixton Prison, Ex p. Stallmann*, [1912] 3 K. B. 424. (*Generally, Mentd. Cox v. Hakes* (1890), 15 App. Cas. 506; *Sivewright v. Allen*, [1906] 2 K. B. 81.

33. Offence against bankruptcy laws—Whether limited to bankrupts only.]—*Re COUNHAYE*, No. 103, *post*.

34. Offence against Gaming Act, 1845 (c. 109), s. 17—False pretences—Three card trick.]—On an application by the Norwegian Govt. for the extradition of two persons accused of obtaining money by false pretences in Norway, the evidence was that prosecutor was induced by accused men to play at a game of chance generally known as the three card trick, whereby he lost money, & that the two men pretended to be unknown to each other, whereas in fact one was a confederate of the other. There was no other evidence of fraud on the part of the accused men. This offence under Gaming Act, 1845 (c. 109), s. 17, is within the Extradition Treaty between England & Norway:—*Held*: the fact that there was an improper method of inducing prosecutor to become a victim was not sufficient to support the charge under the statute & the extradition must be refused.

Under these circumstances I am of opinion that there was no evidence of any offence according to English law for which extradition could be demanded under the Norwegian Treaty, & the magistrate ought not to have committed the men to prison (*LORD ALVERSTONE, C.J.*).—*R. v. Brixton Prison (Governor), Ex p. SJOLAND & METZLER*, [1912] 3 K. B. 568; 82 L. J. K. B. 5; 77 J. P. 23; 29 T. L. R. 10, D. C.

Annotation:—*Mentd. R. v. Moore* (1914), 10 Cr. App. Rep. 54.

35. ——— Rouge et noir.]—*R. v. Brixton Prison (Governor), Ex p. STALLMANN*, No. 13, *ante*.

could be extradited.—*Ex p. MORDUIT* (1900), 2 W. A. L. R. 6.—AUS.

b. ——— "*Grand larceny*."]—Upon an application, on the return of a *habeas corpus*, for the discharge of a prisoner who had been committed for extradition to the State of Washington to answer a charge of having in that State committed the crime of "grand larceny":—*Held*: it must be assumed that "grand larceny" is included in the term "larceny," & is a particular kind of larceny specified by the use of the word "grand."—*Re Moore* (1910), 13 W. L. R. 503; 20 Man. L. R. 41; 16 Can. Crim. Cas. 264.—CAN.

c. ——— "*Stealing*."]—A person charged with "stealing" will be held for extradition upon the demand of a foreign State, provided that the act, if committed in Canada, would have constituted, under the Canadian law, any one of the crimes specified in the treaty & in the schedule to Extradition Act, R. S. C., 1906, c. 155.—*Re Thomas* (1917), 45 N. B. R. 148; 38 D. L. R. 716; 28 Can. Crim. Cas. 396.—CAN.

d. ——— "*Breaking of parole after conviction for*."]—A foreigner had broken his parole in his native country, where he had been convicted of larceny:—*Held*: under Extradition Act (R. S. C.), 1906, c. 155, he might be extradited, although the "breaking of parole" is not an extraditable offence.—*U.S.A. v. ALLISON* (1918), 41 D. L. R. 595.—CAN.

e. ———.]—Where the facts disclosed in extradition proceedings make out a *prima facie* case of theft under Canadian law, proof that such facts constitute larceny under the foreign law may be inferred from deft.'s indictment in the foreign State for the offence.—*Re ISRAELOWITZ* (1919), 25 B. C. R. 143.—CAN.

f. ——— "*Fraud by a bailee*."]—Where on an application for extradition to Denmark on a charge of larceny, the evidence suggested that if the accused committed any offence, that offence was fraud by a bailee, & there was no proof that such fraud was included under larceny in Denmark, the accused was discharged.—*Re NEILSEN*, [1922] 1 W. W. R. 515; 37 Can. Crim. Cas. 32.—CAN.

g. ———.]—Although the warrant of arrest under which accused was arrested in extradition proceedings referred to the offence of "escaping from lawful custody," inasmuch as such warrant was issued on a petition charging theft, which is an extraditable offence:—*Held*: the extradition proceedings were taken in respect of an extraditable offence.—*Tops v. R.* (1918), 1 L. R. 46 Cal. 31.—IND.

h. *Offence against bankruptcy laws—"Fraudulent bankruptcy."*]—It is doubtful whether an offence described as "fraudulent bankruptcy" in a foreign country is an offence under Extradition Act, 1870.—*Re GERHARD* (1901), 27 V. L. R. 244.—AUS.

k. ——— "*Fraudulent concealment of*

36. Political offences—Exemption under Extradition Act, 1870 (c. 52), s. 3—Homicide during insurrection.]—(1) By Extradition Act, 1870 (c. 52), s. 3 (1), "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character":—*Held*: to bring an offence within the meaning of the words "of a political character," it must be incidental to & form part of political disturbances.

(2) A number of the citizens of one of the cantons of the Swiss Republic, being dissatisfied with the administration of the govt. of the canton, rose against the Govt., arrested several members of the Govt., seized the arsenal, from which they provided themselves with arms, attacked, broke open, & took forcible possession of, the municipal palace, disarmed the gendarmes, imprisoned some members of the Government, & established a provisional government. On entering the municipal palace the prisoner, who had taken an active part in the disturbance throughout, shot with a revolver & killed a member of the Govt. He escaped to England, where he was arrested & committed for extradition on a charge of murder:—*Held*: the offence which the prisoner had committed was incidental to & formed a part of political disturbances, & therefore was an offence of a political character within the meaning of the statute, & the prisoner could not be surrendered, but was entitled to be discharged from custody.

(3) The decision of a magistrate, who commits a prisoner for extradition, that the offence charged is not of a political character, is subject to review by the ct. on an application for *habeas corpus*.

Upon an application for a writ of *habeas corpus*, the ct. before whom the application is made has power to review the whole evidence brought before it, whether such evidence was brought before the magistrate who committed the fugitive criminal or not.

It seems to me impossible to say that if [accused]

—*Act of concealment before date of adjudication.*]—The essence of the offence of fraudulent concealment of assets by bkpt. under the law of the United States is the continuance of the concealment after the adjudication of bkpt., & the appointment of a trustee whose title relates back to the date of the adjudication, & extradition will not be refused merely on the ground that the act of concealment is alleged to have taken place before the date of adjudication.—*Re GOODMAN* (1916), 34 W. L. R. 1091; 28 D. L. R. 197; *affd.* 29 D. L. R. 725; 26 Man. L. R. 537.—CAN.

l. ——— "*Banqueroute frauduleuse*."]—Notwithstanding that *banqueroute frauduleuse* is specified in the text of the extradition treaty between France & England as an extradition crime, there is no presumption that the specific offences coming under the generic description correspond to offences against the bankruptcy laws of New Zealand.—*Re GARVEY, Ex p. CURRY* (1888), 5 N. Z. L. R. 630.—N.Z.

m. *Attempt to commit rape.*]—An attempt to commit a rape is not constituted a crime in respect of which a fugitive may be extradited under Extradition Acts, 1870 & 1873, & the treaty with France of Aug. 14, 1876.—*Ex p. JOSSEVEL* (1917), 17 S. R. N. S. W. 574; 34 N. S. W. W. N. 227.—AUS.

n. *Assault with intent to murder—Existence of intent must be established.*]—*Re KELLY*, 22 C. L. T. 262.—CAN.

o. ——— "*Form of warrant.*]—A

Sect. 2.—Application of Extradition Acts: Sub-sect. 2, B. Sect. 3: Sub-sect. 1.]

has a right to move for a *habeas corpus* in order that the case may be reviewed, or for the purpose of getting his discharge, he might not enter into matters which showed that he had been guilty of no offence at all; & I should have said that by no means was the matter concluded by the magistrate's decision that he be committed for trial, because the magistrate does not sit, when he is committing for trial, as a magistrate sitting finally to dispose of the case & to give judgment upon it, but he states his opinion that there is a *prima facie* case, & on that ground he signs his warrant of committal. With reference to the question of whether the magistrate has a right to deal with a man & to deal with his objection to being committed for trial for an extradition crime I entertain no doubt that the magistrate has no right & no jurisdiction to find finally, as against prisoner, whether he has or not committed that crime which he is charged with having committed, or whether that crime is one of a political character (HAWKINS, J.).

By sect. 3 [of Extradition Act, 1870 (c. 52)] a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, such as treason, or if he proves to the satisfaction of the magistrate that the requisition for his surrender has in fact been made with a view to try him for an offence of a political character. These latter words undoubtedly tend to show . . . that the onus of establishing that is upon the alleged criminal himself (HAWKINS, J.).—*Re CASTIONI*, [1891] 1 Q. B. 149; 60 L. J. M. C. 22; 64 L. T. 344; 55 J. P. 328; 39 W. R. 202; 7 T. L. R. 50; 17 Cox, C. C. 225, D. C.

Annotations:—As to (1) Reid. Ex p. Arton (1895), 12 T. L. R.

warrant charging that the prisoners "did feloniously shoot at, etc., with intent, etc., to kill & murder," sufficiently charges an "assault with intent to commit murder," the words used in the treaty & statute.—*R. v. RENO* (1865), 4 P. R. 281.—CAN.

p. — *Causing trains to come into collision.*—Prisoner, who had been committed for extradition, was charged with assault with intent to commit murder, in that he had opened a railway switch, with intent to cause a collision whereby two trains did come into collision, causing a severe injury to a person on one of them:—*Held*: this was not an "assault" within the statute.—*Re LEWIS* (1874), 6 P. R. 236.—CAN.

q. Murder.—*Re ANDERSON* (1860), 20 U. C. R. 124.—CAN.

r. ——*Ex p. ROLFE* (1909), 26 S. C. 433.—S. AF.

s. — *When not a political offence.*—At a village in Russia, one F. shot & killed a watchman, in circumstances which, according to the law of Canada, would make the act murder:—*Held*: the crime was not committed in the furtherance of a political object, within the treaty with Russia of Nov. 24, 1886.—*Re FEDERENKO* (No. 1) (1910), 15 W. L. R. 369; 20 Man. L. R. 221.—CAN.

t. — *Accessory to.*—The offence of being accessory to a murder is included in the offence of murder under Extradition Act.—*R. v. BURKE* (1889), 6 Man. L. R. 121.—CAN.

a. Fraud by a banker — Whether wilfully making false return amounts to.—The accused, who was president of a bank, was extradited from U.S.A.

upon charges of having made false returns to the Minister of Finance under Bank Act, R. S. C., 1906, c. 29:—*Held*: the offence of "wilfully making a false return" was not "fraud by a banker."—*R. v. NEABITT* (1913), 28 O. L. R. 91; 4 O. W. N. 717; 11 D. L. R. 708.—CAN.

b. Burglary.—Burglary is not an offence within the Ashburton treaty or the statutes of Canada passed to give effect to it.—*Re BEEBE* (1863), 3 P. R. 273.—CAN.

c. Forgery.—A prisoner was arrested here for having committed in the United States the crime of forgery, by forging, coining, etc., spurious silver coin, etc.:—*Held*: the offence as charged, did not constitute the crime of "forgery" within the meaning of the extradition treaty or Act.—*Re SMITH* (1864), 4 P. R. 215.—CAN.

d. ——*Ex p. WORMS* (1876), 22 L. C. J. 109.—CAN.

e. ——*R. v. HOVEY* (1880), 8 P. R. 315.—CAN.

f. ——*Re HALL* (1882), 8 A. R. 31.—CAN.

g. ——*Re PHIPPS* (1883), 8 A. R. 77.—CAN.

h. — *What constitutes.*—Where the demand for extradition is for forgery, the offence must be that recognised as forgery by Imperial Extradition Act, 1842.—*Ex p. ENO* (1884), 10 Q. L. R. 191.—CAN.

k. ——*Re MCCARTNEY* (1891), 8 Man. L. R. 367.—CAN.

l. ——Prisoner, using an assumed name, represented himself to

131. *As to (3) Consd. R. v. Holloway Prison, Re Siletti* (1902), 71 L. J. K. B. 935; *R. v. Brixton Prison, Ex p. Perry*, [1924] 1 K. B. 455; *R. v. Brixton Prison, Ex p. Servini*, [1914] 1 K. B. 77.

37. — *Conditions necessary.*—Prisoner committed for extradition, on two charges of committing anarchist outrages in France, by causing explosions at a café & at certain barracks, applied for a writ of *habeas corpus*. The two charges were included in one committal:—*Held*: (1) if the charges had depended on the uncorroborated evidence of an accomplice, which was not the case, that would not be a ground for discharging the prisoner, for absence of corroboration was not conclusive in favour of a prisoner's right to acquittal, but the magistrate had a discretion as to whether the evidence [of identity] was sufficient to justify a committal; (2) separate committals were not necessary; (3) the outrage at the barracks was not an offence of a political character, within Extradition Act, 1870 (c. 52), s. 3 (1), for to constitute a political offence there must be two or more parties in the State, each seeking to impose the govt. of their own choice on the other, which was not the case with regard to anarchist crimes, & therefore the prisoner was liable to extradition.—*Re MEUNIER*, [1894] 2 Q. B. 415; 63 L. J. M. C. 198; 71 L. T. 403; 42 W. R. 637; 18 Cox, C. C. 15; 10 R. 400, D. C.

Annotations:—As to (1) Reid. R. v. Tate, [1908] 2 K. B. 680; *R. v. Christie*, [1914] A. C. 545; *R. v. Baskerville*, [1916] 2 K. B. 658; *R. v. Brixton Prison, Ex p. Perry*, [1924] 1 K. B. 455. *Generally, Mentd. R. v. Wilson, Lewis & Havard* (1911), 4 Cr. App. Rep. 125.

38. ——*Re ARTON* (No. 1), No. 42, *post*.

Offences relating to slave trade.—*See Slave Trade Act, 1873* (c. 88), s. 27.

Bribery.—*See Extradition Act, 1906* (c. 15).

a shopkeeper to be a traveller for a wholesale firm, & after going through the form of taking an order for goods, obtained the indorsement of the shopkeeper to a draft drawn by him in his assumed name on the firm, & this draft was then cashed by him at the bank:—*Held*: this was forgery & that prisoner should be extradited.—*Re LAZIER* (1899), 26 A. R. 260.—CAN.

m. ——*F. executed in P., Oregon, a warranty deed by way of mortgage, & instead of his wife who was living & entitled to a dower interest in the lands dealt with, had E. G. F. described as his wife, & she executed the said deed to enable F. to convey:—Held*: such an act on the part of E. G. F. constituted the offence of forgery according to the laws of Oregon & Canada, & F. was by the same laws a principal in the offence.—*Re FORD & FRARY, Re STATE OF OREGON* (1916), 34 W. L. R. 912; 29 D. L. R. 80.—CAN.

n. "Child stealing."—"Child stealing" is an extraditable offence, & the evidence taken before the Extradition Comr. showing this to be a case of child stealing under Criminal Code, 55-56 Vict. ch. 29 (D), s. 284, was sufficient to warrant the extradition of the prisoner in the absence of evidence of foreign law, as the ct. would assume the crimes to be identical in the two countries.—*Re WATTS* (1902), 1 O. W. R. 129, 133; 3 O. L. R. 368.—CAN.

o. Perjury.—Perjury is an extradition crime within the meaning of the Treaty & the Act.—*Re COLLINS* (1905), 11 B. C. R. 436; 2 W. L. R. 164; 10 Can. Crim. Cas. 70.—CAN.

aa. Conspiracy to defraud.—The offence or crime of conspiracy to

Fraud through the post.]—See No. 7, *ante*, No. 49, *post*.

False pretence.]—See No. 8, *ante*.

SECT. 3.—PROCEDURE.

SUB-SECT. 1.—REQUISITION FOR SURRENDER.

Extradition Act, 1873 (c. 60), s. 7.

39. By whom made—Diplomatic representative—Of State demanding surrender.]—R. v. BRIXTON PRISON (GOVERNOR), R. v. HOLLOWAY PRISON (GOVERNOR), No. 40, *post*.

40. ——— Diplomatic agent of his country—Surrender of British subject—Treaty with France, 1876.]—By Extradition Treaty, 1876, art. 9, between the United Kingdom & France a fugitive criminal may be apprehended under a warrant issued by a magistrate on such information or complaint & such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed where the magistrate exercises jurisdiction; & the accused "shall be discharged, as well in the United Kingdom as in France, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of his country." Under Extradition Treaty, 1908, each country may allow the extradition of its own nationals. In proceedings under art. 9, to obtain the extradition of a British subject charged with having committed a crime in France, it was objected that no requisition had been made for his surrender by the diplomatic agent of the United Kingdom:—*Held*: "the diplomatic agent of his country" meant diplomatic agent of the country within whose jurisdiction the accused was when he committed the crime charged against him & which demanded his extradition, & therefore a requisition for his surrender by the diplomatic agent of this country was not necessary.—R. v. BRIXTON PRISON (GOVERNOR), R. v. HOLLOWAY PRISON (GOVERNOR), [1912] 2 K. B. 578; 28 T. L. R. 405; *sub nom.* R. v. BRIXTON PRISON (GOVERNOR), *Ex p.* WELLS, R. v. HOLLOWAY PRISON (GOVERNOR), *Ex p.* BURNS, 81 L. J. K. B. 912; 107 L. T. 408; 76 J. P. 310; 23 Cox, C. C. 161, D. C.

41. Demand by more than one state—Priority.]—R. v. KAMS (1900), *Times*, Apr. 30.

42. Motive for demand—Inquiry by court.]—Where the surrender of a fugitive criminal is demanded by the Govt. of a friendly State for offences within the provisions of the Extradition

Act, 1870 (c. 52), & of the extradition treaty with that State, the ct. has no jurisdiction to inquire whether the demand for surrender is made in good faith & in the interests of justice. The provision of Extradition Act, 1870 (c. 52), s. 3 (1), by which a fugitive criminal shall not be surrendered if he proves to the satisfaction of the ct. that the requisition for his surrender has been made with a view to try or punish him for an offence of a political character, applies only to an offence of a political character which has been already committed.

Where a prisoner has been committed for extradition in respect of crimes *prima facie* divested of any political character, & there is no evidence that they are of a political character, or that his extradition is demanded in order to punish him for an offence of a political character, but only a suggestion to that effect, the ct. will grant no *habeas corpus*.

I come now to the third & last ground upon which this rule has been moved, that the demand for extradition was not made in good faith & in the interests of justice. . . . This question bears on the political aspect of extradition, & it must be determined upon a consideration of matters into which this ct. is not competent & has no authority to enter. Such considerations, if they exist at all, must be addressed to the executive of this country; they cannot enter, & ought not to enter, into the judicial considerations of this question which in this case turns solely upon the construction of the Extradition Act & the Treaty (LORD RUSSELL, C.J.).—*Re* ARTON (No. 1), [1896] 1 Q. B. 108; 65 L. J. M. C. 23; 73 L. T. 687; 44 W. R. 238; 12 T. L. R. 131; 40 Sol. Jo. 195, D. C.; *subsequent proceedings, sub nom. Re* ARTON (No. 2), [1896] 1 Q. B. 509, D. C.

Annotation:—*Mentd.* R. v. Brixton Prison, *Ex p.* Servini, [1914] 1 K. B. 77.

43. Warrant or depositions in foreign state—Whether necessary before requisition made—Treaty with United States, 1843.]—(1) Under 6 & 7 Vict. c. 76, an Act for giving effect to a treaty between England & the United States, for the apprehension of certain offenders, there is no power to commit accused persons to gaol for the purpose of being delivered up to the United States authorities, unless the United States have exclusive jurisdiction to try & punish the accused. (2) It is not necessary that there should be any warrant issued or depositions taken in the United States, in order to found a requisition by the United States authorities for the delivery up of any accused person under 6 & 7 Vict. c. 76. (3) It is not necessary for the magistrate who commits an accused person to gaol in pursuance of the Act, to state in his warrant that the evidence on which it issued was given upon oath. (4) The word

defraud is not an extraditable crime under the extradition treaty between Great Britain & the United States.—*Ex p.* BROWN (1906), Q. R. 16 K. B. 10.—CAN.

q. Cheating.]—The offence of cheating is an extradition offence, so far as British India is concerned, under Indian Extradition Act (XV. of 1903), notwithstanding its omission from Extradition Treaty, Art. 4, between the British Indian Govt. & Hyderabad State.—*Re* MURLIDHAR BHAGWANDAS (1918), 1 L. R. 43 Bom. 310.—IND.

representative—Of State demanding surrender.]—In the case of an escaped criminal from New Caledonia to this colony, either the Consul General for France in Sydney, or the Governor of New Caledonia, can make the requisition for his surrender.—*Ex p.* ROUANET (1894), 15 N. S. W. L. R. 269; 11 N. S. W. W. N. 55.—AUS.

39 ii. ———.]—Where the requisition is made by the Govt. of a territory which geographically is not part of the State with which the treaty has been made, definite evidence must be given as to the political relations which exist between them in order to determine by whom the requisition should be made. If the territory is

a colony or dependency with its own Govt. the requisition must be made by the Governor, if it is an integral part of the territory of the state it must be made by the Consul; but it may be neither.—*Re* VICENTA SOTTO (1912), 7 Hong Kong L. R. 139.—HONG KONG.

39 iii. ———.]—R. v. GARVEY, *Ex p.* GASPARINI (1888), 6 N. Z. L. R. 604.—N.Z.

r. Whether necessary.]—A fugitive criminal may be arrested without requisition from the foreign Govt. for his surrender.—*Re* GERHARD (1901), 27 V. L. R. 244.—AUS.

—.]—Under Extradition Act,

PART I. SECT. 3, SUB-SECT. 1.

39 i. By whom made—Diplomatic

Sect. 3.—Procedure: Sub-sects. 1 & 2.]

"piracy," in the treaty, does not mean piracy *jure gentium*, but a crime made such by the municipal law of one only of the parties to the treaty, & over which that party has exclusive jurisdiction.—*Re TIVNAN* (1864), 5 B. & S. 645; 122 E. R. 971; *sub nom. Ex p. TIRNAN*, 4 New Rep. 225; *sub nom. Re TERNAN*, 33 L. J. M. C. 201; 28 J. P. 548; 11 Jur. N. S. 34; 9 Cox, C. C. 522; *sub nom. R. v. TIVNAN*, 10 L. T. 499; *sub nom. Re TURNAN*, 12 W. R. 858.

Annotations:—As to (1) & (4) Consd. Re Bennett (1864), 11 L. T. 488. *Reid. Re Windsor* (1865), 11 Jur. N. S. 807.

44. ——— Effect of irregularity—Treaty with France, 1876.]—A warrant was issued by a French magistrate for the arrest of a person charged with an offence to which the extradition treaty between Great Britain & France applied. At the time of issuing that warrant no depositions relating to the charge had been taken on oath before the magistrate. A requisition was made by the French Govt. to the British Secretary of State for the surrender of the accused person. By the terms of the treaty the requisition of the surrender of an accused person is to be "accompanied by a warrant of arrest or other equivalent judicial document issued by a judge or magistrate duly authorised to take cognisance of the acts charged against the accused in France together with duly authenticated depositions or statements taken on oath before such judge or magistrate." Upon receipt of an order from the Secretary of State in that behalf a police magistrate caused the accused person to be apprehended. The treaty provided that a fugitive criminal who had been so apprehended should be discharged "if within fourteen days a requisition shall not have been made for his surrender in the manner directed" by the treaty:—*Held*: it was not essential to the validity of the requisition or of the subsequent proceedings founded thereon that the procedure before the French magistrate should have been regular, & the absence of sworn depositions taken before that magistrate did not entitle the accused person to be discharged.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. THOMPSON*, [1911] 2 K. B. 82; 80 L. J. K. B. 986; 105 L. T. 66; 75 J. P. 311; 27 T. L. R. 350; 22 Cox, C. C. 494, D. C.

45. Obligation of authorities to arrest—After requisition made—Treaty with Russia, 1886, Art. 9.]—Under Extradition Treaty with Russia, 1886, art. 9, after a requisition in due form it is obligatory on the authorities to arrest the fugitive.—*A.-G. FOR CANADA v. FEDORENKO*, [1911] A. C. 735; 81 L. J. P. C. 74; 105 L. T. 343; 27 T. L. R. 511, P. C.

Order to issue warrant for arrest—To whom addressed.]—*See* Extradition Act, 1870 (c. 52), ss. 7, 16.

Discretion of Secretary of State to make order—Or discharge person already arrested—Where

1877, a requisition from the U.S. Govt. is not necessary as a preliminary condition to the arrest & commitment of a person charged with an extraditable offence.—*Ex p. CADBY* (1886), 26 N. B. R. 452.—CAN.

t. ———.]—*Re HOKE* (1887), 15 R. L. O. S. 99.—CAN.

PART I. SECT. 3, SUB-SECT. 2.**a. Arrest without warrant—On**

*picion.]—*A reasonable suspicion that a person has in a foreign country or in another part of British Dominion, committed an offence which if committed in Victoria would be a felony, does not justify a constable in arresting such person in Victoria without a warrant, & is therefore not a defence to an action by such person against constable for false imprisonment.

Only existing powers to arrest, detain or surrender to a foreign country or to

*offence of political nature.]—**See* Extradition Act, 1870 (c. 52), ss. 7, 8 (1); & No. 42, *ante*.

Form of order.]—*See* Extradition Act, 1870 (c. 52), sched. II.

SUB-SECT. 2.—WARRANT OF ARREST.

Form of warrant.]—*See* Extradition Act, 1870 (c. 52), sched. II.

46. ——— Necessity for state requisition.]—Under the Convention Act, 1843 (c. 75), for committing & delivering up to justice on requisition by an agent of the King of the French, persons accused of certain crimes done in France, a warrant to detain a party so accused "until he shall be discharged by due course of law" is insufficient.

I regret that the warrant is so defective that we cannot allow the Act to take effect. Neither we nor the gaoler have any power but such as the statute gives, & its provisions have not been rightly pursued (*LORD DENMAN, C.J.*).—*Ex p. BESETT* (1844), 6 Q. B. 481; 1 New Sess. Cas. 337; 14 L. J. M. C. 17; 8 J. P. 743; 9 Jur. 60; 115 E. R. 180; *sub nom. R. v. BESSÉ*, 4 L. T. O. S. 93.

See, now, Extradition Act, 1870 (c. 52), s. 8 (2), & sched. II.

47. ——— That evidence taken on oath unnecessary.]—*Re TIVNAN*, No. 43, *ante*.

48. Description of offence — "Crimes against bankruptcy law."]—By Extradition Acts, 1870 (c. 52) & 1873 (c. 60), indictable offences under the laws for the time being in force in relation to bkpcy. may be made the subject of extradition treaties. By such a treaty, among other crimes for which extradition was to be granted, were "crimes against bkpcy. law." A warrant for the apprehension of a fugitive criminal by virtue of such treaty described the offence as "the commission of crimes against bkpcy. law" within the jurisdiction of the foreign power demanding the extradition:—*Held*: the description was sufficient, & the warrant was good.—*Ex p. TERRAZ* (1878), 4 Ex. D. 63; 48 L. J. Q. B. 214; 39 L. T. 502; 27 W. R. 170; 14 Cox, C. C. 153.

Annotation:—Consd. Ex p. Plot (1883), 48 L. T. 120.

49. ——— "Suspected of fraud."]—G. & H. were charged with conspiring together in A. in the jurisdiction of the Govt. of H. to obtain goods by false pretences from H. & Co. in M. in the jurisdiction of the Govt. of G. They wrote letters from A., containing the false pretences, to H. & Co., in G., ordering goods to be sent to them in A.; they also orally, with like false pretences, ordered the same goods from the agent of H. & Co., who called on them in A. The goods were sent from M. as ordered. On the receipt of the goods G. & H. sent them to E., whither soon after they themselves absconded; & were there arrested at the request of the Govt. of G. The warrant of arrest described

another part of the British Dominion a person suspected of having there committed a criminal offence, are such as are conferred by statute.—*BROWN v. LIZARS*, [1905] 2 C. L. R. 837.—AUS.

b. ———.]—*Re HOKE* (1887), 15 R. L. O. S. 92.—CAN.

c. Original warrant—Necessity for.]—It is not necessary under Extradition Treaty & Act, 31 Vlot.

the fugitive criminals as "suspected of fraud." On the application for their discharge, it was contended that the warrant of arrest was bad for insufficiency; & that the offence, if any, had been committed in H. & not in G., so that they ought not to be delivered up to the Govt. of G.:—

Held: (1) the foreign warrant of arrest was sufficient, & did not require the offence to be so set out as to strictly satisfy the English definition of the crime committed abroad; but it was enough if it purported to be a judicial document issued by a ct. of competent authority ordering the arrest of a fugitive criminal; (2) where the offence is one continuous transaction committed partly in one country & partly in another, the English law of local venue in criminal matters ought not to be applied to the extradition of fugitive criminals.—*R. v. JACOBI & HILLER* (1881), 46 L. T. 595, n., D. C.

Annotations:—*As to* (1) *Reid. Ex p. Piot* (1883), 48 L. T. 120; *R. v. Godfrey*, [1923] 1 K. B. 24.

50. — "Fraud by an agent."—A French subject & fugitive criminal was apprehended in England upon a warrant issued by the chief metropolitan police magistrate, after notice from the Home Secretary that a requisition had been made for his extradition under the treaty with France, 1876, for the surrender of fugitive criminals & he was committed under Extradition Act, 1870 (c. 52), s. 10. In the foreign warrant issued in France the prisoner was accused of the crime of "*abus de confiance*;" & by art. 3 of the treaty one of the crimes for which extradition is to be granted is "*abus de confiance ou détournement par un banquier, commissionnaire, administrateur, etc.*" In the police magistrate's warrant of committal the offence was described as "fraud by an agent": *Held*: the description of the offence in the warrant was sufficient, & the facts upon the depositions disclosed a *prima facie* case of fraud by an agent within Larceny Act, 1861 (c. 96), s. 75, to justify the prisoner's committal for trial if the offence had been committed in England, & therefore the magistrate was right in committing him under Extradition Act, 1870 (c. 52).—*Ex p. Pior* (1883), 48 L. T. 120; 47 J. P. 247; 15 Cox, C. C. 208, D. C.

Annotation:—*Consd. Re De Portugal* (1885), 34 W. R. 42.

51. — Fraud by a bailee.]—The charge contained in a French warrant against a prisoner under arrest in England was that in nineteen cases he had embezzled or misappropriated money entrusted or delivered to him in his capacity of notary. The warrant of the Secretary of State addressed to the chief magistrate of the Metropolitan Police Cts. recited that a requisition had been made for the surrender of the prisoner upon an accusation of "fraud by a bailee," within the jurisdiction of the French Republic. The magistrate's warrant of commitment recited that the prisoner was accused of "fraud by a bailee," & frauds as an agent:—*Held*: the French warrant stated an offence within Extradition Treaty, 1876, No. 18, art. 13, which the Home Secretary's warrant translated into the corresponding English provision of the same article; the magistrate's warrant was good; the term "embezzlement" in the French

warrant might with equal propriety be translated "fraudulent misappropriation," & in four out of the nineteen cases there was evidence that the prisoner had been entrusted with property for safe custody in the terms of Larceny Act, 1861 (c. 96), s. 76. Accordingly, a *prima facie* case against the law of England had been made out.

In order to justify the extradition of the subject of a foreign state, there must be evidence of an act committed by him in the foreign country amounting to an offence against the law of such country, & which, if committed in England, would amount to an offence against English law.—*Re BELLENCONTRE*, [1891] 2 Q. B. 122; 60 L. J. M. C. 83; 64 L. T. 461; 55 J. P. 694; 39 W. R. 381; 7 T. L. R. 315; 17 Cox, C. C. 253, D. C.

52. — Variation in warrants.]—*Re BELLENCONTRE*, No. 51, *ante*.

53. — Date of offence material.]—A warrant of extradition alleged no dates, & it did not appear whether the offences had been committed before or after the date of the treaty which made them extradition offences. Application for a writ of *habeas corpus* granted & prisoner discharged.—*R. v. ASHFORTH* (1892), 8 T. L. R. 283; 36 Sol. Jo. 234, D. C.

54. Option to extradite—Treaty with Belgium, 1887.]—*Re GALWEY*, No. 11, *ante*.

55. Validity of issue—Ulterior purposes—To enforce civil liability—Abuse of process of court.]—(1) An attachment issued by the High Ct. of Justice for disobedience of an order of the Ct. in a civil action is not an offence within Extradition Act, 1870 (c. 52), s. 19. Therefore, where a party to an action in the Ch. Div. was arrested in Paris for a crime under the Extradition Act, 1870 (c. 52), s. 19, & while in prison in England under the warrant was served with an attachment for disobedience to an order in the action:—*Held*: the attachment was valid, & the prisoner was not entitled to his discharge until he had cleared his contempt, although he had been acquitted of the criminal charge.

(2) Extradition Act, 1870 (c. 52), s. 19, is not confined to political offences, but applies to all criminal charges.

(3) If a warrant under Extradition Act, 1870 (c. 52), is obtained, not for the *bona fide* purpose of punishing a person for a crime, but with the indirect object of making him amenable to an attachment in a civil action, the Ct. will relieve against such an abuse of the process of the Ct.—*POOLEY v. WHETHAM* (1880), 15 Ch. D. 435; 50 L. J. Ch. 236; 43 L. T. 267; 29 W. R. 296, C. A.

56. — Irregularity prior to requisition—Foreign procedure—Contrary to treaty.]—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. THOMPSON*, No. 44, *ante*.

57. Arrest without warrant—Evidence to justify—Extradition Act, 1870 (c. 52), s. 8.]—Under above sect. of above Act, a fugitive criminal who is already in custody may be detained for an offence coming within above Act, even though he was originally arrested without any warrant.

c. 94 (D), that an original warrant should have been granted in the United States for the apprehension in this country of the person accused, to enable proceedings to be effectually taken against him in this province for an offence within the treaty.—*Re*

CALDWELL (1870), 5 P. R. 217.—CAN.

d. — Meaning of term.]—*Held*: the original warrant, within 31 Vict. c. 94, s. 2 (D), is not the first of two or more consecutive warrants, but is any warrant issued in the United

States.—*Re PHIPPS* (1882), 1 O. R. 586; (1883), 8 A. R. 77.—CAN.

e. Jurisdiction to issue—Contents of information.]—In order to give jurisdiction to issue a warrant to arrest a person under Extradition

Sect. 3.—Procedure: Sub-sects. 2 & 3, A. & B.]

The word "apprehension" in above sect. includes "detention."

Semble: a constable would be justified in arresting without a warrant a fugitive from a foreign country on reasonable grounds of suspicion that he has committed a crime which would be a felony if committed in the United Kingdom. *Qu.*: whether the Ct. of Appeal has any jurisdiction to entertain an appeal from the refusal of a div. ct. to issue a writ of *habeas corpus*, on the application of a person who has been arrested for an alleged extradition crime.

All that the Act requires is that the evidence should be sufficient "in the opinion of the person issuing the warrant." That is a matter of judicial discretion. There must be some evidence, but very little will do (JESSEL, M.R.).—*R. v. WEIL* (1882), 9 Q. B. D. 701; 53 L. J. M. C. 74; 47 L. T. 630; 31 W. R. 60; 15 Cox, C. C. 189, C. A.

Annotations:—*Consd. Ex p. Plot* (1883), 48 L. T. 120. *Reid. R. v. Rudge* (1886), 53 L. T. 851; *Ex p. Woodhall* (1888), 20 Q. B. D. 832.

— **Subsequent procedure.]—See** Extradition Act, 1870 (c. 52), s. 8.

58. Validity of arrest—Warrant backed in Jersey.]—*Re PARISOT*, No. 68, *post*.

Foreign warrant—Necessity for.]—See Sub-sect. 3, C. (a) i., *post*.

SUB-SECT. 3.—PROCEEDINGS BEFORE MAGISTRATE.

A. In General.

Venue.]—See Extradition Act, 1870 (c. 52), ss. 8, 26.

— **Circumstances affecting—Crime committed on high seas.]—See** Extradition Act, 1870 (c. 52), s. 16 (1).

— **Ill health of prisoner.]—See** Extradition Act, 1895 (c. 33), s. 1.

Manner of hearing—& extent of jurisdiction.]—See Extradition Act, 1870 (c. 52), s. 9; Sub-sect. 3, *post*.

59. Adjournment—Resumption before different magistrate—Validity of committal.]—(1) On an application for extradition of G. for larceny in France, one magistrate heard part of the evidence, & adjourned the hearing when another magistrate continued the evidence, & finally committed G. to await his surrender. The question whether G. was a British subject was raised, & the second magistrate held G. was a French subject. On a rule for *habeas corpus* to release G.:—*Held*: the evidence had not been taken according to law, but the ct., on reviewing the decision as to nationality,

discharged the rule for *habeas corpus* till an issue was tried before a judge to decide that point.

Every prisoner is entitled to a judicial decision by a magistrate as to whether a *prima facie* case is made out against him. What he gives is a judicial decision. I think the proceedings ought to be conducted throughout by the same magistrate who has heard the witnesses & observed their demeanour (WILLS, J.).

(2) An appeal lies to the Q. B. Div. from the decision of a magistrate on a question of fact which is cardinal to the jurisdiction but collateral to the subject of inquiry, as, for instance, from a decision that an accused person against whom an extradition order is sought is not a "native-born" British subject within the exemption contained in the Extradition Treaty between Great Britain & France.—*Re GUERIN* (1888), 58 L. J. M. C. 42; 60 L. T. 538; 53 J. P. 468; 37 W. R. 269; 16 Cox, C. C. 596, D. C.; *subsequent proceedings, sub nom. GUERIN v. BANK OF FRANCE*, 5 T. L. R. 160; *sub nom. Re GUERIN* (1889), 5 T. L. R. 188, D. C.

Annotation:—As to (1) *Reid. Ex p. Bottomley*, [1909] 2 K. B. 14.

B. Powers and Duties of Magistrate.

60. Preservation of property as evidence—

For use of foreign tribunal.]—Upon the hearing by a magistrate of an application to extradite a person accused of theft abroad, O., a witness, produced under a *subpoena duces tecum* certain articles which he had purchased from prisoner. After the magistrate had committed prisoner to await the Secretary of State's warrant, he orally directed a constable to take charge of the property for production at the trial abroad. O. applied, under Justices Protection Act, 1848 (c. 44), s. 5, for an order directing the property to be given up to him:—*Held*: (1) the magistrate was *functus officio* when he had committed prisoner, & any subsequent direction as to the property, whether given or omitted, was not an act relating to the duties of his office, & the ct. had no jurisdiction to make the order. (2) assuming the ct. had such jurisdiction, O.'s possessory title, if any, had been lawfully divested by their passing out of his possession under the *subpoena duces tecum*, & therefore that he was not entitled to the relief asked.

There is a great deal to be said for the proposition that when you find the preliminary stages of an investigation applied, not for the purpose of a trial in this country, but for the purpose of a trial abroad under Extradition Acts, the magistrate here should have similar powers with reference to the commitment under Extradition Acts as he would have with reference to commitment for trial here, & that in some cases he would have powers to preserve evidence for the use of the foreign tribunal, without which the Extradition Act would be futile in its application to the particular case (WRIGHT, J.).—*R. v. LUSHINGTON, Ex p. OTTO*, [1894] 1 Q. B. 420;

Act, 1877, it is not necessary that the information should state that he was then within the province.—*Ex p. CADBY* (1886), 26 N. B. R. 452.—CAN.

PART I. SECT. 3, SUB-SECT. 3.—A.

1. Decision to commit—Must be made in court.]—The magistrate held the inquiry not in the court house, but on the verandah of the prison:—*Held*: though the taking of evidence was a ministerial duty, the decision to commit the prisoner was a magisterial function which could not be exercised

elsewhere than in a ct.—*Re SUN AN*

PART I. SECT. 3, SUB-SECT. 3.—B.

g. General rule.]—The Comr. is not bound to try the accused, but merely to consider whether evidence given justifies committal for trial.—*U.S.A. v. WEBBER* (1912), 11 E. L. R. 379.—CAN.

h. "Judge of county court"—Who included in term.]—The expression

"all judges, etc., of the county ct." contained in Extradition Act, R. S. C., c. 142, s. 5, includes the junior judge of said ct.—*Re PARKER* (1890), 19 O. R. 612.—CAN.

k. ———.]—The junior judge of a county ct. is "a judge of a county ct." & has the functions of an extradition judge.—*Re GARBUTT* (1891), 21 O. R. 179.—CAN.

l. ——— Jurisdiction of—Power to hold second inquiry.]—The jurisdiction of a county ct. judge under Extradition Act is limited only by the bounds of the

70 L. T. 412; 58 J. P. 282; 42 W. R. 411; 17 Cox, C. C. 754; 10 R. 418; *sub nom. Re EBSTEIN, Ex p. OTTO*, 10 T. L. R. 57, D. C.

61. ———.]—The property found on a fugitive offender, arrested on an extradition warrant in England for offences committed in a foreign country, who becomes bkpt. in England while the extradition proceedings are pending, vests in his trustee in bkpcy. The committing magistrate has, however, power as being the "competent authority" mentioned in the Belgian Extradition Treaty, 1872, art. 12, to decide whether the whole or any part of the property will serve as proof of the crime, & may order it to be delivered up with the prisoner. Where property is so ordered to be delivered up, the Secretary of State in making the extradition order should stipulate for the redelivery of the property on the termination of the criminal proceedings in the foreign state.—*Re BOROVSKY & WEINBAUM, Ex p. SALAMAN*, [1902] 2 K. B. 312; 71 L. J. K. B. 992; 87 L. T. 184; 51 W. R. 48; 9 Mans. 346.

See, also, Extradition Act, 1870 (c. 52), s. 9.

62. Power to remand—Additional charges—Treaty with Germany.]—By Extradition Treaty, art. 9, with Germany, where a fugitive criminal is arrested upon a request for extradition, the preliminary investigation of the case is to be conducted as if the apprehension had been for a crime committed in the same country, & by art. 12 the fugitive is to be set at liberty if sufficient evidence for his extradition is not produced within two months from the date of his apprehension.

A fugitive criminal was arrested on Dec. 15 on a warrant issued upon an information charging him with obtaining money by false pretences within the jurisdiction of the German Empire, & was remanded from time to time until the following Feb. 14, when evidence was given upon one charge, which, in the opinion of the magistrate, was sufficient to justify the committal of prisoner for trial if the crime had been committed in this country. The prosecution having intimated an intention to prefer additional charges, the necessary papers in which had only reached the magistrate on the previous day, the magistrate did not then commit prisoner for extradition, but further remanded him until Feb. 21, when evidence was taken upon thirty-one additional charges, & prisoner was committed for extradition upon the original charge & thirty of the additional charges:—*Held*: there was in fact upon the depositions sufficient evidence to justify the committal of prisoner upon the original charge on Feb. 14, & prisoner was therefore not entitled to be set at liberty under art. 12. *Semble*: sufficient evidence upon the original charge having been produced within two months of the arrest to justify a committal upon that charge, the magistrate was entitled after the expiration of the two months to receive evidence upon charges other than that on which the prisoner had been arrested, & the committal upon those charges was good.—*Re BLUHM*, [1901] 1 K. B. 764; 70

L. J. K. B. 472; *sub nom. R. v. HOLLOWAY PRISON (GOVERNOR), Ex p. BLUHM*, 49 W. R. 464; 17 T. L. R. 358; 45 Sol. Jo. 362, D. C.

63. ——— Effect of writ of habeas corpus.]—Resps. having been arrested in Montreal by order of the Extradition Comr. for an alleged extradition offence in the State of Georgia, were remanded by him for the purpose of affording the prosecution an opportunity of proving its case. Thereafter one judge in Quebec issued on their application & then quashed writs of *habeas corpus*, while another judge afterwards issued similar writs & discharged resps. from custody on the ground that no extradition offence had been disclosed against them in the proceedings before him:—*Held*: this was the question which the Extradition Comr. had jurisdiction to investigate on the remand which he had ordered; his remand warrant could not be treated as a nullity; resps. were in lawful custody, & in consequence the judge had no jurisdiction to order their release.

There was an accusation of theft, which is an offence in both countries, but the judge does not appear to have apprehended that an accusation on information of theft, was enough for the claim to arrest & detain. Whether the accusation was well founded or whether there was enough to justify the Extradition Comr. in committing for surrender was a question which would have been regularly brought before him & determined at the proper time if the due course of justice had not been interfered with by the interposition of the judge. Their lordships do not mean to suggest that the writ of *habeas corpus* is not applicable when there is a preliminary proceeding. Each case must depend upon its own merits. But where a prisoner is brought before a competent tribunal, & is charged with an extradition offence, & remanded for the express purpose of affording the prosecution the opportunity of bringing forward the evidence by which that accusation is to be supported; if, in such a case, upon a writ of *habeas corpus*, a learned judge treats the remand warrant as a nullity, & proceeds to adjudicate upon the case as though the whole evidence were before him, it would paralyse the administration of justice, & render it impossible for the proceedings in extradition to be effective (LORD HAINSBURY, C.).—*U.S.A. v. GAYNOR*, [1905] A. C. 128; 74 L. J. P. C. 44; 92 L. T. 276; 21 T. L. R. 254, P. C.

— On bail.]—See Sub-sect. 3, D., *post*.

64. Production & inspection of documents—Subpoena duces tecum—Extradition Act, 1873 (c. 60), s. 5.]—A banker with whom a document sealed up in a packet has been deposited by two persons, upon the terms that it is not to be given up without the consent of both, is nevertheless bound to produce it, if summoned to do so, before a police magistrate acting under the order of a Secretary of State, made in pursuance of above sect.—*R. v. DAYE*, [1908] 2 K. B. 333; 77 L. J. K. B. 659; 99 L. T. 165; 21 Cox, C. C. 659; *sub nom. R. v. DAYE, Ex p. R.*, 72 J. P. 269, D. C. *Annotation*:—*Consd. Forbes v. Samuel*, [1913] 3 K. B. 706.

province & not by those of his county. An extradition judge has power to inquire into a charge & commit a person for extradition, after a previous inquiry & committal by another judge & discharge under *habeas corpus*.—*Re PARKER*, 10 C. L. T. Occ. N. 373.—CAN.

m. ———.]—*Ex p. SKITZ* (1899), Q. R. 8 Q. B. 345.—CAN.

n. Duty to record evidence given

against prisoner—Evidence taken in shorthand.]—Where prisoner was charged with an extraditable crime & the evidence was taken down in the narrative form on the judge's notes, & by way of question & answer by a shorthand reporter which were afterwards extended by the reporter but were not read over to the witnesses or signed by them:—*Held*: there was no evidence that the ct. could look at as proof of the alleged crime.—*Re*

STANBRO (1884), 1 Man. L. R. 325.—CAN.

o. ———.]—Under Extradition Act, R. S. C. 1906, c. 155, s. 13, the proceedings are regulated by Criminal Code, ss. 682–686, & under s. 693, if the evidence is taken in shorthand, it is imperative that the transcript be signed by the judge & be accompanied by an affidavit of the stenographer that it is a true record.

Sect. 3.—Procedure: Sub-sect. 3, B. & C. (a) i.

65. ——— Criminal Justice Administration Act, 1914 (c. 58), s. 29.]—Extradition Act, 1873 (c. 60), s. 5, is to be read in conjunction with Criminal Justice Administration Act, 1914 (c. 58), s. 29, & when a magistrate is ordered by a Secretary of State under Extradition Act, 1873 (c. 60), s. 5, to take evidence for the purpose of a criminal matter pending in a foreign ct., Criminal Justice Administration Act, 1914 (c. 58), s. 29, enables him, besides taking oral evidence, to issue a summons for the production of documents & to inspect the documents when produced, in order to see if they are likely to be material evidence at the hearing.—*R. v. CARDIFF (LORD MAYOR), Ex p. LEWIS*, [1922] 2 K. B. 777; 92 L. J. K. B. 28; 128 L. T. 63; 86 J. P. 207; 20 L. G. R. 758; 27 Cox, C. C. 327, D. C.

Sufficiency of evidence.]—See Sub-sect. 3, C. (a) ii., post.

Duty to inform prisoner—Of date of surrender.]—See Sub-sect. 3, E., post.

—— *Of right to apply for habeas corpus.]—See Sub-sect. 3, E., post.*

Duty to record evidence given against prisoner.]—See Extradition Act, 1873 (c. 60), s. 5.

C. Evidence and Proof.

(a) Evidence Required.

i. In General.

66. Order in Council—On which proceedings founded—Necessity for proof.]—A police magistrate committed a fugitive criminal to prison with a view to his extradition to Italy. There was an Order in Council applying the Extradition Act, 1870 (c. 52), in the case of Italy, but the Order was not formally proved before the magistrate, he being aware of its existence. A rule *nisi* for a writ of *habeas corpus* for the discharge of prisoner having been obtained on the ground that in the absence of proof of the Order in Council the magistrate had no jurisdiction to make the order of committal:—*Held*: discharging the rule, the mere omission to give formal proof of the Order in Council, which contained nothing that could assist prisoner, did not entitle prisoner to be released. The Order in Council should be given in evidence before the committing magistrate.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SERVINI*, [1914] 1 K. B. 77; 83 L. J. K. B. 212; 109 L. T. 986; 78 J. P. 47;

of the evidence before there can be a committal of the accused for extradition.—*Re ROYSTON* (1909), 18 Man. L. R. 539; 10 W. L. R. 513; 15 Can. Crim. Cas. 96.—CAN.

p. Power to commit—Pending extradition.]—A magistrate has no power, under 33 & 34 Vict. c. 42, to commit an accused person to gaol pending extradition.—*STONE v. R.* (1906), T. S. 855.—S. AF.

PART I. SECT. 3, SUB-SECT. 3.—C. (a) i.

66 i. Order in Council—On which proceedings founded—Necessity for proof.]—By a treaty made in 1898 between Her late Majesty & the Queen of the Netherlands, the contracting parties undertook to deliver up to each other reciprocally fugitive offenders accused of certain specified offences:—*Held*: the ct., being bound to take judicial notice of Acts of State, must

regard the Order in Council which contained the Treaty of 1898 & make the Extradition Acts apply in the case of the Netherlands, though the same was not tendered in evidence before the magistrate.—*R. v. MACDONALD, Ex p. STRUTT* (1901), 11 Q. L. J. 85.—AUS.

66 ii. ———.]—In applications for extradition before the magistrate the Order in Council embodying the treaty with the requisitioning State must be proved.—*Re VICENTA SOTTO* (1912), 7 Hong Kong L. R. 139.—HONG KONG.

———.]—*Re CAN.* (1891), 8 Man. L. R.

g. Foreign warrant of arrest ——— to U.S.W. Africa ——— charged with murder theft in that territory, the German

30 T. L. R. 35; 58 Sol. Jo. 68; 23 Cox, C. C. 713, D. C.

Order of Secretary of State—Notifying requisition for surrender—Necessity for production.]—*See Extradition Act, 1870 (c. 52), s. 8.*

67. Foreign warrant of arrest—Necessity for authentication—Extradition Act, 1870 (c. 52), s. 10.]—*R. v. GANZ*, No. 12, *ante*.

How proved.]—*See Extradition Act, 1870 (c. 52), s. 15.*

Description of offence.]—*See Nos. 48–51, ante.*

68. Identity of accused.]—There were substantially three points. As to the first, I think the arrest, as the warrant was backed in Jersey, was legal, & even when the prisoner was in this country the magistrate had jurisdiction to issue a warrant of commitment. Next, as to the point of identity, the prisoner's name was X. A. P. & he admitted it to the officer. He was charged by that name, & when the warrant was read over to him he did not protest, & made no reply; it might fairly be inferred that he was the same man. As to the third point, whether there was evidence of an extradition offence. I think there is such evidence in the depositions [taken in France]. The magistrate had jurisdiction to issue the warrant of extradition, & the writ must be refused & the prisoner surrendered (*HUDDLESTON, B.*).—*Re PARISOT* (1889), 5 T. L. R. 314, D. C.

69. ———.]—*Re MEUNIER*, No. 37, *ante*.

70. Nationality of accused.]—*R. v. ALLEN & TAYLOR* (1888), Clarke's Law of Extradition, 4th ed. p. 252.

71. ——— Issue ordered to determine.]—*Re GUERIN*, No. 59, *ante*.

72. ——— Onus of proof.]—Appct. for a rule *nisi* for a *habeas corpus* had been sentenced by a French ct. & sent to a penal settlement on the coast of French Guiana. He escaped & got to England. On an application by the French Govt. a magistrate ordered his extradition. The prisoner, in resisting the order for extradition, pleaded he was the son of British parents, & obtained a rule *nisi* for *habeas corpus*:—*Held*: the onus was on the Crown to show that prisoner's father had abandoned or lost his nationality by residence abroad, & there being no satisfactory evidence to that effect, prisoner's plea was a good defence, & he must be discharged.—*R. v. BRIXTON*

warrant produced had been authenticated by the Governor of that territory as having been duly issued by the proper civil authority:—*Held*: such authentication was sufficient.

r. Foreign law—Necessity for proof —Larceny.]—Proof of the foreign law is not necessary to show that "grand larceny" is included in the crime of larceny mentioned in the Extradition Treaty between the United States & Great Britain.—*R. v. MOORE* (1910), 20 Man. L. R. 41.—CAN.

s. ———.]—Theft under the name of larceny is an extraditable offence under the treaty between the United States & Canada. Where the facts disclosed make a strong *prima facie* case of theft under the Canadian law, so that if the offence were committed in Canada it would be a clear

PRISON (GOVERNOR), *Ex p. GUERIN* (1907), 51 Sol. Jo. 571, D. C.

73. Commission of crime charged—Within country seeking extradition.]—To satisfy a magistrate in committing a prisoner, charged with an extradition crime, under Extradition Act, 1870 (c. 52), s. 10, there must be some evidence that prisoner committed such crime within the jurisdiction of the country seeking extradition.—*R. v. LAVAUDIER, TRESSARD, LAUDAIS, PATUREAU & SCHWARTZ* (1881), 15 Cox, C. C. 329, D. C.

74. ———.]—*Re BELLENCONTRE*, No. 51, *ante*.

75. Prima facie case must be shown.]—*Re GUERIN*, No. 59, *ante*.

76. ———.]—*Re BELLENCONTRE*, No. 51, *ante*.

77. ——— Guilty knowledge.]—Bonds, which had been stolen in 1883, were found in prisoner's possession in 1890. Under an assumed name, he was dealing with them & selling them to innocent purchasers:—*Held*: there was evidence of guilty knowledge, on which a magistrate in this country might commit the prisoner for trial; & on the assumption that he knew that the bonds had been stolen, his conduct amounted to a false representation of their genuineness, which could not be cured by the fact that, the bonds passing freely from hand to hand, the innocent purchaser from whom he obtained the money would be able to get it back again.—*Re PINTER* (1891), 66 L. T. 324; 17 Cox, C. C. 497, D. C.

78. ———.]—*Re ARTON* (No. 2), No. 21, *ante*.

79. ———.]—*R. v. DIX*, No. 27, *ante*.

80. ——— Sufficiency of foreign depositions—Extradition Act, 1870 (c. 52).]—*Ex p. PIOT*, No. 50, *ante*.

81. ———.]—Extradition should be ordered if the depositions show facts which would support any offence in our law which is extraditable.—*R. v. HOLLOWAY PRISON (GOVERNOR)* (1900), 16 T. L. R. 247, D. C.

case to commit for trial, it is not necessary to prove the law of the demanding country. Where it appears that a prisoner whose extradition is sought has been indicted for theft in one of the United States, such indictment affords strong presumptive evidence of the foreign law.—*Re DEERING* (1915), 49 N. S. R. 41; 24 D. L. R. 818.—CAN.

t. ———.]—*Re ROSKNEBERG* (1918), 1 W. W. R. 845; 28 Man. L. R. 439; 29 Can. Crim. Cas. 309.—CAN.

a. ——— Offence punishable jure gentium.]—If the offence charged falls within those ordinary crimes & offences which are punishable by the laws of all nations, it will be assumed to be an offence under the law of China. In such a case it is unnecessary to offer specific evidence of Chinese law.—*Re CHUNG SAN NAM* (1914), 9 Hong Kong L. R. 26.—HONG KONG.

PART I. SECT. 3, SUB-SECT. 3.— C. (a) ii.

83 i. Test of sufficiency.]—It is sufficient to authorise a commitment for an extraditable offence that the evidence would justify a commitment for trial if the offence had been committed in this province.—*Ex p. OADBY* (1886), 26 N. B. R. 462.—CAN.

83 ii. ———.]—One test of determining whether the evidence is such as would justify committal of accused for trial if the crime had been committed in Canada, is to conceive the accused pursuing the conduct in question in this country, & then to transplant along with him his environment, including, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers & rights, & fixing the legal character of the acts of the persons concerned, always excepting the law supplying the definition of the crime which is charged.—*Re COLLINS* (1905), 11 B. C. R. 436; 2 W. L. R. 164; 10 Can. Crim. Cas. 70.—CAN.

83 iii. ———.]—On an application for the surrender of an accused under Extradition Act, it is sufficient to produce such evidence as would justify the committal of the accused for trial if the alleged crime had been committed in Canada.—*Re ROSENBERG*, [1918] 1 W. W. R. 845; 28 Man. L. R. 439; 29 Can. Crim. Cas. 309.—CAN.

85 i. Foreign depositions alone—Whether sufficient.]—*R. v. BROWNE* (1871), 31 C. P. 484; *affd.* 6 A. R. 386.—CAN.

b. Evidence of accomplices.]—The evidence of accomplices is sufficient

82. ———.]—*R. v. ZOSSENHEIM*, No. 106, *post*.

Sufficiency of evidence.]—See Sub-sect. 3, C. (a) ii., *post*.

ii. Sufficiency.

83. Test of sufficiency.]—*R. v. MAURER*, No. 127, *post*.

See, further, Extradition Act, 1870 (c. 52), s. 9.

84. Uncorroborated evidence of accomplice—Discretion of magistrate.]—*Re MEUNIER*, No. 37, *ante*.

85. Foreign depositions alone—Whether sufficient.]—*Re PARISOT*, No. 68, *ante*.

86. Decision of magistrate—How far conclusive—Evidence of expert on foreign law.]—*Ex p. HUGUET*, No. 126, *post*.

87. ———.]—*R. v. MAURER*, No. 127, *post*.

88. ———.]—*Re CASTIONI*, No. 36, *ante*.

89. ———.]—*Re ARTON* (No. 2), No. 21, *ante*.

90. ———.]—*R. v. HOLLOWAY PRISON (GOVERNOR)*, *Re SILETTI*, No. 129, *post*.

91. ———.]—A magistrate committed an accused person to prison to await extradition to France. The accused obtained a rule nisi for a writ of habeas corpus on the ground that new evidence had arisen since the committal disproving his identity with the person against whom the warrant was issued. It was admitted that there was evidence upon which the magistrate was entitled to make the order & that he had the necessary jurisdiction:—*Held*: discharging the rule, the ct. had no power to review the magistrate's decision upon the above ground & that the matter was one to be dealt with, if at all, by a Secretary of State in exercise of his powers under the Extradition Act, 1870 (c. 52), s. 11.—*R. v. BRIXTON PRISON (GOVERNOR)*, *Ex p. PERRY*, [1924] 1 K. B. 455; 93 L. J. K. B. 380; 130 L. T. 731; 40 T. L. R. 181; 68 Sol. Jo. 370; 27 Cox, C. C. 597, D. C.

—— **Review on application for habeas corpus.]—**See Sub-sect. 5, *post*.

to establish a charge for the purposes of extradition.—*Re CALDWELL* (1870), 5 P. R. 217.—CAN.

c. Foreign indictment.]—On an application for the discharge of a prisoner committed for extradition under an order of the county judge of Kent, on a charge of murder:—*Held*: a certified copy of an indictment for murder found by the grand jury of Erie county, State of New York, U.S., was of itself sufficient evidence to justify the committal of such prisoner for extradition.—*R. v. BROWNE* (1871), 31 C. P. 484; *affd.* 6 A. R. 386.—CAN.

d. Hearsay.]—Where the facts in evidence, though sufficient to warrant extradition if deposed to by witnesses who could really testify to their occurrence, were sworn to from information only, the prisoner was discharged.—*Re PARKER* (1882), 9 P. R. 332.—CAN.

e. Prima facie case—Established by circumstantial evidence.]—A prima facie case is sufficient to warrant extradition & this may be established by circumstantial evidence.—*Re HOKK* (1887), 15 R. L. O. S. 99.—CAN.

f. ———.]—It is sufficient for applot. for extradition to make out a prima facie case.—*GROSSBERG v. CHOUQUET* (1924), 41 Can. Crim. Cas. 291; Q. R. 36 K. R. 517 —

Sect. 3.—Procedure: Sub-sect. 3, C. (b) i. & ii., & D.]

(b) *Evidence Admissible.*

i. *In General.*

See, generally, EVIDENCE, Vol. XXII., pp. 53 et seq.

Absence of provision by foreign law—Against trial for offence other than crime charged.]—*See Extradition Act, 1870 (c. 52), s. 3 (2), & compare Nos. 1, 2, ante.*

92. Absence of good faith—In demanding surrender.]—*Re ARTON (No. 1), No. 42, ante.*

93. Merits of foreign adjudication—In bankruptcy.]—Upon an application, under the treaty with Belgium, for the extradition of a person charged with having committed a crime against the Belgian bkpcy. law, it is no answer to show that the adjudication in bkpcy. in Belgium was founded upon a petitioning creditor's debt for less than £50. The magistrate in this country ought not to inquire into the merits of the adjudication.—*R. v. HOLLOWAY PRISON (GOVERNOR) (1902), 18 T. L. R. 475, D. C.*

94. Political nature of crime charged—Extradition Act, 1870 (c. 52), s. 3 (1).]—*Re MEUNIER, No. 37, ante.*

95. ———.]—*Re ARTON (No. 1), No. 42, ante.*

96. Evidence taken before one magistrate—

Whether admissible before another—Upon subsequent hearing.]—*Ex p. HUGUET, No. 126, post.*

97. ———.]—*Re GUERIN, No. 59, ante.*

98. Nationality of accused—When material under treaty.]—*R. v. ALLEN & TAYLOR (1888), Clarke's Law of Extradition, 4th ed. p. 252.*

99. Charges other than that for which arrested—Evidence on original charge already sufficient.]—*Re BLUM, No. 62, ante.*

ii. *Foreign Depositions.*

100. Original deposition.]—Copies of depositions taken before the passing of 29 & 30 Vict. c. 121, if authenticated as required by the Act, may be received in evidence in proceedings under the Extradition Acts. The original depositions, properly authenticated, can be received in evidence against the prisoner. A French warrant for the apprehension of an accused person is necessary in order to procure his extradition under 6 & 7 Vict. c. 75, but it need not be signed by a judge or competent magistrate, & need only be authenticated or made in such a manner as would justify the arrest of the accused person in France. A person condemned *pur contumace* in France continues to be an accused person, liable to be delivered over under the Extradition Acts.

† granted this *habeas corpus* during the vacation & made it returnable on the first day of term in

PART I. SECT. 3, SUB-SECT. 3.—
C. (b) i.

98 i. Nationality of accused—When material under treaty—Burden of proof.]—In extradition proceedings under Chinese Extradition Ordinance 1889, there must be clear proof before the magistrate that accused is a subject of China. It is not necessary for accused to set up that he is not a Chinese subject; the burden of proof is on the Crown.—*R. v. SUN AH WAN (1910), 5 Hong Kong L. R. 33.—HONG KONG.*

g. Copy of bill of indictment.]—*Re ROSENBAUM (1874), 20 L. C. J. 165.—CAN.*

h. ———.]—*R. v. BROWNE (1881), 6 A. R. 386.—CAN.*

k. ———.]—*Ex p. ENO (1884), 7 L. N. 360.—CAN.*

l. ———.]—A document certified to be a true copy of an original indictment & attested by the seal of the ct. of the United States, into which it was returned, is admissible in evidence in extradition proceedings.—*Re GOODMAN (1916), 34 W. L. R. 531; 10 W. W. R. 781; 28 D. L. R. 197; affd. 29 D. L. R. 725; 26 Man. L. R. 537.—CAN.*

m. Proof that crime charged is not extraditable.]—A person whose extradition is demanded has a general right to show by evidence that what he is charged with is not an extradition crime.—*Re PHIPPS (1883), 8 A. R. 77.—CAN.*

n. Evidence to contradict prosecution.]—*Re DEBAUM (1888), 11 L. N. 323.—CAN.*

o. ———.]—Where evidence is given by the prosecution before an extradition judge positively identifying prisoner, the judge cannot receive evidence on behalf of the prisoner to show an *alibi*.—*Re GARBUTT (1891), 21 O. R. 179.—CAN.*

p. Secondary evidence of document.]—The basis of a charge being false pretence, & that false pretence being obtained in a written document, unless a foundation be laid by secondary

evidence to make out a *prima facie* case, the document itself must be produced upon application for a warrant for extradition.—*Re JOHNSTON (1907), 13 B. C. R. 209.—CAN.*

q. Merits of foreign adjudication—Indictment based on insufficient evidence.]—A person whose extradition is asked for cannot offer evidence at the inquiry to show that the foreign indictment was based on insufficient evidence & that a true bill should not have been returned by the grand jury.—*ECREMENT v. SEGUIN (1921), 39 Can. Crim. Cas. 113; Q. R. 33 K. B. 302.—CAN.*

r. Affidavit—Properly proved.]—*Ex p. PHELAN (1883), 6 L. N. 261.—CAN.*

—.]—Affidavits duly authenticated may properly be taken into consideration by the extradition comr. although made after the appearance of accused before him.—*GROSSBERG v. CHOQUET (1924), 41 Can. Crim. Cas. 291; Q. R. 36 K. B. 517.—CAN.*

t. ———.]—A comr. acting under the powers vested in him by Extradition Act is justified in proceeding upon the complaint laid before him, without taking any evidence in support of such complaint. Evidence in support of the charge may be submitted by affidavit.—*Re O'NEILL (1912), 17 B. C. R. 123.—CAN.*

a. ——— Matter for commissioner's discretion.]—Affidavits taken *ex p.* in the manner provided in Extradition Act, R. S. C., c. 142, s. 10, are admissible as evidence in support of the charge for which the extradition of a fugitive is sought. The sufficiency of such evidence is a matter for the judicial discretion of the extradition comr.—*BROWNE v. U.S.A. (1906), Q. R. 30 S. C. 363.—CAN.*

b. ——— On collateral questions—Proof of foreign law.]—The ct. might receive affidavits on questions cardinal to the jurisdiction but collateral to the subject of inquiry, that is not within the sole jurisdiction of the magistrate.

Affidavits to prove Chinese law & show the non-existence of martial law in Kuang Tung were admitted.—*Re CHUNG SAN NAM (1914), 9 Hong Kong L. R. 26.—HONG KONG.*

c. Political nature of crime charged.]—The same fundamental principles govern the extradition of convicted & accused fugitives; the prisoner may therefore, although convicted, prove that his surrender is asked for with a view to punish him for an offence of a political character.—*Re VICENTA SOTTO (1912), 7 Hong Kong L. R. 139.—HONG KONG.*

d. Admissions made to police officer.]—A person who had escaped from a French penal settlement made admissions to a constable. After these admissions had been made the constable said, "We don't want to do you any harm," & asked him to come to town, offering him to keep him for a week & get him work. Eight days afterwards he was arrested by the same constable on an extradition warrant. The constable then asked him some questions, receiving in reply further admissions:—*Held*: these conversations were admissible in evidence against him.—*R. v. GARVEY, Ex p. (1888), 6 N. Z. L. R. 604.—N.Z.*

PART I. SECT. 3, SUB-SECT. 3.—
C. (b) ii.

100 i. Original deposition.]—Application for the discharge on *habeas corpus* of prisoners charged with robbery committed in the United States, & committed at Sandwich for extradition. The prisoners had been previously arrested at Toronto on the same charge, & had been discharged by the local police magistrate:—*Held*: the depositions on which the warrant issued in the United States after the arrest in Canada, were properly admitted here as evidence of criminality, their admission being within both the letter & spirit of 31 Vict. c. 94.—*R. v. MORTON (1868), 19 C. P. 9.—CAN.*

100 ii. ———.]—Upon an application for extradition of deft. who was under

order that the objections made to the delivery up of prisoner to the French Govt. might be publicly argued & determined (LORD CHELMSFORD, C.). *Re COPPIN* (1866), 2 Ch. App. 47; 30 J. P. 776 *sub nom. Ex p. DUBOIS (alias COPPIN)*, 36 L. J. M. C. 10; 15 L. T. 165; 12 Jur. N. S. 867; 15 W. R. 24, L. C.

101. — If authenticated—Extradition Act, 1870 (c. 52), s. 14.]—*Re COUNHAYE*, No. 103, *post*.

102. Copies—If authenticated.]—*Re COPPIN*, No. 100, *ante*.

Proof of authentication.]—See Extradition Act, 1870 (c. 52), s. 15.

103. Not taken in presence of accused—Whether admissible.]—(1) Under Extradition Act, 1870 (c. 52), foreign depositions, if duly authenticated, may be received in evidence in proceedings under the Act, although taken in the absence of the person accused, & without his having had an opportunity of cross-examining the witnesses.

(2) In the list of "extradition crimes" in the schedule to the Act are included "crimes by bkpts. against the bkpcy. law":—*Held*: a married woman charged with complicity in the fraudulent bkpcy. of her husband is not a person charged with a crime within the meaning of the above description, as it is limited to crimes committed by bkpts. only.

(3) By treaty between this country & Belgium, a requisition for the surrender to Belgium of a fugitive criminal shall be made to the Foreign Secretary, accompanied by a warrant of arrest or other equivalent judicial document issued by a judge or magistrate, duly authorised, etc., together with duly authenticated depositions taken on oath before such judge or magistrate, which documents are to be transmitted to the Home Secretary, who, if there be due cause, shall require a magistrate to apprehend the fugitive:—*Held*: the Secretary may waive the fulfilment of these conditions, & such documents may be received in evidence before the police magistrate before whom the fugitive is brought, although the warrant is not issued & the depositions taken before same judge.

Qu.: whether Extradition Act, 1870 (c. 52), applies to criminals who have taken refuge in this country before the date of the Act.—*Re COUNHAYE* (1873), L. R. 8 Q. B. 410; 42 L. J. Q. B. 217; 28 L. T. 761; 38 J. P. 39; 21 W. R. 883.

Annotations:—As to (1) & (3) *Consd. R. v. Brixton Prison*, [1911] 2 K. B. 82; *R. v. Brixton Prison, Ex p. Servini*,

[1914] 1 K. B. 77. *Reid. R. v. Ganz* (1882), 9 Q. B. D. 93. *Generally, Mentd. Re Castioni*, [1891] 1 Q. B. 149.

104. Not taken pursuant to terms of treaty—Waiver of irregularity—Treaty with Belgium.]—*Re COUNHAYE*, No. 103, *ante*.

105. — Irregularity not material—Treaty with France.]—*R. v. Brixton Prison (Governor)*, *Ex p. THOMPSON*, No. 44, *ante*.

106. Not taken according to English law—Whether admissible.]—It was said that the magistrate ought not to have acted upon evidence appearing on the depositions, because it might be assumed in favour of the prisoner that certain rules of evidence according to English law had not been complied with. Foreign depositions ought to be most strictly scrutinised. The magistrate ought to see what the substance of them was, as establishing the facts of the case, but to say that if the statements in the depositions did establish the facts, the magistrate should then inquire whether certain formalities according to English law had been taken is in my opinion contrary to Extradition Act, 1870 (c. 52), s. 14. It was suggested in support of the rule that many of these facts might have been altered by cross-examination. I know of no authority that, because they might be criticised subsequently & cross-examined to subsequently, or because possibly they had not been taken according to the English rules of evidence, they ought not to be acted upon. On the first point . . . there was no ground to interfere. It was said also that the magistrate had declined to exercise a jurisdiction that he ought to have exercised, namely, to consider the evidence for the defence. . . . He could not have acted upon that principle, for in this case evidence was given before him on behalf of deft., & the text-books showed that the practice had been established of such evidence being considered by the magistrates before they decided the question of committal for extradition. There was evidence establishing a *prima facie* case. The magistrate rightly exercised his jurisdiction, & there was nothing before them to show that he proceeded on a wrong view of the law (LORD ALVERSTONE, C.J.).—*R. v. ZOSSENHEIM* (1903), 20 T. L. R. 121; 67 J. P. Jo. 616, D. C.

D. Bail.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 156 *et seq.*, Nos. 1301 *et seq.*

107. Bail not as of right—Dependent on treaty.]—*R. v. SPILSBURY*, No. 155, *post*.

indictment in the State of New York for murder, the coroner who had held the inquest there, proved by oral testimony before the county judge here, the original depositions taken on oath before him, & also copies of the depositions certified by him to be true copies:—*Held*: under Imperial Extradition Act of 1870, s. 14, the original depositions were properly received.—*R. v. BROWNE* (1881), 6 A. R. 386.—CAN.

g. — If authenticated.]—Under 31 Vict. c. 94, the depositions must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing, & not depositions taken subsequently to the issue of the original warrant, & without any parent connection therewith.—*R. v. ROBINSON* (1870), 5 P. R. 189.—CAN.

h. — Ex p. WORMS (1870), 7 R. L. O. S. 320.—CAN.

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i. — Original depositions are admissible in proceedings under Imperial Act, 6 & 7 Vict. c. 34, & can be used in evidence against a prisoner upon proof of their identity & of their being properly taken.—*R. v. MATTHEW* (1877), 7 P. R. 190.—CAN.

j. — *Re HOKE* (1887), 15 R. L. O. S. 99.—CAN.

k. — *R. v. MOORE* (1910), 20 Man. L. R. 41.—CAN.

l. — *Re STAGGS* (1912), 22 W. L. R. 853; 5 Alta. L. R. 350.—CAN.

m. — Necessity for strict proof.]—In extradition cases, the forms & technicalities with which the statute surrounds the production of affidavit evidence must be strictly complied with. Depositions taken in the United States cannot be read unless certified under the hand of the magistrate who

issued the original warrant as being copies of the depositions upon which such warrant issued.—*Re LEWIS* (1874), 6 P. R. 236.—CAN.

n. — Where an application for extradition is founded upon deposition evidence it will be required to conform strictly to the conditions prescribed by the Act for such evidence, nothing will be inferred in its favour.—*Re OOKERMAN* (1898), 6 B. C. R. 143.—CAN.

108 i. Not taken in presence of accused—Whether admissible.]—Foreign depositions may be read, although not taken in the presence of prisoner.—*R. v. BURKE* (1889), 6 Man. L. R. 121.—CAN.

PART I. SECT. 3, SUB-SECT. 3.—D.

o. Power of Court of Appeal to admit to bail.]—An application to a judge of the Ct. of Appeal to admit to

Sect. 3.—Procedure: Sub-sect. 3, D. & E.; sub-sect. 4.]

108. — Discretion of magistrate to grant.]—*R. v. PASQUALE DE FRANCIS (1895), Times, Mar. 14.*

109. — — —.]—*R. v. KUNAN (1908), Times, Nov. 18.*

110. — — —.]—Deft., arrested in extradition proceedings on a charge of a misdemeanour committed abroad, & remanded pending the receipt of further information from the foreign country, is not entitled as of right to be granted bail either by the magistrate or by the K. B. Div., but the matter is in the magistrate's discretion.—*R. v. PHILLIPS (1922), 128 L. T. 113; 86 J. P. 188; 38 T. L. R. 897; 67 Sol. Jo. 64; 27 Cox, C. C. 332, D. C.*

111. — — —.]—*Re LAPIERRE (1906), Times, July 6.*

E. Committal or Discharge.

Form of warrant of committal.]—*See, now, Extradition Act, 1870 (c. 52), sched. II.*

112. — Necessity to follow statutory form.]—*Ex p. BESET, No. 46, ante.*

113. — Description of offence—Description under one section of Act—Evidence supporting offence under different section.]—Prisoner charged with misappropriation of certain securities handed to him while engaged in an attempt, under an agreement with prosecutor, to procure a contract for the construction of certain railways, was arrested, & committed to prison to be extradited, on a warrant accusing him of an offence in the terms of Larceny Act, 1861 (c. 96), s. 75. On cause being shown against a rule *nisi* obtained by prisoner for his discharge:—*Held*: he was entitled to be discharged, since the words "or other agent" in Larceny Act, 1861 (c. 96), s. 75, meant a person entrusted with money in a personal capacity & *ejusdem generis* with banker, merchant, broker, & attorney; & prisoner was not an agent within Larceny Act, 1861 (c. 96), s. 75.

Where on the warrant for the commitment of a person accused of an extradition crime the magistrate had set out in terms an offence under a

particular sect. of Larceny Act, 1861 (c. 96), & the ct. were of opinion that the depositions failed to show that deft. had been guilty of any offence under that section, the ct. refused to order deft. to be held in prison to be extradited, because the evidence before the magistrate would have justified him in committing under another sect. of Larceny Act, 1861 (c. 96).—*R. v. PORTUGAL (1885), 10 Q. B. D. 487; 50 J. P. 501; sub nom. R. v. DE PORTUGAL, 55 L. J. Q. B. 567; sub nom. Re DE PORTUGAL, 34 W. R. 42; 2 T. L. R. 14, D. C.*
Annotation:—Reid. R. v. Kane, [1901] 1 K. B. 472.

114. — — — Discrepancy between English & foreign classification of crime—& English & foreign version of treaty.]—*Re ARTON (No. 2), No. 21, ante.*

115. — — —.]—Prisoner was arrested on a charge of obtaining goods by false pretences in Germany. The offence was rightly described according to the law of Germany, but did not amount in this country to obtaining goods by false pretences. He was accordingly committed by the magistrate for extradition to Germany on the offence of "fraud by an agent & larceny by a bailee," which properly described the offence according to the law of England, all the offences coming within the Extradition Treaty:—*Held*: the committal was proper.

When under art. 5, exemption from punishment had been acquired by lapse of time according to the laws of the State applied to the extradition was not to be granted. Those words . . . referred to such limitations as were imposed by various statutes (WRIGHT, J.).

With regard to art. 4, the meaning of it was that if a crime had been committed by a person, for which crime he could be punished in both countries, & he had, in fact, been punished for it in one, he could not be tried again for it in the other (WRIGHT, J.).—*R. v. HOLLOWAY PRISON (GOVERNOR), Ex p. BUDDENBORG (1898), 14 T. L. R. 252, D. C.*

116. — — —.]—*Ex p. KOHN (1900), 35 L. Jo. 173, D. C.*

117. — Ambiguity in description of offence—Remittal of warrant to magistrate.]—*Re ARTON (No. 2), No. 21, ante.*

bail a person committed for extradition, pending an appeal to that ct. from an order of the High Court refusing, upon *habeas corpus*, to discharge the applicant, was refused on the grounds (1) that it did not appear that the applicant was in actual custody, & (2) that it was doubtful whether a judge of the Ct. of Appeal had power to make the order.—*Re WATTS (1902), 22 C. L. T. 130; 3 O. L. R. 279; 1 O. W. R. 129; 5 Can. Crim. Cas. 538.—CAN.*

p. Power of magistrate to grant.]—There is no provision in Criminal Procedure Code (Act V of 1898) or in Extradition Act (XV of 1903) authorising a magistrate to hold a person to bail to appear before a tribunal in a State to which the Extradition Act applies, unless the warrant is endorsed under the provisions of s. 8 of the Act.—*BALTHASAR v. R. (1906), 1 L. R. 33 Calc. 1032.—IND.*

q. — — —.]—The magistrate in British India to whom a warrant has been addressed under Indian Extradition Act, 1903, s. 7, has no power to admit an arrested person to bail apart from ss. 8 & 8a of the Act.—*Re MURLIDHAR BHAGWANDAS*

(1918), 1 L. R. 43 Bom. 310.—IND.

r. Application for — Necessity for notice to Minister of Justice.]—Where a person arrested for extradition to a foreign country applied to the ct. for bail, notice of his application was ordered to be given by him to the Minister of Justice of the Union, although he had given notice to the A.-G. of this province.—*Ex p. RECKLING, [1920] C. P. D. 567.—S. AF.*

PART I. SECT. 3, SUB-SECT. 3.—E.

s. Duty to commit—Where evidence would justify magistrate in committing.]—On the hearing of an application for the extradition of accused it is the duty of the Extradition Judge, if the evidence adduced would justify a magistrate in committing the accused & is not contradicted, to make an order for extradition, in the same way as if the case had come before a magistrate at a preliminary enquiry & he had committed the case for trial.—*Re LATIMER (1906), 3 W. L. R. 81; 10 Can. Crim. Cas. 244.—CAN.*

t. — — — If evidence raises presumption of guilt.]—It is the duty of the magistrate to commit accused if in

his opinion the evidence raises a strong or probable presumption of guilt.—*Re WONG KA CHEONG (1905), 1 Hong Kong L. R. 1.—HONG KONG.*

u. Form of warrant of committal—Warrant defective—Power of court to remand.]—*Held*: when prisoner was brought before the ct. upon a writ of *habeas corpus* under our statute, the warrant of commitment upon which he was detained appearing on its face to be defective, the ct. had no authority to remand him, such power only being possessed by the ct. at common law, & prisoner not being charged with any offence for which he could be tried in this Province.—*Re ANDERSON (1861), 11 C. P. 9.—CAN.*

v. — — —.]—(1866), 2 L. C. L. J. 23.—CAN.

w. Error in warrant of arrest—Effect on warrant of commitment.]—*Ex p. WORMS (1876), 22 L. C. J. 109.—CAN.*

x. Commitment for "forgery."—A commitment for extradition for "forgery" is sufficient & no further particularity is necessary.—*Re HOKE (1887), 15 R. L. O. S. 92.—CAN.*

y. — — —.]—In extradition proceed-

l. v. DIX, No. 27,

— As to place to which committed—When affected by ill health of prisoner.]—See Extradition Act, 1895 (c. 33), s. 1 (3).

119. Validity of warrant—When committal on all offences charged—Of which some not substantiated.]—*Re BELLENCONTRE*, No. 51, *ante*.

120. — Committal for distinct offences—Separate committals for each—Whether necessary.]—*Re MEUNIER*, No. 37, *ante*.

121. — Limitation of time for punishment by foreign law—Order made before expiration of time—But enforced after—Due to prisoner serving prior sentence in England.]—*R. v. BRIXTON PRISON (GOVERNOR)*, *Ex p. VAN DER AUWERA*, No. 141, *post*.

122. Duty of magistrate to commit—For trial in jurisdiction where arrested—Offence against *jus gentium*—Hong Kong Ordinance No. 2 of 1850.]—*A.-G. FOR COLONY OF HONG KONG v. KWOK-A-ante*.

123. Meaning of "committed to prison"—Where time for surrender material—Treaty with France, 1876, Art. 10.]—By above art. of above Treaty between the United Kingdom & France, "if the fugitive criminal who has been committed to prison be not surrendered & conveyed away within two months after such committal, or within two months after the decision of the Court upon the return to a writ of *habeas corpus* in the United Kingdom, he shall be discharged from custody, unless sufficient cause be shown to the contrary": *Held*: "committed to prison" meant the committal of the accused person to prison by the

ings for forgery of a draft on a bank in the United States:—*Held*: a warrant of commitment may be issued in proceedings instituted in this province; the previous issue of a warrant in the country demanding extradition not being essential.—*Re GARBUTT* (1891), 21 O. R. 465.—CAN.

l. Date on information—Different from that given in evidence—Power of commissioner to dismiss application.]—The Comr. is not justified in dismissing the application because date of offence as given in the information is different from that given in evidence before him.—*U.S.A. v. WRBBER* (1912), 11 E. L. R. 379.—CAN.

g. Validity of warrant—Necessity for strict compliance with Act.]—In order to constitute a valid commitment there must be a strict compliance with the Extradition Act, which has to be literally & strictly interpreted.—*Re GOLDSTEIN* (1899), 8 Nfld. L. R. 247.—NFLD.

h. Duty to discharge prisoner—If committal order not made.]—Prisoner had been brought before a magistrate as a fugitive criminal under Chinese Extradition Order, 1889, s. 9. The magistrate, having heard the evidence, decided not to commit, but remanded the prisoner, apparently in order that another warrant should be executed upon him:—*Held*: the prisoner was entitled to his discharge, when the magistrate decided not to commit, & there was no power to remand him until the execution of the later warrant.—*Re SUN AH WAN* (1909), 5 Hong Kong L. R. 58.—HONG KONG.

k. Duty of magistrate to inform prisoner—Of right to apply for habeas corpus.]—Proceedings for the extradition of a fugitive from Macao were taken under Extradition Act, 1870,

instead of under the Macao Extradition Ordinance which came into force 14 years before the Extradition treaty between Great Britain & Portugal. One of the provisions of the treaty was that special arrangements for the surrender of criminals might be made in the colonies. S. 6 of the Ordinance provides that the magistrate, before committing a fugitive for extradition, shall inform him that a period of 15 days will be allowed for him to appeal to the Supreme Ct. for a writ of *habeas corpus*. The magistrate omitted so to inform the fugitive:—*Held*: the Macao Extradition Ordinance, is preserved under the language of the treaty & its provisions not having been complied with, the order for the extradition of the fugitive must be set aside.—*Re EXTRADITION ACT, 1870, Re KONG CHI TEN* (1919), 14 Hong Kong L. R. 48.—HONG KONG.

PART I. SECT. 3, SUB-SECT. 4.

l. From decision of magistrate—On sufficiency of evidence.]—The Ct. or judge may determine whether a case be within the Extradition Treaty, & a judge in chambers has power to review & decide on the sufficiency of the evidence returned by the committing magistrates, or, if necessary, to hear further testimony.—*R. v. TUBBEE* (1852), 1 P. R. 98.—CAN.

m. — — —]—When the comr. has decided that there is evidence justifying an order for extradition, his decision cannot be reviewed if the judge to whom the application is made is of the opinion from the record that there was such evidence.—*Re O'NEILL* (1912), 17 B. C. R. 123; 5 D. L. R. 646.—CAN.

n. — — —]—The Ct. of Appeal has no authority to interfere with the

magistrate, upon the conclusion of the proceedings of the proceedings before him, to await the warrant of the Secretary of State for his extradition, & did not mean the arrest of the accused under the warrant issued by the magistrate in the first instance; & therefore the accused is not entitled to be discharged from custody merely because he has not been surrendered & conveyed away within two months after his arrest under the magistrate's warrant.—*R. v. BRIXTON PRISON (GOVERNOR)*, *Ex p. MEHAMED BEN ROMDAN*, [1912] 3 K. B. 190; 81 L. J. K. B. 1128; 76 J. P. 391; 28 T. L. R. 530, D. C.

Place to which committed.]—See Extradition Act, 1870 (c. 52), s. 10; Local Government Act, 1888 (c. 41), s. 89 (3).

— Ill health of prisoner—Discretion of magistrate.]—See Extradition Act, 1895 (c. 33), s. 1 (3).

Duty to discharge prisoner—If committal order not made.]—See Extradition Act, 1870 (c. 52), s. 10.

124. Discretion of Secretary of State—Fresh evidence after committal—Which might have influenced magistrate's decision.]—*R. v. HOLLO-WAY PRISON (GOVERNOR)*, *Re SILETTI*, No. 129, *post*.

— To discharge at any time—On account of political nature of offence.]—See Extradition Act, 1870 (c. 52), s. 7.

SUB-SECT. 4.—APPEAL.

125. From decision of magistrate—On question of fact.]—*Re GUERIN*, No. 59, *ante*.

discretion of an extradition judge in committing accused under an Extradition Act where the case is one wherein there is some evidence to support his decision.—*Re ROSENBERG*, [1918] 1 W. W. R. 845; 28 Man. L. R. 439; 29 Can. Crim. Cas. 309.—CAN.

o. — — — Ordering forfeiture of bail.]—No appeal lies to the Ct. of Appeal from an order made in the county ct. judge's criminal ct. ordering the forfeiture of bail for the non-appearance of an accused person in an extradition proceeding.—*l. v. HARVIE* (1912), 18 B. C. R. 5; 9 D. L. R. 432.—CAN.

p. — — — Discharging prisoner on habeas corpus.]—The Ct. of Appeal in British Columbia has no jurisdiction to entertain an appeal from an order of a judge upon *habeas corpus* discharging a prisoner from custody in a cause or matter arising out of extradition proceedings.—*Re TIDERTINGTON* (1912), 20 W. L. R. 355; 5 D. L. R. 138.—CAN.

q. Effect of equal division in Appeal Court.]—Prisoner was remanded for extradition by order of the Ch. Div. of the High Ct. of Justice which on appeal to this Ct. was affirmed, the Ct. being equally divided. A second writ of *habeas corpus* was thereupon obtained, & prisoner brought before the Common Pleas Div., when he was again remanded, whereupon he again appealed to this Ct., which appeal was dismissed with costs, as under such circumstances a second appeal could not be entertained. The effect of an equal division in this Ct., as in a Ct. of first instance, is simply that the rule or motion drops or the appeal is dismissed, & the judgment below remains undisturbed, but is not considered as a binding authority.—*Re HALL* (1882), 8 A. R. 135.—CAN.

Sect. 3.—Procedure: Sub-sects. 5 & 6.]**SUB-SECT. 5.—APPLICATION FOR HABEAS CORPUS.**

Procedure on application generally, see R. S. C., Ord. 59, r. 1 (g); Crown Office Rules, 1906, rr. 216-219, 265; CROWN PRACTICE, Vol. XVI., pp. 255 *et seq.*, Nos. 566 *et seq.*

Right to apply.]—See CROWN PRACTICE, Vol. XVI., p. 248, No. 474.

— Duty of magistrate to inform prisoner.]—See Extradition Act, 1870 (c. 52), s. 11.

126. Powers of court—To review magistrate's decision—How limited.]—(1) By Extradition Act, 1870 (c. 52), when a fugitive criminal is brought before a police magistrate, the latter is to hear the case in the same manner & to have the same jurisdiction & powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England:—*Held*: upon a rule for a *habeas corpus*, upon a committal by a police magistrate, as this is not a ct. of appeal in such a case it will not question the judgment of the magistrate if the case was within his jurisdiction & there was any evidence to support his decision.

(2) Upon such a hearing, a witness gave his evidence before a police magistrate, A., in the presence of the accused & signed his deposition. The further hearing of the case was then adjourned, & on the adjournment day the further hearing was resumed before B., another police magistrate, but as the witness before examined before A. refused to attend & had gone abroad, his deposition made before A. was proved to have been duly taken & was read as part of the case against the accused, whereupon additional evidence having been taken, the prisoner was committed to the Middlesex House of Detention pursuant to Extradition Act, 1870 (c. 52):—*Held*: the deposition so taken at the former hearing by A. was properly receivable by B. upon the subsequent hearing.

Where there is evidence of experts in French law, which shows a crime committed in France, which, if committed here, would be punishable by our law, we have no right to question the truth of the testimony. In such a case it is for the magistrate to decide, & although we may think that the case is very inconclusive, we cannot interfere. He is the only party authorised to

decide upon the facts (KELLY, O.B.).—*Ex p. HUGUET* (1873), 20 L. T. 41; 12 Cox, C. C. 551.

Annotations:—As to (1) *Consd. R. v. Maurer* (1883), 10 Q. B. D. 513. *Reid. Ex p. Castioni* (1890), 7 T. L. R. 50; *Re Bluhm*, [1901] 1 K. B. 764. As to (2) *Reid. Re Guerin* (1888), 58 L. J. M. C. 42.

127. — — — — —.]—Upon an application for a *habeas corpus* in the case of a fugitive criminal committed by a police magistrate under the Extradition Act, 1870 (c. 52), the ct. has no power to review the decision of the magistrate on the ground that it was against the weight of evidence laid before him, there being sufficient evidence before him to give him jurisdiction in the matter.

There must be such evidence as, according to the law of England, would justify the magistrate in committing the prisoner for trial if the alleged crime had been committed in England (MATHEW, J.).—*R. v. MAURER* (1883), 10 Q. B. D. 513; *sub nom. Re MAURER*, 52 L. J. M. C. 104; 31 W. R. 609, D. C.

Annotations:—*Reid. Ex p. Castioni* (1890), 7 T. L. R. 50; *Re Bluhm*, [1901] 1 K. B. 764. *Mentd. R. v. Brixton Prison, Ex p. Perry*, [1924] 1 K. B. 455.

128. — — — — —.]—*Re ARTON* (No. 2), No. 21, *ante*.

129. — — — — — Fresh evidence subsequent to decision.]—On an application for a *habeas corpus* to bring up a fugitive criminal committed for extradition by a police magistrate under the Extradition Act, 1870 (c. 52), it is not competent for the ct. to review the decision of the magistrate on the ground that further evidence has come to light, provided that there was evidence upon which the magistrate could act & that it is not shown that he had not jurisdiction.

Accused may say that the crime with which he was charged was not a crime within [Extradition] Act, that is to say that it did not come within the class of offences contemplated or that it was an offence of a political character & therefore outside the Act. He may say also that there was no evidence upon which the magistrate could exercise his discretion as to whether he would commit or not. Those things he may say. I am clearly of opinion that there is one thing he cannot say: that is that there is evidence one way & the other, & that this ct. ought to consider whether the

PART I. SECT. 3, SUB-SECT. 5.

126 i. Powers of court—To review magistrate's decision—How limited.]—On an application for a writ of *habeas corpus*, on the ground that the French vice-consul made the requisition for the surrender of accused & not the Governor of New Caledonia, the judgment of the police magistrate who has committed accused under extradition proceedings will not be reviewed by a judge in chambers.—*R. v. HUSTIN* (1881), 1 Q. L. J. 16.—AUS.

126 ii. — — — — —.]—On a petition for *habeas corpus*, by one who had been committed for extradition:—*Held*: the judge is required to decide whether he deems the evidence adduced before him sufficient to justify the apprehension & commitment for trial of the person accused, if the crime had been committed in Canada. If he finds in the affirmative he should so state it in his commitment, & certify the fact to the proper executive authority. His functions do not extend to determining whether the accused should be extradited.—*Ex p. ZINK* (1880), 6 Q. L. R. 260.—CAN.

126 iii. — — — — —.]—In examining upon a petition for *habeas corpus*, whether the detention of the prisoner is lawful, the ct. or judge will set aside the warrant of commitment only if there be manifest error in the adjudication. If the comr. had jurisdiction & there was legal evidence before him, the ct. is not called upon to examine the sufficiency of the evidence.—*Ex p. DEBAUM* (1888), M. L. R. 4 Q. B. 145.—CAN.

126 iv. — — — — —.]—When, at the close of the evidence for the demanding country at the hearing of an application for extradition under the judge calls on counsel for the accused for his defence, a committal subsequently made will not be set aside on *habeas corpus* on the ground that the judge did not formally ask the accused if he wished to call any witnesses, as required by Criminal Code, s. 686.—*Re MOORE* (1910), 20 Man. L. R. 41.—CAN.

126 v. — — — — —.]—The ct. on *habeas corpus* has no jurisdiction to review the magistrate's decision on the facts after he has decided to commit

the fugitive for surrender.—*Re LI YU MUI* (1910), 5 Hong Kong L. R. 227.—HONG KONG.

126 vi. — — — — —.]—The duty of the ct. or a judge on a *habeas corpus*, is to determine on the legal sufficiency of the commitment, & to review the magistrate's decision as to there being sufficient evidence of criminality.—*R. v. RENO* (1865), 4 P. R. 281.—CAN.

126 vii. — — — — —.]—*Ex p. PHILAN* (1883), 11 L. N. 261.—CAN.

126 viii. — — — — —.]—The decision of the extradition comr. on the sufficiency of evidence by affidavit is not subject to review in *habeas corpus* proceedings.—*BROWN v. U. S. A.* (1906), Q. R. 30 S. C. 363.—CAN.

r. — — — — — To review the whole of the evidence.]—*Re HOKE* (1887), 15 R. L. O. S. 99.—CAN.

s. — — — — — To remand prisoner—Warrant of commitment defective.]—When prisoner was brought before the ct. upon a writ of *habeas corpus* under the Ontario statute, after having been committed in extradition proceedings, the warrant of commitment

magistrate has exercised his discretion as to it properly (BIGHAM, J.).

Where such further evidence has been obtained since the committal order it is entirely a question for the Secretary of State to consider before making the order for the surrender of the prisoner under Extradition Act, 1870 (c. 52), s. 11.—*R. v. HOLLOWAY PRISON (GOVERNOR), Re SILETTI* (1902), 71 L. J. K. B. 935; 87 L. T. 332; 67 J. P. 67; 51 W. R. 191; 18 T. L. R. 771; 46 Sol. Jo. 686; 20 Cox, C. C. 353, D. C.

Annotations:—*Consd. R. v. Brixton Prison, Ex p. Perry*, [1924] 1 K. B. 455. *Refd. R. v. Brixton Prison, Ex p. Servini*, [1914] 1 K. B. 77.

130. ————.]—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. PERRY*, No. 91, *ante*.

131. ———— **Nationality of accused.**] *Re GUERIN*, No. 59, *ante*.

132. ———— **To review the whole of the evidence—Whether before magistrate or not.**]—*Re CASTIONI*, No. 36, *ante*.

133. ———— **Inquiry into motive of foreign state—In demanding surrender.**]—*Re ARTON* (No. 1), No. 42, *ante*.

134. **Grounds for application—Determination of treaty by notice—Notice subsequently postponed—Validity of detention.**]—By the terms of Extradition Act, 1843 (c. 75), the contracting parties were at liberty at any time after Jan. 1, 1844, to put an end to the convention upon which it was founded, by giving six months' notice of their intention so to do, & the Act was to remain in force during the continuance of the convention. The Act, however, contained no provisions for the withdrawal or renewal of such notices. The French Govt. on Dec. 4, 1865, gave such notice, but on May 21, before the expiration of the six months, they gave a fresh notice, & agreed with the English Govt. that such notice should be treated as expiring on Nov. 21, 1866:—*Held*: the Act was still in force, & a writ of *habeas corpus* was refused to a French subject detained in English custody after the expiration of the six months included in the original notice.—*Ex p. WIDEMANN* (1866), 14 L. T. 719; 12 Jur. N. S. 536, L. C.

135. ———— **Political offence—Necessity for evidence—Suggestion alone insufficient.**]—*Re ARTON* (No. 1), No. 42, *ante*.

136. ———— **Sufficiency of statement in affidavit.**]—An affidavit in support of an application for a writ of *habeas corpus* contained a statement by appct. that he "escaped from Russia

upon which he was detained appearing on its face to be defective, the ct. has no authority to remand him, such power being possessed only by the ct. at common law, & prisoner not being charged with any offence for which he could be tried in this province.—*Re ANDERSON* (1861), 11 C. P. 9.—CAN.

To award costs.]—*Habeas corpus* proceedings in favour of an extradition prisoner are proceedings in "a criminal cause or matter," & neither the English cts. nor the cts. of Hong Kong have any jurisdiction to award costs in respect of them.—*Re SUN AH WAN, Re CHINESE EXTRADITION ORDINANCE*, 1889 (1910), 5 Hong Kong L. R. 72.—HONG KONG.

138 i. **Right of appeal—Refusal to issue writ.**]—There is no appeal to the Ct. of Appeal from a refusal by the Supreme Ct. to grant a writ of *habeas corpus* in respect of an accused person

committed under the Extradition Acts.—*Ex p. BOUVY* (No. 3) (1900), 18 N. Z. L. R. 608.—N.Z.

a. ———— **Necessity for motion to quash.**]—By Supreme & Exchequer Cts. Act, R. S. C. c. 135, s. 31, "no appeal shall be allowed in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty." On application to the ct. to fix a day for hearing a motion to quash such an appeal:—*Held*: the matter was *coram non iudice* & there was no necessity for a motion to quash.—*Re LAZIER* (1899), 29 S. C. R. 630.—CAN.

b. **Right of foreign Governments—To take part in proceedings.**]—In extradition cases foreign Govts. have not any right to take part in proceedings for *habeas corpus*.—*Re WONG KA*

for political reasons" at a date when he was about seventeen years of age:—*Held*: the bare statement of appct. that he was a political refugee, unsupported by any evidence, was not sufficient to entitle the ct. to order the writ to issue.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SARNO*, [1916] 2 K. B. 742; 86 L. J. K. B. 62; 115 L. T. 608; 80 J. P. 389; 32 T. L. R. 717; 14 L. G. R. 1060, D. C.

Annotations:—*Refd. R. v. Chiswick Police Station Superintendent, Ex p. Sacksteder*, [1918] 1 K. B. 578. *Mentd. Brightman v. Tate* (1919), 35 T. L. R. 209; *R. v. Brixton Prison, Ex p. Bloom* (1920), 90 L. J. K. B. 574; *R. v. Home Secretary, Ex p. Bressler* (1924), 131 L. T. 386.

137. ———— **Omission to prove Order in Council—On which proceedings founded.**]—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SERVINI*, No. 66, *ante*.

138. **Right of appeal—Refusal to issue writ.**]—*R. v. WEIL*, No. 57, *ante*.

———.]—*See, further, CROWN PRACTICE*, Vol. XVI., p. 270, Nos. 795–797.

139. ———— **During vacation.**]—*Re COPPIN*, No. 100, *ante*.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 270, 271, Nos. 792–804.

SUB-SECT. 6.—SURRENDER OR DISCHARGE.

140. **Consent of British Government—Not necessary.**]—*Re GALWEY*, No. 11, *ante*.

141. **Time within which surrender may be made—Where sentence being served in England—Extradition Act, 1870 (c. 52), s. 3 (3).**]—Where a metropolitan magistrate commits a fugitive criminal, alleged to have been convicted in a foreign country of an extradition crime, to prison there to await the warrant of a Secretary of State for his surrender under s. 10 of above Act, & by virtue of s. 3 (3) of above Act prisoner's surrender does not take place till after the expiration of a sentence inflicted on him in England for an offence committed in England, the order of committal will, if made before exemption from punishment for the extradition crime takes place in the foreign country by lapse of time, be valid & remain in full force until the expiration of the sentence inflicted upon prisoner in England, although exemption from punishment for the extradition crime may have then taken place in the foreign country by lapse of time; & a writ of *habeas corpus* to bring

CHEONG (1905), 1 Hong Kong L. R. 1.—HONG KONG.

c. ————.]—The Chinese Govt. has no *locus standi* in extradition proceedings after requisition for surrender has been made.—*Re LI YU MUI* (1910), 5 Hong Kong L. R. 227.—HONG KONG.

PART I. SECT. 3, SUB-SECT. 6.

d. **Form of warrant for surrender—Description of offences.**]—A warrant of committal, under Extradition Act, of a fugitive to await surrender to the foreign state, after reciting the apprehension of the accused, that he had been brought before the judge, & that the judge had determined that he should be surrendered, continued: "on the ground of his being accused of the crime of forgery & also of the crime of uttering what was forged within the jurisdiction of the State of

Sect. 3.—Procedure: Sub-sect. 6. Parts II. & III.
Sect. 1: Sub-sect. 1.]

up & discharge the prisoner upon the ground that the extradition offence is no longer punishable in the foreign country will not be granted.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. VAN DER AUWERA*, [1907] 2 K. B. 157; 76 L. J. K. B. 661; 96 L. T. 821; 71 J. P. 226; 23 T. L. R. 415; 21 Cox, C. C. 446, D. C.

— **Right of criminal to be informed.]—**
See Extradition Act, 1870 (c. 52), s. 11.

— **Not before fifteen days after committal.]—**
See Extradition Act, 1870 (c. 52), s. 3 (4).

— **When writ of habeas corpus applied for.]—**
See Extradition Act, 1870 (c. 52), s. 11.

— **Discretion of Secretary of State.]—***See Extradition Act, 1870 (c. 52), s. 11.*

142. Time within which surrender must be made—Two months after committal to prison—On conclusion of proceedings before magistrate—Treaty with France, 1876, Art. 10.]—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. MEHAMED BEN ROMDAN*, No. 123, *ante*.

—.]—*See, also, Extradition Act, 1870 (c. 52), s. 12.*

143. Requisition by more than one state—Priority.]—*R. v. KAMS* (1900), *Times*, Apr. 30.

Form of warrant of surrender.]—*See Extradition Act, 1870 (c. 52), sched. II.*

Discharge—If not surrendered within statutory period.]—*See Extradition Act, 1870 (c. 52), s. 12.*

— **Discretion of Secretary of State.]—***See Extradition Act, 1870 (c. 52), s. 7.*

144. Hearing of further arguments—On application for discharge—Whether permissible.]—The point is one which ought to have been raised on the application for the *habeas corpus*, & in future arguments against the application for a *habeas corpus* will only be heard upon the understanding that there should be no further argument when the prisoner came up for his discharge (*per cur.*).—*R. v. PORTUGAL* (1885), 16 Q. B. D. 492, n.; *sub nom. R. v. DE PORTUGAL*, 55 L. J. Q. B. 570; *sub nom. Re DE PORTUGAL*, 34 W. R. 44; 2 T. L. R. 16, D. C.

Annotation:—Mentd. R. v. Kane, [1901] 1 K. B. 472.

Part II.—Extradition from Foreign States.

145. Validity of arrest in foreign country.]—A British subject, arrested abroad, under a warrant upon an indictment for a misdemeanour, brought in custody to England, & there committed to prison:—*Held*: if the arrest was made in violation of the law of the foreign country, the authorities of that country might have interfered to vindicate their own law, & if it was made in violation of our law, the prisoner had a right of action, & might pursue his legal remedy. If such a party has been really illegally arrested, he has his remedy for that wrong by action; but he is not to be allowed the

opportunity of escaping & altogether eluding public justice, merely because there was some irregularity in his original apprehension.—*Ex p. SCOTT* (1829), 9 B. & C. 446; 4 Man. & Ry. K. B. 361; 2 Man. & Ry. M. C. 308; 109 E. R. 166.

Annotation:—Reid. R. v. Garrett, Ex p. Sharf (1917), 86 L. J. K. B. 894.

146. Name under which extradited—Not material to indictment.]—T. was received into custody from the Swedish police in Stockholm, where he was in prison, having been arrested under

Ohio, one of the United States of America, & of the United States of America":—*Held*: this was a sufficient description of the offences to show a ground of detention under the statute.—*Re MCCARTNEY* (1891), 8 Man. L. R. 367.—CAN.

e. Discharge—Liability to re-arrest for same offence.]—A fugitive criminal arrested in Nova Scotia under an extradition warrant & improperly brought into this province while the proceedings were pending, by the officer having him in charge, was discharged from custody here by a judge's order:—*Held*: being out of the jurisdiction of Nova Scotia he might afterwards be arrested here for the same offence.—*Ex p. CADBY* (1886), 26 N. B. R. 452.—CAN.

PART II.

f. Trial for offence other than for which prisoner surrendered—Onus of proof.]—Where there was evidence that a prisoner had been surrendered to a detective of this colony after he had been arrested by the American authorities, & proceedings had taken place in San Francisco:—*Held*: (1) there was no evidence that the prisoner was a person "surrendered

in pursuance of any arrangement with a foreign state," within Extradition Act, 1870, s. 19; (2) assuming that there was evidence that he was such person, if he wanted to raise the defence that he was being tried for an offence for which he had not been extradited, the onus lay on him to prove it, & not upon the Crown to prove that he was being tried for the offence for which he had been extradited.—*R. v. BUTLER* (1879), 18 N. S. W. L. R. 146.—AUS.

—.]—A person imprisoned in this province on a charge of having committed an extraditable crime escaped & fled to the States, & on requisition made to the Govt. of that country was surrendered to this province. He was convicted here of the crime charged, & while he was a prisoner under that conviction was tried for the breach of prison which was not an extraditable offence:—*Held*: such trial was not "in contravention of any terms of the arrangement" for the surrender of fugitives between Great Britain & the United States & was sustainable.—*R. v. WADDELL* (1885), 25 N. B. R. 93.—CAN.

h. —.]—A count in an indictment of accused which charges him with an offence other than those upon

which he was extradited must be quashed.—*R. v. KELLY* (1916), 35 W. L. R. 46; 11 W. W. R. 46.—CAN.

k. — Jurisdiction of court to look into proceedings abroad.]—The ct. can look into proceedings abroad to see that one crime is not charged & surrender obtained on such charge & another crime laid & prosecuted in the country obtaining the surrender of prisoner.—*R. v. HALL* (1919), 52 N. S. R. 260; 30 Can. Crim. Cas. 129.—CAN.

l. — Return of prisoner without extradition proceedings.]—Where prisoner, accused of an offence under The Criminal Code, who has fled to a foreign state where the offence is extraditable & where he has been arrested on instructions from the Canadian authorities, consents to his being taken back to Canada without extradition proceedings, he is in a different position from that of a prisoner who has been surrendered by the foreign state under extradition proceedings. In the latter case the prisoner is entitled to the benefit of Extradition Act, R. S. C. 1906, c. 155, s. 32, & cannot be convicted of any lesser offence included in the offence for which he was extradited

the name of Dubois, under which name he was extradited. Dubois had previously been connected with T., & it was proved that they were different persons:—*Held*: the ct. having juris-

diction to try the indictment, it was immaterial under what name T. was extradited.—*R. v. FINKELSTEIN & TRUSCOVITCH* (1886), 16 Cox, C. C. 107.

Part III.—Surrender between British Dominions inter se and the United Kingdom.

SECT. 1.—APPLICATION OF THE STATUTES.

SUB-SECT. 1.—TO BRITISH DOMINIONS AND POSSESSIONS.

See Fugitive Offenders Act, 1881 (c. 69).

147. British Dominions—Extent of jurisdiction of English courts—Surrender under writ of habeas corpus.—The superior cts. of common law at Westminster have jurisdiction at common law to issue a writ of *habeas corpus ad subjiciendum*, to all parts of the dominions of the Crown of England, even to those in which an independent local judicature has been established. Such jurisdiction can be taken away only by express legislative enactment. Accordingly, this ct. granted a writ of *habeas corpus* directed to certain gaolers & others, in the province of Upper Canada, commanding them to bring up the body of A., a British subject, alleged to be illegally in their custody.—*Ex p. ANDERSON* (1861), 3 E. & E. 487; 30 L. J. Q. B. 129; 3 L. T. 622; 25 J. P. 116; 7 Jur. N. S. 122; 9 W. R. 255; 121 E. R. 525.

Annotations:—*Ex p. Mansergh* (1861), 1 B. & S. 400. *Consd. R. v. Crewe, Ex p. Sekgome*, [1910] 2 K. B. 576; *Secretary of State for Home Affairs v. O'Brien*, [1923] A. C. 603. *Reid. Ex p. Brown* (1864), 5 B. & S. 280.

148. British dominions—Contrasted with places where Crown has jurisdiction.—By an Order in Council, dated May 9, 1891, made "in exercise of the powers by the Foreign Jurisdiction Act, 1890 (c. 37), or otherwise in Her Majesty vested," the High Comr. for South Africa was authorised to exercise in the Bechuanaland Protectorate the powers of Her Majesty, & to do all such things "as are lawful," & to provide by proclamation for the administration of justice & generally for the peace, order, & good government of all persons within the Protectorate, including the prohibition & punishment of all acts tending to disturb the public peace. One Sekgome, who claimed to be the chief of a native tribe in the Protectorate, was detained in custody at a place within the Protectorate by virtue of a proclamation authorising his detention, & expressed to have been made by the High Commissioner, under the powers conferred on him by the Order in Council, on the ground that the detention was necessary for the preservation of peace within the Protector-

ate. On an application by Sekgome for a writ of *habeas corpus* to the Secretary of State for the Colonies:—*Held*: (1) the Protectorate was a foreign country in which His Majesty had jurisdiction within the meaning of the Foreign Jurisdiction Act, 1890 (c. 37); the proclamation was validly made under the powers conferred by the Order in Council; & the detention of Sekgome was, therefore, lawful; (2) the Protectorate was not a "foreign dominion of the Crown" within Habeas Corpus Act, 1862 (c. 20), s. 1.

In conclusion, I have no doubt but that in [Habeas Corpus] Act, 1862 (c. 20), dominion is used in the sense of territorial dominion, nor but that in the Foreign Jurisdiction Act, 1890 (c. 37), when the expression "out of Her Majesty's dominions" is used it means outside Her Majesty's territory. I have no doubt but that at the date of the Order in Council of May 9, 1891, the Protectorate was outside the territorial dominion. I recognise that a country which originally was a foreign country outside the territorial dominions of the Crown might in course of time become a part of the territorial dominions of the Crown, & this by the acts of the Crown without any formal act of annexation, especially in a case where the land in question had ceased to be a land in which British subjects were, to use the words of Foreign Jurisdiction Act, 1890 (c. 37) s. 2, "British subjects for the time being resident in or resorting to that country," but had become a British settlement by virtue of the extent to which British subjects had permanently settled there with the assent of the Crown, but I do not find any evidence leading to the conclusion that the Bechuanaland Protectorate had ceased to be a foreign country outside the territorial dominions of the Crown. I am inclined to think that in a case where the King legislates by proclamation, by virtue of an Act of Parliament, such as the Foreign Jurisdiction Act, 1890 (c. 37), the mere fact of the country not having been annexed, & being extra-territorial, would not prevent the issue by the K. B. Div., or the judges of the High Ct., of a writ of *habeas* to run in a country governed by a system of laws created under the powers of such an Act of Parliament, especially in a case where the laws thus created apply to British subjects for the time being

unless the lesser offence is itself extraditable. There, the question of good faith arises as between contracting States & that good faith must be preserved at all costs. In the case of the prisoner who volunteers to return, the better opinion seems to be that no question of good faith towards him arises, & he may be tried on the lesser offence although it is not itself extraditable.—*R. v. FLANNERY*, [1923] 3 W. W. R. 97; 3 D. L. R. 689; 40 Can. Crim. Cas. 263.—CAN.

m. Surrender by foreign Government—Sufficient evidence of corpus delicti.—A prisoner charged with forgery in Canada was arrested & surrendered by the Govt. of the United States under the Ashburton treaty. Upon application for bail on the ground that there was no evidence of the *corpus delicti*:—*Held*: the surrender of the prisoner by the United States Govt. was sufficient evidence.—*R. v. VAN AERMAN* (1854), 4 C. P. 288.—CAN.

PART III. SECT. 1, SUB-SECT. 1.

n. Australia—Effect of establishment of Commonwealth.—Unless the Commonwealth Parliament has under the Constitution power to make laws such as are referred to in Fugitive Offenders Act, 1881, s. 32, or to legislate generally as to the surrender of fugitive offenders between the Commonwealth & other parts of the British Dominions, the establishment of the Commonwealth has had no

Sect. 1.—Application of the statutes: Sub-sects. 1, 2 & 3. Sect. 2: Sub-sect. 1.]

resident in or resorting to the country in question (VAUGHAN WILLIAMS, L.J.).

But then comes the question which is raised in what I have called resp.'s second contention, namely, "Is Gaberones, where Sekgome is incarcerated, a place within His Majesty's dominions?" Now I have not found anywhere, nor shall I attempt to formulate, a definition of "dominions." I think that in its ordinary force, the force which it must be taken to have unless the context or other circumstances necessarily involve a different interpretation, "His Majesty's dominions" means regions over & in which His Majesty has & exercises the whole collection or bundle of separable powers, to borrow the phraseology of Sir Henry Maine, which constitute territorial sovereignty. Possibly it may, in a certain context or in connection with a particular subject-matter, properly be interpreted as meaning something less. But I see no reason to assign to the phrase less than its ordinary force when it occurs in Habeas Corpus Act, 1862 (c. 20), in the preamble of the Foreign Jurisdiction Act, 1890 (c. 37), & in the judgment of the Ct. of Queen's Bench dealing with the question of the issue of the writ from the common law standpoint in the case of *Ex p. Anderson*, No. 147, *ante*, which was decided shortly before Habeas Corpus Act, 1862 (c. 20). If this view is correct, the Protectorate of a foreign country in which His Majesty has & exercises power & jurisdiction as a protecting & not as a ruling Sovereign, & which he has never annexed to the possessions of the British Crown, certainly cannot properly be treated as part of His Majesty's dominions (KENNEDY, L.J.).—*R. v. CREWE (EARL)*, *Ex p. SEKGOME*, [1910] 2 K. B. 576; 79 L. J. K. B. 874; 102 L. T. 760; 26 T. L. R. 439, C. A.

Grouping of British Possessions for purposes of the Act.]—See Statutory Rules & Orders Revised, Vol. V., pp. 324–327.

Recognition by Order in Council of colonial

effect whatever upon the position & authority of the States with regard to the Act.—*McKELVEY v. MRAGHER* (1906), 4 C. L. R. 265.—AUS.

o. Application to Solomon Islands.]—Fugitive Offenders Act has been extended to the Solomon Islands by virtue of Pacific Order in Council, 1893.—*Ex p. GLASSON* (1918), 18 S. L. N. S. W. 230; 35 N. S. W. W. N. 79.—AUS.

PART III. SECT. 1, SUB-SECT. 2.

p. Offender not a fugitive—Transferred to another colony by employer in course of business—Illness of prisoner.]—An offender may be amenable to extradition under Fugitive Offenders Act, 1881, though he has not taken to flight, but has been transferred in the ordinary course of business, by his employer, from one colony to another. The ct. will stay extradition where the prisoner's health renders it dangerous to remove him.—*Re SMYTH* (1883), 9 V. L. R. 363.—AUS.

q. Conditions precedent to apprehension & return.]—In order to render a person liable to be apprehended & returned, under Fugitive Offenders Act, 1881, to the place where he is accused of having committed an offence, it is necessary that the commission of the alleged offence should have preceded his flight. It is also

necessary that at the time when the offence is alleged to have been amenable to the criminal jurisdiction of the country whither he is sought to be returned.—*BUCKMAN v. R.* (1914), 35 N. L. R. 114.—S. AF.

PART III. SECT. 1, SUB-SECT. 3.

r. Obtaining by false pretences—Full offence charged—Attempt proved.]—A person charged, under a warrant issued under Fugitive Offenders Act, with the offence of obtaining by false pretences, cannot be committed for the offence of attempting to obtain by false pretences when the evidence does not justify a committal for the full offence.—*Re HARRISON* (No. 2) (1919), 25 B. C. R. 641.—CAN.

s. Murder.]—A warrant indorsed by one of H.M.'s Secretaries of State bore that, from information taken upon oath before a magistrate in one part of H.M.'s dominions, there were reasonable grounds of suspicion that a person named did on a day named, "commit the crime of murder":—*Held*: this warrant, although the name of the person murdered was not given, nor the locus mentioned, nor any statement made that the locus was within H.M.'s dominions, must be received by the sheriff, to whom it was presented under Fugitive Offenders Act, 1881, as valid

enactments applying Act.]—See Fugitive Offenders Act, 1881 (c. 69), s. 32.

— **Indian Extradition Act, 1903.]—See Statutory Rules & Orders, 1904, No. 318, p. 255.**

— **Natal Fugitive Offenders Act.]—See Statutory Rules & Orders, 1906, No. 808, p. 289.**

— **Straits Settlements Ordinance.]—See Statutory Rules & Orders, 1923, No. 153, p. 353.**

Application to places outside British Dominions.]—See Extradition Act, 1881 (c. 69), ss. 31, 36; Foreign Jurisdiction Act, 1890 (c. 37), s. 5, sched. 1; & Fugitive Offenders (Protected States) Act, 1915 (c. 39).

SUB-SECT. 2.—TO PERSONS.

See Fugitive Offenders Act, 1881 (c. 69), ss. 2, 31.

SUB-SECT. 3.—TO OFFENCES.

See Fugitive Offenders Act, 1881 (c. 69), ss. 9, 38, 39.

149. Offence punishable with imprisonment—With hard labour for twelve months or more—Fugitive Offenders Act, 1881 (c. 69), s. 9.]—*R. v. BRIXTON PRISON (GOVERNOR)*, *Ex p. PERCIVAL*, No. 152, *post*.

SECT. 2.—PROCEDURE.

SUB-SECT. 1.—RETURN OF FUGITIVES.

See, generally, Fugitive Offenders Act, 1881 (c. 69).

150. Return to United Kingdom—On charges other than those for which returned—Validity.]—Prisoner, who had been arrested in Canada under the Colonial Arrest Act upon a charge of burglary, for which the bill was ignored, allowed to be arraigned upon another charge.—*R. v. PHILIPS* (1858), 1 F. & F. 105.

Annotation:—Folld. R. v. Cohen (1907), 71 J. P. 190.

& regular in all respects.—*CARLIN v. CAPE COLONY, ETC. GOVERNMENT* (1885), 12 R. (Ct. of Sess.) 50; 22 Sc. L. R. 906, J.—SCOT.

PART III. SECT. 2, SUB-SECT. 1.

t. Validity of warrant.]—Where a prisoner was committed for detention with a view to being sent to New Zealand, under a warrant reciting that he had been charged with felony in that, his affairs being in course of liquidation, he did "feloniously" quit New Zealand & take with him property to the amount of, etc.:—*Held*: the warrant was good, though not stating that the property was his, or divisible amongst his creditors.—*Re FISHERDEN (A PRISONER)* (1878), 4 V. L. R. 143.—AUS.

a. —.]—A warrant from another British possession for the apprehension of an offender against the insolvency law of that possession, stating that insolvency proceedings have been instituted in an inferior ct., is sufficient if it sets out in general terms the competence of such ct., the regularity of the proceedings in that ct., & that the fugitive has been charged with an offence to which Part I. of the Act is applicable.—*Re RYAN* (1882), 8 V. L. R. 327.—AUS.

b. —.]—I. was arrested under a warrant issued in London & indorsed

151. — — — —.]—Prisoner was indicted in one indictment for obtaining goods by false pretences & for various offences under the Debtors Act, 1869 (c. 62). He was also indicted for a felony under same Act. Prisoner had been arrested & returned from Cape Colony under the Fugitive Offenders Act, 1881 (c. 69), on charges of obtaining goods by false pretences in this country. He was committed for trial in this country on all the charges. At the trial, counsel for the defence contended that the prisoner could only be tried on the counts for false pretences on which he was returned:—*Held*: prisoner could be tried on all the charges.—*R. v. COHEN* (1907), 71 J. P. 190.

152. Return to dominions—Evidence on which magistrates may commit—Fugitive Offenders Act, 1881 (c. 69), s. 9.]—In order that a magistrate may have jurisdiction under above sect. of above Act to commit a fugitive offender for return to a colony, it is necessary that there should be evidence before him that the offender has committed an offence, punishable according to the law of the colony in which it is alleged to have been committed by imprisonment with hard labour for a term of twelve months or more.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. PERCIVAL*, [1907] 1 K. B. 696; 76 L. J. K. B. 619; 96 L. T. 545; 71 J. P. 148; 23 T. L. R. 238; 21 Cox, C. C. 387, D. C.

153. — — — — Power of court to review evidence—Fugitive Offenders Act, 1881 (c. 69), ss. 5, 10.]—An order was made by a magistrate sitting at Bow Street, under sect. 5 of above Act, committing V. to prison, before being sent out to South Africa, there to stand his trial on charges of fraud alleged against him. A rule *nisi* to show cause why a writ of *habeas corpus* should not issue was granted. The ct., on cause being shown against its being made absolute, expressly left open the question whether they could consider under sect. 10 of above Act or otherwise whether there was, on the evidence before the magistrate, a strong or probable presumption that the fugitive had committed the offence mentioned in the

under Fugitive Offenders Act, 1881, & was brought before the magistrate & committed to await return. The warrant of commitment did not on its face show that a warrant had been issued in London, or that evidence had been taken there:—*Held*: the warrant of commitment was bad.—*Re DARGAVAL* (1882), 16 S. A. L. R. 62.—AUS.

c. — — — — Issue of second warrant—Without evidence.]—H. was arrested under Fugitive Offenders Act, 1881, & was brought before a magistrate who ordered him to be committed to prison, to await his return to New Zealand. Under this order a warrant was issued pursuant to which H. was arrested on June 10 & committed, but was discharged on July 8 on *habeas corpus*, the warrant being held to be bad. On the same day he was re-arrested on a second warrant issued under the original order for committing & lodged in prison without being again brought before a magistrate:—*Held*: the magistrate had no right to issue a second warrant, under the original order for commitment without a new hearing or evidence.—*Re HARJES* (1882), 16 S. A. L. R. 71.—AUS.

d. — — — —]—Where parties answering the description in an advertisement in an English paper as having stolen bank notes, were arrested in Newfoundland, having the notes upon them, & committed by the magistrate for "feloniously circulating" & "feloniously having in their possession"

such notes:—*Held*: these commitments were bad, but that in such cases where there was sufficient suspicion of their having committed a felony prisoners might be detained to that part of the Queen's dominions where the alleged crime was triable.—*Re BRADSHAW & O'KELLY* (1848), 3 Nfld. L. R. 44.—NFLD.

e. — — — —.]—A warrant for commitment purporting to be made under Fugitive Offenders Act, 1881, not showing or alleging an extraditable offence, is bad.—*Re HOLMES* (1903), 23 N. Z. L. R. 11.—N.Z.

f. — — — —.]—A warrant issued under Fugitive Offenders Act, 1881, need not contain a statement that the crime alleged is one falling within the provisions of s. 9 of that Act.

Such warrant is not bound to be addressed to some specific person for execution & is sufficiently endorsed by the mere signature of a judge of a superior ct. as an endorsement.

When a fugitive is arrested in the Transvaal on a warrant endorsed by a judge of the Transvaal Provincial Divn. the arrest cannot be set aside on the ground that the fugitive was illegally brought into the Transvaal.—*R. v. ROBERTSON* (1912), T. P. D. 10.—S. AF.

g. Trivial offence.]—Arrest of person under New Zealand warrant for disobedience to order for payment of money:—*Held*: a "trivial offence"

warrant. Assuming, however, that the ct. could consider such a question, they were of opinion that on the facts of this case there was such a strong & probable presumption, and discharged the rule.—*R. v. VYNER* (1903), 68 J. P. 142, D. C.

154. — — — — Power to grant bail—Fugitive Offenders Act, 1881 (c. 69), s. 5.]—*R. v. HARVEY* (1895), Biron & Chalmers' Law & Practice of Extradition, p. 50.

155. — — — — Whether common law power affected by Act.]—(1) Where a magistrate has made an order under above Act committing to prison a person accused of having committed an offence to which Part I. of above Act applies in some part of Her Majesty's dominions, or within the jurisdiction of a consular ct., to await his return to the place where the offence is alleged to have been committed, the Q. B. Div. of the High Ct. has jurisdiction to admit the accused to bail until the time for his return.

It is clear that the magistrate may remand deft. pending the inquiry, & the inquiry may extend over a long period of time, & it is also clear that the magistrate may admit deft. to bail as often as he remands him (LORD RUSSELL, C.J.).

The inherent power to admit to bail is historical & has long been exercised by the ct., & if the Legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment (LORD RUSSELL, C.J.).

Cases [as regards prisoner's right to bail] arising under Fugitive Offenders Act [1881 (c. 69)], will not in all instances apply as precedents in cases under the Extradition Acts. Under the former Act it is generally a question between different parts of Her Majesty's dominions, but under the Extradition Acts the jurisdiction depends in all cases on treaties with foreign countries (WRIGHT, J.).

(2) The only remaining point is this: Failing the quashing of the warrant of commitment, & failing the application to admit to bail, counsel

& prisoner released on giving security for payment.—*Ex p. COUNSEL* (1887), 8 N. S. W. L. R. 315; 4 N. S. W. W. N. 74.—AUS.

h. Appeal—From order of magistrate—Discharging offender—Jurisdiction of Full Court.]—Where a person apprehended under Fugitive Offenders Act, 1881, has been discharged from custody by order of a judge, the Full Ct. has no jurisdiction to entertain an appeal.—*Re MARSHALL* (1901), 27 V. L. R. 205.—AUS.

k. — — — —.]—An order by a police magistrate of Victoria purporting to act as a "magistrate of a British possession" under Fugitive Offenders Act, 1881, s. 39, cannot be the subject of an order of review.—*O'DONNELL v. McKELVIE*, [1906] V. L. R. 207.—AUS.

l. — — — — Returning offender.]—Where a magistrate made an order under Fugitive Offenders Act, 1881, returning a fugitive offender to a British possession, upon the ground that the matters set out in s. 14 of the Act had been proved to his satisfaction, his decision upon the facts is subject to review by the Ct. The Ct. will not overrule the magistrate's decision if satisfied that the evidence adduced is such as to bring the offence charged within the Act.—*KURTZ v. AICKEN* (1889), 9 N. Z. L. R. 673.—N.Z.

m. — — — — Refusing discharge.]—When an application for discharge

Sect. 2.—Procedure: Sub-sects. 1 & 2.]

for deft. urges this ct. to order that the trial should take place at G., & with that view deft. should be returned to G. The ct. undoubtedly has power so to order, & it is, as it seems to us, not merely within our competence, but our duty so to order, if we see reasons which ought to operate on us judicially why deft. ought not to be returned to the particular place demanded where the affair was alleged to have been committed, & why he should be tried in another place. That we have the power seems to me to be clear. Under the Order in Council in this case, third division, clause 11, it is provided: "For better effectuating the provisions of this order concerning the power & authority of the Supreme Ct. of G., in communication with the Ct. for M., the Supreme Ct. shall have . . . an original jurisdiction concurrent with the jurisdiction of the Ct. for M. to be exercised subject to & in accordance with the provisions of this order" (LORD RUSSELL, C.J.).—*R. v. SPILSBURY*, [1898] 2 Q. B. 615; 67 L. J. Q. B. 938; 79 L. T. 211; 62 J. P. 600; 14 T. L. R. 579; 42 Sol. Jo. 717; 19 Cox, C. C. 160, D. C.; subsequent proceedings, *sub nom.* *SPILSBURY v. R.*, [1899] A. C. 392, P. C.

Annotations:—As to (1) *Consd. R. v. Brixton Prison, Ex p. Savarkar*, [1910] 2 K. B. 1056; *R. v. Phillips* (1922), 128 L. T. 113. *Refd. R. v. Hole* (1898), 14 T. L. R. 578.

156. ——— Circumstances influencing exercise of power.]—Where a magistrate had made an order under Fugitive Offenders Act, 1881 (c. 69), s. 5, committing to prison a person charged with having committed an offence to which Part I. of Fugitive Offenders Act, 1881 (c. 69), applies, in some part of Her Majesty's dominions, to await his return to the place where the offence was alleged to have been committed, the Q. B. Div., without deciding whether it had jurisdiction to admit the accused to bail, decided that under the particular circumstances, even if it had the power, it would not exercise it.—*R. v. HOLE* (1898), 62 J. P. 616; 14 T. L. R. 578, D. C.

Annotation:—*Distd. R. v. Spilsbury* (1898), 62 J. P. 600.

has been refused by a magistrate, the proper mode of appeal is not by proceedings under Justice of the Peace Act, 1908, but by motion to the Supreme Ct. to discharge the prisoner.—*Re MURRAY ROSS* (A PRISONER), [1921] N. Z. L. R. 292.—N.Z.

n. Discharge of fugitive—Leave to appeal—When granted.]—A fugitive from South Africa who had been apprehended in N. S. W. under Fugitive Offenders Act, 1881, was committed by a magistrate to prison, to await his return. On application for a *habeas corpus* the Supreme Ct. ordered the discharge of the fugitive on the ground that the evidence adduced before the magistrate did not raise a "strong or probable" presumption that the fugitive had committed any of the offences mentioned in the warrant:—*Held*: the fact that if the fugitive was returned to S. Africa an important question of law might arise on the trial is not sufficient reason for granting leave to appeal in such a case.—*COLLIS v. SMITH* (1909), 9 C. L. R. 490.—AUS.

o. ——— Application for—Whether habeas corpus proceedings available.]—It is not proper for an application for discharge under Fugitive Offenders Act, 1881, s. 10 or s. 19, to be made by way of proceedings for *habeas corpus*.—*Re MURRAY ROSS* (A

PRISONER), [1921] N. Z. L. R. 292.—N.Z.

p. Provisional warrant—Necessity for indorsement.]—Prisoner was arrested in Toronto on a provisional warrant under Fugitive Offenders Act, R. S. C. 1906, pursuant to a warrant for his apprehension issued by a justice of the peace in Ireland, & after an enquiry before the police magistrate for Toronto, was committed by him to prison to await return under the Act. Prisoner was apprehended & brought before the magistrate & so committed without the warrant having been indorsed as provided by s. 8 of the Act:—*Held*: the magistrate had no jurisdiction to enter upon the inquiry & therefore no jurisdiction to commit prisoner, under s. 12 of the Act.—*R. v. WISHART* (1910), 18 Can. Crim. Cas. 146; 22 O. L. R. 594.—CAN.

q. ——— How obtained.]—An information for the purpose of obtaining the issue of a provisional warrant to apprehend a fugitive under Fugitive Offenders Act, R. S. C. 1906, may be laid upon information & belief, & witnesses need not be examined in support unless the magistrate considers it desirable or necessary.—*Re HARRISON* (No. 1) (1919), 25 B. C. R. 433.—CAN.

r. ——— Issue of—Whether justice of peace competent to issue.]—It is not

157. ——— Discretion of magistrate.]—*R. v. SPILSBURY*, No. 155, *ante*.

158. ——— To place other than that where offence committed—Discretion of court—Under Order in Council.]—*R. v. SPILSBURY*, No. 155, *ante*.

159. ——— Bankruptcy proceedings pending—Procedure.]—A bkpt. who is under a criminal charge is bound to answer questions put to him by the official receiver at his public examination relating to such charge, even though they may tend to incriminate him. The usual practice in such cases is not to press such questions, but to adjourn the public examination until after the trial of the bkpt. in the criminal charge. Such practice, however, will not be followed in cases where an application to extradite the bkpt., or to hand him over to the authorities of a colony, is pending: or where for other reasons it is desirable that the examination should be proceeded with without delay.—*Re ATHERTON*, [1912] 2 K. B. 251; 81 L. J. K. B. 791; 106 L. T. 641; 28 T. L. R. 339; 56 Sol. Jo. 446; 19 Mans. 126.

Application for habeas corpus.]—See Part I., Sect. 3, sub-sect. 5, *ante*.

Appeal from refusal to grant habeas corpus.]—See CROWN PRACTICE, Vol. XVI., p. 270, Nos. 795–801.

160. Appeal where habeas corpus granted—By ct. of competent jurisdiction.]—No appeal lies from an order of a competent ct. for the issue of a writ of *habeas corpus* where the ct. determines the illegality of appct.'s detention & his right to liberty, although the order does not direct his discharge. Upon the application of a man whom the Home Secretary had caused to be arrested & deported to Dublin, where he was interned by the Govt. of the Irish Free State, the Ct. of Appeal, reversing the decision of the Div. Ct., granted an order *nisi*, which they subsequently made absolute, for the issue of a writ of *habeas corpus* directed to the Home Secretary, the ct. holding that the detention was illegal as the Home Secretary had no power to order a person to be interned in the

necessary to authorise the issue of a provisional warrant under Fugitive Offenders Act, 1881, s. 4, that there should be in existence a warrant under s. 3. A justice of the peace is not competent to issue a provisional warrant.—*Re HOLMES* (1903), 23 N. Z. L. R. 11.—N.Z.

s. Evidence—Admissibility of depositions.]—Depositions made in Natal in proceedings instituted in the Colony, which are the basis of a criminal charge there against a person who has come to Victoria may be received in evidence before a magistrate on proceedings under Fugitive Offenders Act, 1881, to have that person sent back to Natal, there to be tried on that charge.—*McKELVEY v. MEAGHER* (1906), 4 C. L. R. 265.—AUS.

t. ———.]—Depositions though taken before any charge has been laid, on a preliminary inquiry held in the country from which the fugitive has fled, are admissible in evidence on an application before a magistrate for the return of the fugitive offender.—*Ex p. GLASSON* (1918), 18 S. R. N. S. W. 230; 35 N. S. W. W. N. 79.—AUS.

u. ——— Power of magistrate to compel attendance of witness.]—Fugitive Offenders Act, 1881, s. 20, permitting a magistrate to take depositions for the purposes of the Act in the absence of the accused in like manner as if he

Irish Free State; &, owing to a doubt whether the Home Secretary had control of the body, the order allowed him a week within which to make his return to the writ. Before the week had elapsed an appeal by the Home Secretary to the House of Lords was heard on the question of competency:—*Held*: notwithstanding the generality of the language of Appellate Jurisdiction Act, 1876 (c. 59), s. 3, the House had no jurisdiction to entertain the appeal.—*SECRETARY OF STATE FOR HOME AFFAIRS v. O'BRIEN*, [1923] A. C. 603; 92 L. J. K. B. 830; 129 L. T. 577; 87 J. P. 174; 39 T. L. R. 638; 67 Sol. Jo. 747; 21 L. G. R. 609; 27 Cox, C. C. 466, H. L.; *previous proceedings, sub nom. R. v. SECRETARY OF STATE FOR HOME AFFAIRS, Ex p. O'BRIEN*, [1923] 2 K. B. 361, C. A.

161. Relief refused under Fugitive Offenders Act 1881 (c. 69), s. 10—No appeal to Court of Appeal.—A decision of the K. B. Div. discharging an order *nisi* for a writ of *habeas corpus* to bring up the body of a person committed to prison by a magistrate under the Fugitive Offenders Act, 1881 (c. 69), is a decision in a "criminal cause or matter" within the meaning of Supreme Court of Judicature Act, 1873 (c. 66), s. 47, & therefore no appeal lies from it to the Ct. of Appeal. A native of India having, under Fugitive Offenders Act, 1881 (c. 69), s. 5, & in pursuance of an Indian warrant charging him with certain offences, been committed to prison by a metropolitan police magistrate to await his return to India, an application was made on his behalf to the K. B. Div. of the High Ct. of Justice for an order *nisi* for a writ of *habeas corpus* addressed to the governor of the prison. The K. B. Div. made an order *nisi* calling upon the governor of the prison to show cause why a writ of *habeas corpus* should not issue directed to him to bring the body of appct. before the Ct. This order was expressed to be made on various grounds, one of which was that following the words of Fugitive Offenders Act, 1881 (c. 69), s. 10, it would be "unjust or oppressive or too severe a punishment to return" appct. to India, because the alleged offences were of a "trivial nature," &

because the application for his return was not "made in good faith in the interests of justice." On the hearing of the argument on cause being shown before the K. B. Div. questions arising under Fugitive Offenders Act, 1881 (c. 69), s. 10, were discussed by counsel & were considered by the judges in their judgments, but the order of the ct. as drawn up & perfected was simply an order that the order *nisi* should be discharged. The Ct. of Appeal having dismissed an appeal by appct. from that decision on the ground that it was a decision in a criminal cause or matter, the appct. made an original application to the Ct. of Appeal to exercise in his favour the powers conferred on the ct. by Fugitive Offenders Act, 1881 (c. 69), s. 10, which empowers a "superior ct." in the circumstances therein mentioned to discharge appct. or make such other order as to the ct. seems just. The objection was taken on the part of the Crown that, assuming the Ct. of Appeal to be by virtue of Fugitive Offenders Act, 1881 (c. 69), s. 39, a "superior ct." within the meaning of Fugitive Offenders Act, 1881 (c. 69), s. 10, having concurrent jurisdiction with the High Ct., this application could not be entertained, for the matter of the application was *res judicata* between appct. & the Crown:—*Held*: inasmuch as the only matter which the records of the ct. showed to have been adjudicated by the K. B. Div. was that the order *nisi* for a writ of *habeas corpus* should be discharged, the matter of this application was not *res judicata*, & the Ct. of Appeal had no jurisdiction to entertain the application.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SAVARKAR*, [1910] 2 K. B. 1056; 80 L. J. K. B. 57; 103 L. T. 473; 26 T. L. R. 561; 54 Sol. Jo. 635, C. A.

Annotations:—*Consd. R. v. Garrett, Ex p. Sharf*, [1917] 2 K. B. 99. *Refd. Ex p. Le Gros* (1914), 30 T. L. R. 249; *Home Secretary v. O'Brien* (1923), 39 T. L. R. 638.

SUB-SECT. 2.—INTER-COLONIAL BACKING OF WARRANTS.

See, generally, Fugitive Offenders Act, 1881 (c. 69), & cases *infra*.

were present, should be read in combination with the Criminal Code relating to preliminary inquiries, & the magistrate may compel a witness to attend & give evidence against the accused under the Act.—*R. v. SIMPSON, Re WHITLA* (1916), 33 W. L. R. 547, 833; 9 W. W. R. 986, 1461.—CAN.

b. — Oral evidence by constable producing warrant.—Where a constable from one colony, who produces a warrant issued there, deposes on oath before a magistrate in another colony that the offence recited in the warrant is an offence publishable by law in the first-mentioned colony, this is evidence upon which the magistrate is entitled to act in the absence of evidence to the contrary.—*Re TREASIDER* (1905), 25 N. Z. L. R. 289.—N.Z.

c. Confirmation on habeas corpus—Prima facie case must be made out.—Extradition from Canada to another British possession will not be confirmed on *habeas corpus* unless a *prima facie* case of guilt is made out to the satisfaction of the superior ct. to which the accused has made application for discharge.—*Re HARRISON* (No. 3) (1919), 25 B. C. R. 545.—CAN.

d. When refused.—It is only in a clear case that a person charged as a fugitive offender under Fugitive Offenders Act, 1881, should not be

returned.—*Re COURTS* (1902), 11 N. Z. L. R. 203.—N.Z.

e. Jurisdiction of magistrate—Concurrent with that of Supreme Court.—When the return of a prisoner is sought under Fugitive Offenders Act, 1881, s. 14, a magistrate has, under s. 19, concurrent jurisdiction with the Supreme Ct. to order his discharge instead of his return.—*Re MURRAY ROSS (A PRISONER)*, [1921] N. Z. L. R. 292.—N.Z.

f. Trial of prisoner for crime other than that for which extradited.—A fugitive offender extradited under 44 & 45 Vict. c. 69, may be tried for a crime other than that upon which he has been extradited.—*R. v. ESSER* (1888), 9 N. L. R. 238.—S. AF.

g. Discharge of prisoner—Want of proof of identity—Liability to re-arrest on same warrant.—An offender brought before a magistrate under a foreign warrant, endorsed under Fugitive Offenders Act of 1881, s. 13, & discharged for want of proof of identity cannot validly be re-arrested on the same warrant.—*JACKSON v. A.-G.* (1910), L. L. R. 327.—S. AF.

PART III. SECT. 2, SUB-SECT. 2.

h. Indorsement—By State governor—

Validity of.—Since the establishment of the Commonwealth of Australia, a warrant for the apprehension of a fugitive cannot be properly indorsed under Fugitive Offenders Act, 1881, s. 3, by the Governor of any of the States forming part of the Commonwealth.—*R. v. PIERSON, Ex p. SMALL*, [1905] S. R. Q. 5.—AUS.

k. — Sufficiency of.—*Held*: an indorsed warrant which alleged that deft. had committed the crime of Contravening Law 47 of 1887 (Natal), s. 76, was sufficient to give the magistrate in Victoria jurisdiction to commit deft. to prison to await his return to Natal.—*McKELVEY v. MEAGHER* (1906), 4 C. L. R. 265.—AUS.

l. Presumption that warrant regularly issued.—Appct. was arrested in Natal under a warrant issued in the Transvaal & backed by the assistant magistrate of Durban:—*Held*: a magistrate acting under Act 27 of 1912, s. 11 (1), is not bound to satisfy himself in any particular way that the warrant was regularly issued & unless it can be shown that he acted irregularly or wrongly it may be assumed that he has satisfied himself for the maxim *omnia præsuntur rite esse acta* applies.—*PATEL v. A.-G.* (1917), 38 N. L. R. 1.—S. AF.

Part IV.—Examination of Witnesses for Foreign Tribunals.

See R. S. C., Ord. 37, r. 54 ; Extradition Acts, 1870 (c. 52), s. 24 ; 1873 (c. 60), s. 5.

EXTRAORDINARY RESOLUTION.

See COMPANIES.

EXTRAORDINARY TRAFFIC.

See HIGHWAYS, STREETS AND BRIDGES.

EXTRA-PAROCHIAL PLACES.

See ECCLESIASTICAL LAW.

EXTRA-TERRITORIALITY.

See ALIENS ; CONSTITUTIONAL LAW ; DEPENDENCIES ; FISHERIES.

EYE-WITNESS.

See EVIDENCE.

EYOT.

See WATERS AND WATERCOURSES.

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<i>Alkali Works</i>	<i>See</i> PUBLIC HEALTH.	<i>Quarrying</i>	<i>See</i> MINES.
<i>Apprentices</i>	„ MASTER AND SERVANT.	<i>Rating</i>	„ RATES AND RATING.
<i>Birth Certificates</i>	„ REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.	<i>Refuse, removal of</i>	„ PUBLIC HEALTH.
		<i>Registration of Births.</i>	„ REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.
<i>Docks</i>	„ RAILWAYS; SHIPPING; WATERS AND WATERCOURSES.	<i>Restraint of Trade</i>	„ TRADE AND TRADE UNIONS.
<i>Domestic Servants</i>	„ MASTER AND SERVANT	<i>Secretaries of State</i>	„ CONSTITUTIONAL LAW.
<i>Drains</i>	„ SEWERS AND DRAINS.	<i>Servant's Registries</i>	„ PUBLIC HEALTH.
<i>Electric Power</i>	„ ELECTRIC LIGHTING.	<i>Sewers</i>	„ SEWERS AND DRAINS.
<i>Elementary Education</i>	„ EDUCATION.	<i>Smoke Nuisance</i>	„ NUISANCE.
<i>Explosives</i>	„ PUBLIC HEALTH.	<i>Surgeons</i>	„ MEDICINE AND PHARMACY.
<i>Gas</i>	„ GAS.	<i>Trade Boards</i>	„ TRADE AND TRADE UNIONS.
<i>Gunpowder Factories</i>	„ PUBLIC HEALTH.	<i>Trade Disputes.</i>	„ TRADE AND TRADE UNIONS.
<i>Inquests</i>	„ CORONERS.	<i>Trade Unions</i>	„ TRADE AND TRADE UNIONS.
<i>Inspectors of Mines</i>	„ MINES.		
<i>Master and Servant</i>	„ MASTER AND SERVANT.	<i>Wages generally</i>	„ MASTER AND SERVANT.
<i>Notification of Infectious Diseases</i>	„ PUBLIC HEALTH.	<i>Warehousing</i>	„ BAILMENT.
<i>Offensive Trades</i>	„ NUISANCE; PUBLIC HEALTH.	<i>Water Supply</i>	„ WATER SUPPLY.
<i>Pollution of Water</i>	„ WATERS AND WATERCOURSES.	<i>Work and Labour</i>	„ WORK AND LABOUR.
<i>Printers and Printing</i>	„ PRESS AND PRINTING.	<i>Workmen's Compensation</i>	„ MASTER AND SERVANT.

NOTE.—The principal Act now in force in England is *Factory & Workshop Act, 1901 (c. 22)*, referred to as *1901 Act*, which largely re-enacted & consolidated *Factory & Workshop Act, 1878 (c. 16)*, & amending Acts. In considering the cases, regard should be had to their dates & the Act under which they were decided.

Part I.—Classification and Definitions.

SECT. 1.—FACTORIES.

SUB-SECT. 1.—IN GENERAL.

See 1901 Act, s. 149 (2), (4), (5).

Use of mechanical power—As distinguished from workshop.]—See 1901 Act, ss. 115, 149.

1. — **Machinery set & kept in motion by hand.]—**(1) Premises in which machinery is set in motion & kept in motion by hand-power only are not premises wherein "mechanical power" is used within the meaning of *Factory & Workshop Act, 1878 (c. 16)*, s. 93, & the use of such machinery does not constitute the premises a factory within *Workmen's Compensation Act, 1897 (c. 37)*, s. 7.

It was said, & the county ct. judge so held, that the machinery in this case was driven by mechanical power, although it was in fact kept in motion by hand-power & that it was not necessary that the "other mechanical power" contemplated by [above sect.] should be *ejusdem generis* with steam power or water power. With that part of the judgment of the county ct. judge I cannot agree (COLLINS, M.R.).

(2) A warehouse may be a factory within *Workmen's Compensation Act, 1897 (c. 37)*, s. 7, although it is not part of, or adjacent to, a dock, wharf, or quay, & is not contiguous to water.—*WILLMOTT v. PATON*, [1902] 1 K. B. 237; 71 L. J. K. B. 1; 85 L. T. 569; 66 J. P. 197; 50 W. R. 148; 18 T. L. R. 48; 46 Sol. Jo. 49; 4 W. C. C. 65, C. A.

Annotations:—As to (2) *Reid. Buckingham v. Fulham Corpn.* (1905), 53 W. R. 628; *Doswell v. Cowell* (1906), 95 L. T. 56.

Compare Nos. 17–21, *post*.

2. **Geographical limits of factory — Buildings great distances apart—Part of same establishment—Whether separate factories.]—**Applts. carried on the business of calico printers at two places distant from each other seven miles. The business of a calico printer consists of four processes, viz. bleaching, printing by impressing the pattern on the bleached cloth by means of mordants, dyeing, & finishing. Three of the processes, viz. the bleaching, dyeing & finishing were performed at one branch of the establishment, & the fourth

viz. the printing at the other:—*Held*: a child employed on the premises, where the bleaching, dyeing & finishing were performed, was employed in "an incidental printing process" within 8 & 9 Vict. c. 29, s. 2, & the place where he was so employed formed part of "the establishment where the chief process of printing was carried on" within that Act & consequently applts. were not liable to be convicted of an offence against *Bleaching Works Act, 1860 (c. 78)*, in employing him without a schoolmaster's certificate.

It appears that the works at M. having some years ago become inadequate, applts. transferred part of their works to V. but the principal part of the work continued to be carried on at M. In a commercial sense therefore V. was clearly part of one entire establishment. It was contended for resp. that the statute [8 & 9 Vict. c. 29, s. 2] did not mean forming part in a commercial sense. But I see no reason for confining the meaning to local proximity. The whole substantially forms one establishment (ERLE, C.J.).—*HOYLE v. ORAM* (1862), 12 C. B. N. S. 124; 31 L. J. M. C. 213; 27 J. P. 74; 8 Jur. N. S. 1154; 142 E. R. 1090.

Annotation:—*Folld. Coles v. Dickinson* (1864), 16 C. B. N. S. 604.

3. — — — — —.]—(1) By 7 & 8 Vict. c. 15, s. 73, premises which are used solely for the manufacture of paper are excluded from the operation of the *Factory Acts*.

(2) A. was possessed of paper mills in Hertfordshire & of a mill at Manchester. At the latter place he employed steam-power to prepare what is called "half-stuff" which is made from cotton-waste & refuse & rags. The half-stuff was afterwards sent to the mills in Hertfordshire to be manufactured into paper:—*Held*: the mill at Manchester was exempted from the operation of the *Factory Acts*, although the "half-stuff" was capable of being converted into articles other than paper.

In this case the magistrate decided that resp.'s mill at M. & their mills at H. formed two parts of one & the same establishment or "factory." The magistrate's decision was right. It appears

PART I. SECT. 1, SUB-SECT. 1.

a. "Premises used for 'preparing articles for sale.'"—Defts. occupied premises in which four persons were employed by him in sorting, weighing & packing into cartons & boxes nails manufactured by him:—*Held*: these persons were "employed in preparing articles for sale" & the premises were a "factory or workshop."—*ALDERSON v. GOLD*, [1909] V. L. R. 219.—AUS.

b. — **Articles retaining original character.]—**A warehouse, belonging to importers & distributors of soft goods, in which goods when received were unpacked, ticketed, sold, & when sold, repacked for delivery to purchasers, is not a "factory."—*BULL (HENRY) & Co., LTD. v. HOLDEN* (1912), 13 C. L. R. 569.—AUS.

c. — — — — —.]—Four or more persons were engaged on deft.'s premises in (a) Comprising wool into smaller compass for shipment in order to reduce freight charges; (b) Sorting, drying & spraying with preservative sheepskins, to prevent weevils from attacking them pending & during shipment; (c) Salting hides to preserve them pending & during shipment. All the goods had previously been sold in the local market, & were in deft.'s premises pending shipment by the purchasers for whom defts. were treating them:—*Held*: none of these operations was a "preparing for trade or sale" & defts.' premises did not require registration as a factory.—*BILLINGHAM v. NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD.*, [1914] V. L. R. 321.—AUS.

d. **Place where electricity generated**

—**For use of tenants of person generating.]—**A place, where electricity is generated for the supply of heat or light or power to tenants of the person generating it, is a factory.—*TIPPLE v. GEELONG HARBOUR TRUST COMRS.*, [1914] V. L. R. 407.—AUS.

e. **Place "where not more than five persons employed."]**—Premises where seven persons are found working upon or about the machinery but three are the employers of the others, is a place "where not more than five persons are employed," within the proviso in *Factories Act, R. S. O. c. 256, s. 2*, & a conviction of the three employers, under s. 19, for keeping the premises in a dangerous state was quashed.—*R. v. WEIR*, 20 C. L. T. 232.—CAN.

f. **Merchant tailors' store.]—Held**:

Sect. 1.—Factories: Sub-sects. 1 & 2.]

that the mill at M. was used by resps. for the purpose of turning cotton-waste into what is called half-stuff, which, after going through certain processes is conveyed to the mills at A. & there the manufacture is completed. Each step in that process is a step in the manufacture & the distance between the two places is wholly immaterial (ERLE, C.J.).—COLES v. DICKINSON (1864), 16 C. B. N. S. 604; 4 New Rep. 335; 33 L. J. M. C. 235; 33 L. J. C. P. 312; 10 L. T. 616; 10 Jur. N. S. 802; 12 W. R. 918; 143 E. R. 1264.

Annotation:—As to (1) *Reid*. Whympers v. Harney (1865), 18 C. B. N. S. 243.

See No. 180, *post*.

4. — "Place situate within curtilage"—Sole use for purpose other than process carried on in factory—Separate factory.]—Resps. were occupiers of a factory for the manufacture of iron & tin plates, & by the side of their factory & within the curtilage thereof, upon a site which had been cleared for the purpose of creating a new mill thereon, there was a crushing machine driven by a steam-engine, & used solely for crushing stone & making mortar & cement for the new works intended to be erected on that site. Both the steam-engine & crushing machine were upon that site. Upon an information under 1901 Act, for not securely fencing the dangerous parts of this machinery, the justices were of opinion that the machinery was not securely fenced, but they decided that the place on which the engine & crusher stood, though within the close, curtilage, & precincts forming the factory, was a place solely used for a purpose other than the manufacturing process carried on in the factory, within s. 149 (4) of above Act, & therefore could not be deemed to be a part of the factory, & was not a separate factory in itself, & they dismissed the information upon that ground:—*Held*: the justices having found that the site on which the machinery was not a part of the area of the existing factory, but was a place or area separate & apart from the factory, they were right in holding that the case came within the exemption in s. 149 (4), as the machinery in this separate area was being solely used for a purpose other than the manufacturing process carried on in the factory.—LEWIS v. GILBERTSON & Co., LTD. (1904), 91 L. T. 377; 68 J. P. 323; 20 Cox, C. C. 677, D. C.

5. — How determined.]—In these cases [factories, etc.] the walls or fences built round the factory fix the boundaries & determine the area (LORD ATKINSON).—BACK v. DICK KERR & Co., LTD., [1906] A. C. 325; 75 L. J. K. B. 569; 94

a store occupied by merchant tailors, the rear part being used as a tailoring department & the front as a retail sale department, 14 persons being employed in the former, was a "factory."—BURKE v. FERGUSON (1907), 13 O. L. R. 479.—CAN.

g. Use of mechanical power.]—The word "factory" applies to every building in which machinery driven by mechanical power is used, & is not restricted in its meaning to buildings used for industrial purposes.—WESTERN TRUST CO. v. DUNCAN & WILLOUGHBY (1915), 30 W. L. R. 921; 21 D. L. R. 461; 8 Sask. L. R. 7.—CAN.

h. Laundry—Worked by owners living on premises.]—A laundry operated by several persons, all working &

sharing in the profits equally, & all living on the premises, & with no others employed & no one receiving compensation for work other than as aforesaid, is not a "factory."—R. v. CHOW CHIN, [1920] 2 W. W. R. 997.—CAN.

k. — — —.]—Four Chinamen who lived & prepared their meals in a house in which were two bedrooms upstairs, an ironing-room, dining-room & kitchen on the ground floor & a washing-room in the basement, obtained a licence to operate a laundry on the premises. They were convicted for operating in prohibited hours:—*Held*: Factories Act, s. 2 (d), contemplates the existence of a "dwelling-house" & a "factory" in the one building & the conviction should be sustained.—R. v. OHONG

L. T. 802; 22 T. L. R. 548; 8 W. C. C. 40, H. L.; *affg.*, [1905] 2 K. B. 148, C. A.

Annotations:—*Consd.* Rimmer v. Premier Gas Engine Co. (1907), 97 L. T. 226. *Reid*. Rogers v. Cardiff Corp., [1905] 2 K. B. 832. *Mentd.* Handford v. Clark (1907), 97 L. T. 124.

6. Part of building used as factory — When building not a factory.]—A building was let by the owners before 1892 to different tenants. Upon the second, third, & fourth floors businesses were carried on which were "non-textile factories" within Factories & Workshop Acts, but the tenants of the basement, ground, & first floors did not carry on businesses within those Acts. In an arbitration under Factory & Workshop Act, 1891 (c. 75), s. 7, the owners were ordered by the award to provide staircases thereto from the top of the building to the bottom, which would necessitate an encroachment upon the lower floors of the building:—*Held*: there was no jurisdiction under the Acts to require that such alterations should be done as would necessitate such encroachment upon those floors of the building which were not factories, as only the second, third, & fourth floors were factories within Factories & Workshops Acts.—LONDON COUNTY COUNCIL v. LEWIS (1900), 69 L. J. Q. B. 277; *sub nom.* Re LONDON COUNTY COUNCIL & LEWIS, 82 L. T. 195; 61 J. P. 39; 16 T. L. R. 137, D. C.

Annotations:—*Apld.* Toller v. Spiers & Pond, [1903] 1 Ch. 362. *Reid*. Brass v. L. C. C. (1904), 91 L. T. 344.

7. Whole building used as factories — Parts by different persons—When each part a separate factory.]—TOLLER v. SPIERS & POND, LTD., No. 91, *post*.

8. — — —.]—(1) A building is not a "tenement factory" within 1901 Act, s. 149 (1), where the mechanical power employed in the different parts of the building occupied by different persons is derived from separate sources situated upon these parts respectively, inasmuch as mechanical power is not "supplied to" different parts of such a building within the meaning of above sub-sect.

(2) *Semble*: adjoining premises consisting of two factories, the one in part superimposed upon the other, & a builder's store, approached by separate entrances, cannot properly be described as "buildings situate within the same close or curtilage" within the definition of "tenement factory" in above sub-sect.

I assent to the view that these buildings are not "situate within the same close or curtilage" within the meaning of s. 149 (1). We should be in great difficulties if we were to hold that the mere fact of one factory overlapping another

KER (1922), 37 Can. Crim. Cas. 22; 29 B. C. R. 165.—CAN.

l. Room of surgeon dentist—Used for mechanical part of business—Employment of apprentices.]—The term "handicraft" in Factories Act, 1894, s. 2, has not a technical meaning, & must be construed in a popular sense. Where a surgeon dentist employs for hire two or more apprentices in the mechanical part of his business, the room in which such part of his business is carried on is a factory.—ARMSTRONG v. MAXWELL (1895), 13 N. Z. L. R. 636.—N.Z.

m. Geographical limits of factory.]—The premises of resp. co. consisted of land on which stood the factory building, stables, offices, & the dwelling-house of the manager, all in the same

caused them to be within the same curtilage (KENNEDY, J.).—BRASS v. LONDON COUNTY COUNCIL, [1904] 2 K. B. 336; 73 L. J. K. B. 841; 91 L. T. 344; 68 J. P. 365; 53 W. R. 27; 20 T. L. R. 464; 48 Sol. Jo. 507; 2 L. G. R. 809, D. C.

9. Adjacent buildings — Having internal communication — Whether same factory.]—HARD-CASTLE v. JONES, No. 28, *post*.

10. — Connected by bridge—1901 Act, s. 14 (2).]—Two adjacent houses were let by the same owner to the same tenant on separate leases. They were occupied by the tenant for the purposes specified in 1901 Act, s. 149 (1) (c). The houses were only connected by an emergency exit from the window of one to the roof of the other & by a bridge from the first floor of one to the corresponding level of the other. Over this bridge a constant traffic passed in the course of business. In one of the houses more, in the other less, than forty persons were employed. An umpire appointed pursuant to s. 14 (3) & the first schedule of above Act, found that the two houses together constituted a "factory" within s. 14 (2) of above Act. On a case stated the ct. was of opinion that the user, inter-communication, & process of manufacture on the premises as stated above were all facts bearing upon the question of whether the two houses constituted a "factory & workshop" within s. 14 (2) of above Act. The umpire did not misdirect himself in taking them into consideration & there was substantial evidence in support of his decision.—*Re LONDON COUNTY COUNCIL & TUBBS* (1903), 68 J. P. 29; 1 L. G. R. 716, D. C.

11. Gas main — Not part of gas works.]—A workman in the employ of a gas co. was, in the course of his employment, engaged in making a trench in the roadway, under which one of their gas mains was laid, at a distance of a quarter of a mile from the works where the gas was manufactured, which works came within the definition of a "non-textile factory" given by 1901 Act, s. 149 (1) (c), when he was injured by an accident arising out of & in the course of his employment. The workman having claimed compensation under Workmen's Compensation Act, 1897 (c. 37), s. 7, the county ct. judge held that, at the time of the accident, he was employed "about a factory," inasmuch as the gas main was part of the gasworks, which were a factory, & accordingly awarded him compensation.—*Held*: the main was not part of a factory & the workman was not employed "about a factory" within 1901 Act, & therefore was not entitled to compensation.—SPACEY v. DOWLAIS GAS & COKE CO., [1905] 2 K. B. 879; 75 L. J. K. B. 5; 93 L. T. 685; 54 W. R. 138; 22 T. L. R. 29; 50 Sol. Jo. 42; 8 W. C. C. 29, C. A.

12. Works in open air—Slate quarry—Not a factory.]—A slate quarry, a large open space extending over an area of 400 acres, the works of which are carried on in the open air, the only buildings being sheds & in which more than fifty persons were employed in splitting the rock into slates & shaping them for sale, is not "a factory" within 30 & 31 Vict. c. 103, s. 3 (7).—KENT v. ASTLEY (1869), L. R. 5 Q. B. 19; 10 B. &

S. 802; 39 L. J. M. C. 3; 21 L. T. 425; 34 J. P. 374; 18 W. R. 185.

Annotations:—*Fold*. Redgrave v. Lee (1874), L. R. 9 Q. B. 363. *Reid*. Hoare v. Green, [1907] 2 K. B. 315.

— **Manufacture of cement — Not a factory.]**—Premises, consisting of ten acres, in which the manufacture of cement from chalk & mud is carried on chiefly in the open air, & in which 200 people are employed in grinding & washing in mills, but in which there is no great building in which men & women are employed under cover, are not a "factory" within 30 & 31 Vict. c. 103, s. 3 (7).

The legislature had the subject before them in 1871, & they might then have amended the former Acts if the decision of this ct. in *Kent v. Astley*, No. 12, *ante*, did not carry out what they intended should be the law (BLACKBURN, J.).—REDGRAVE v. LEE (1874), L. R. 9 Q. B. 363; 43 L. J. M. C. 105; 30 L. T. 519; 38 J. P. 676; 22 W. R. 857.

—.]—*See, now*, 1901 Act, s. 149 (5).

Machinery for special purpose—Unloading ship.]—*See* Part IV., Sect. 2, sub-sect. 1, *post*.

SUB-SECT. 2.—TEXTILE FACTORIES.

See, now, 1901 Act, s. 149 (1).

14. "Materials other than those enumerated" —Leather used with cotton & wool—Factory Act, 1844 (c. 15), s. 30.]—Applt. was the occupier of a factory within above Act, in which he manufactured cotton & wool into a material termed "webbing." Applt. manufactured also braces & girths in rooms which were part of the factory, using for the purpose both the webbing manufactured by himself & other webbing purchased by him. He was convicted, under above Act, for employing a child in the factory after the hour of one o'clock. The child was engaged in labour for the applt. in the manufacture of braces & girths, & the only process in which he was employed was the preparation of pieces of leather for being stitched to the webbing, but no part of the webbing itself, nor any machinery, was in the room in which he was so employed:—*Held*: the room was not shown to be a room used solely for the manufacture of goods made entirely of any other material than those enumerated in the Act, & therefore applt. was rightly convicted.—TAYLOR v. HICKES (1862), 12 C. B. N. S. 152; 31 L. J. M. C. 242; 6 L. T. 784; 9 Jur. N. S. 21; 142 E. R. 1100.

15. "Process incident to manufacture" —Winding thread on to spools.]—A number of children were employed in a building where machinery worked by steam-power was used for the purpose of winding thread which had been previously manufactured elsewhere, from skeins on to spools or reels, in which form it is usually sold:—*Held*: this building was a "factory" within 3 & 4 Will 4, c. 103, & 7 & 8 Vict. c. 15.

The process in question is a "process incident to the manufacture" within [the latter] statute,

enclosure. Men were employed outside the factory buildings in the enclosure, the whole of which was used for factory purposes only. It was necessary for the office staff to be present when the factory was working:—*Held*: the whole of the above-

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mentioned premises were included in the term "factory."—KEDDIE v. SOUTH CANTERBURY DAIRY CO. (1907), 26 N. Z. L. R. 522.—N. Z.

n. Machine & traction-engine in transit.]—A threshing-machine &

traction-engine in transit to a place where they are to be used for threshing, the engine being connected with the machine for no purpose but that of haulage do not constitute "a factory."—GEORGE v. MACDONALD (1901), 4 F. (Ct. of Sess.) 190.—SCOT.

Sect. 1.—Factories: Sub-sects. 2 & 3.]

for it brings the cotton into a state in which it certainly was not at the time it was in the skein (COCKBURN, C.J.).—HAYDON v. TAYLOR (1863), 4 B. & S. 519; 3 New Rep. 116; 33 L. J. M. C. 30; 33 L. J. Q. B. 70; 9 L. T. 382; 27 J. P. 758; 12 W. R. 103; 122 E. R. 554.

16. — **Covering steel strips with thread.**—The premises of a manufacturer of crinoline skirts, in which steam-power is used to work machinery which by the interlacing or plaiting of cotton threads together around & over every part of the strips of steel, which are afterwards placed in the crinoline skirts, effects a covering for such strips, are a factory within Factory Acts.—WHYMPER v. HARNEY (1865), 18 C. B. N. S. 243; 5 New Rep. 369; 34 L. J. M. C. 113; 11 L. T. 711; 11 Jur. N. S. 269; 13 W. R. 440; 144 E. R. 436.

SUB-SECT. 3.—NON-TEXTILE FACTORIES.

See, now, 1901 Act, s. 149 (a), (b), (c), sched. VI., Parts I. & II.; Factory & Workshop Act, 1907 (c. 39), s. 1.

17. **Use of mechanical power**—“In aid of manufacturing process”—**Cleaning bottles.**—By Factory & Workshop Act, 1878 (c. 16), s. 93 (3) (c), the expression “non-textile factory” means any premises wherein any manual labour is exercised by way of trade or for the purposes of gain “in or incidental to the adapting for sale of any article, & wherein or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.” Resps. occupied premises which they used solely for the purpose of washing bottles & bottling beer in their trade of wholesale & retail beer dealers. Before the bottles were filled with beer, which was done by manual labour only, they were washed inside by a rotary brush driven by a small gas-engine, the bottles being held in position by hand:—*Held*: resps. premises were not a “factory” within above sub-sect.—LAW v. GRAHAM, [1901] 2 K. B. 327; 70 L. J. K. B. 608; 84 L. T. 599; 65 J. P. 501; 49 W. R. 622; 17 T. L. R. 474; 45 Sol. Jo. 485; 3 W. C. C. 131; 19 Cox, C. C. 709, D. C.

Annotations:—*Distd.* Hoare v. Truman, Hanbury, Buxton (1902), 71 L. J. K. B. 380. *Consd.* Paterson v. Hunt (1909), 101 L. T. 571.

18. — **Bottles filled by gas engine.**—Certain premises were used for the purpose of aerating & bottling beer in order to adapt it for sale as bottled beer. Gas engines were used for the purpose of aeration, but the bottling was done by hand, the bottling machine not being worked by

mechanical power & the bottle filling by means of the pressure of gas with which it had been aerated:—*Held*: these premises were a non-textile factory within Factory & Workshop Act, 1878 (c. 16), s. 93.—HOARE v. TRUMAN, HANBURY, BUXTON & Co. (1902), 71 L. J. K. B. 380; 86 L. T. 417; 66 J. P. 342; 50 W. R. 396; 18 T. L. R. 349; 46 Sol. Jo. 299; 4 W. C. C. 58; 20 Cox, C. C. 174, D. C.

Annotation:—*Consd.* Paterson v. Hunt (1909), 101 L. T. 571.

19. — **Laundry.**—OWNER v. COTTINGHAM SANITARY STEAM LAUNDRY CO., LTD., No. 23, *post*.

20. — **Steam to heat water**—In tripe factory.]—Where in a tripe manufactory cold water was supplied to a boiler by pressure of steam, & steam was used to heat the water in the coppers wherein the tripe was prepared & adapted for sale:—*Held*: there was a use of steam-power rendering the premises a “non-textile factory” within 1901 Act, s. 149 (1), (c).—DOSWELL v. COWELL (1906), 95 L. T. 38; 22 T. L. R. 628; 8 W. C. C. 33, C. A.

21. “**Manufacturing process**”—**Incidental manual labour.**—By 30 & 31 Vict. c. 103, s. 3, “factory” shall mean . . . 5, “any premises in which steam, water, or other mechanical power is used for moving machinery employed . . . (b), in the manufacture of any article of metal not being machinery.” A co. carried on very large works, comprising the business of blast furnaces, iron rolling mills, engine building, & iron ship-building in all its branches. The whole of the several branches communicated, & were open from one end to the other, & were within one common boundary. A boy was employed as a rivet-boy, & in the department where he worked steam machinery was in use for cutting & shaping iron plates, & rivets were heated there. Both the plates & rivets were used in the manufacture of a ship. The co. having been convicted of having employed the boy in a “factory” beyond the statutable number of hours:—*Held*: (1) the department in which the boy was employed was a “factory” within above definition, & the conviction was therefore right. (2) *Seem*: a ship is not “an article” within s. 3 (7), which defines “factory” as “any premises in which fifty or more persons are employed in any manufacturing process,” “manufacturing process” being defined as “any manual labour incidental to the making of any article or part of an article.”—PALMER’S SHIPBUILDING & IRON CO. v. CHAYTOR (1869), L. R. 4 Q. B. 209; 10 B. & S. 177; 38 L. J. M. C. 63; 19 L. T. 638; 33 J. P. 327; 17 W. R. 401.

Annotation:—*Reid.* Kent v. Astley (1869), 10 B. & S. 802.

22. — **Rags sorted by hand**—**Dusted by electric motor.**—Resp. was summoned for employing persons under sixteen years of age in a factory without obtaining certificates of their

PART I. SECT. 1, SUB-SECT. 3.

o. Use of mechanical power—“In aid of manufacturing process”—*Stone-dressing.*—The premises consisted of a yard in which stones were dressed by manual labour, & included an engine-house where the workmen’s tools were sharpened on a grindstone driven by a gas engine. No other mechanical power was used in the premises:—*Held*: the premises were premises in which mechanical power was “used in aid of the manufacturing process carried on therein” & were

therefore a factory.—PETRIE v. WEIR (1900), 2 F. (Ct. of Sess.) 1041.—SCOT.

p. “Adapting for sale”—*Refuse works.*—In the Refuse Dispatch works of the G. Corpn. saleable parts of the city refuse were separated from the unsaleable part by processes in which steam power was used. The sums realised were applied in reducing the cost of the disposal of the refuse, which fell on the rates:—*Held*: these works were a non-textile factory in respect that the material in question was there adapted for sale, & after-

wards sold.—HENDERSON v. GLASGOW CORPN. (1900), 2 F. (Ct. of Sess.) 1127.—SCOT.

q. — Bottling beer.—KEITH, LTD. v. KIRKWOOD, [1914] S. C. (J.) 150.—SCOT.

r. Machine-room—*For repair of tramcars.*—A cable tramway co. had a covered shed for their cars & adjoining it a machine-room or workshop, which contained lathes, turning machines, & boring machines, driven by two electric motors. This workshop was used for the repair of the

fitness as required by 1901 Act, s. 63. Resp. was the occupier of the premises, & his business consisted in purchasing rags, which were sorted by hand, having been in some cases dusted by a shaker driven by an electric motor, & were sold wholesale to manufacturers of paper:—*Held*: as this did not constitute a manufacturing process, the premises were not a factory within sect. 149 of above Act.—*PATERSON v. HUNT* (1909), 101 L. T. 571; 73 J. P. 496, D. C.

23. — Whether actual production of articles necessary.]—1901 Act, s. 149 (1), defines non-textile factory as meaning certain classes of premises where mechanical power is used in aid of the manufacturing process carried on there. By Factory & Workshop Act, 1907 (c. 39), s. 1, laundries carried on by way of trade or for the purpose of gain or carried on as ancillary to another business or incidentally to the purposes of any public institution are added to the classes of premises referred to in the above definition:—*Held*: the words “manufacturing process” do not necessarily refer to something being produced but to the business carried on, & a laundry which is carried on for the purpose of gain & in which mechanical power is used for driving the machines used in aid of the work of washing clothes, is a non-textile factory within the definition.—*OWNER v. COTTINGHAM SANITARY STEAM LAUNDRY CO., LTD.* (1910), 102 L. T. 571; 74 J. P. 219, D. C.

Annotation:—*Folld. Johnston v. Lalonde & Parham*, [1912] 3 K. B. 218.

24. — Carpet beating — By mechanical power.]—Premises in which carpets are beaten by the aid of mechanical power are a factory within 1901 Act, s. 149 (1), (b), inasmuch as carpet-beating is a “manufacturing process” within above sub-sect. read together with Sched. 6, Part II., clause 28.—*JOHNSTON v. LALONDE BROTHERS & PARHAM*, [1912] 3 K. B. 218; 81 L. J. K. B. 1229; 76 J. P. 378; 10 L. G. R. 671, D. C.

25. “Making of any article” — Ship.]—*PALMER'S SHIPBUILDING & IRON CO. v. CHAYTOR*, No. 21, *ante*.

26. Bleaching & dyeing works — “Finishing.”]—One whose sole business consists in the “finishing” of cotton fabrics, but who neither bleaches nor dyes, is not within Bleaching & Dyeing Works Act, 1860 (c. 78). The “finishing” spoken of in sects. 7 & 11 of that Act refers to the process of finishing which is incidental to dyeing, & not to the dealing with fabrics which are neither bleached nor dyed.—*HOWARTH v. COLES* (1862), 12 C. B. N. S. 139; 31 L. J. M. C. 262; 6 L. T. 785; 9 Jur. N. S. 251; 142 1095.

27. — Hooking, lapping, making up & packing.]—By Factory & Workshop Act, 1878 (c. 16), Sched. 4, Part I., s. 2, bleaching & dyeing works are defined as “any premises in which

bleaching, beetling, dyeing, calendaring, finishing, hooking, lapping, & making-up & packing any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried on.” By s. 93, the word “factory” means “textile factory” & “non-textile factory,” & “non-textile factory” includes any places named in Sched. 4, Part I.

Resps. were engaged in hooking, lapping, making-up, & packing cloth for exportation, which they received in a finished state from the manufacturers. They were summoned by applt. for employing a young woman contrary to Factory Acts. It was contended on behalf of resps. that their premises were not a factory within the Act, as the hooking, lapping, making-up, & packing were not carried on incidentally to bleaching & dyeing. The magistrate decide in favour of resps.:—*Held*: the decision was wrong, as the premises came within “bleaching & dyeing works” as defined by the Act, though not within the ordinary sense.—*ROGERS v. MANCHESTER PACKING CO.*, [1898] 1 Q. B. 344; 67 L. J. Q. B. 310; 78 L. T. 17; 62 J. P. 166; 46 W. R. 350; 14 T. L. R. 196; 42 Sol. Jo. 234; 18 Cox, C. C. 698, D. C.

28. Printing works — “Finishing.”]—S. was employed in “skutching” goods which had been previously printed. She was employed in a room or shed, in which “finishing” alone was carried on, but which had an internal & direct communication with print-works, in which all the processes incident to the chief process of printing were carried on:—*Held*: (1) S. was employed in a print-work within 8 & 9 Vict. c. 29, s. 2, whether “skutching” was an “incidental process” or not; (2) the room was part of the print works.—*HARDCASTLE v. JONES* (1862), 2 B. & S. 153; 1 New Rep. 54; 32 L. J. M. C. 49; 7 L. T. 322; 27 J. P. 166; 9 Jur. N. S. 19; 11 W. R. 36; 122 E. R. 59.

29. “By way of trade or for purpose of gain” — Steam engine on farm — To grind meal for stock.]—Where a workman who was employed by a farmer on his farm to drive a movable steam-engine, for the purpose of working a mill for grinding meal intended to be used for food for stock on the farm, & not for sale, was injured by an accident arising out of & in the course of that employment:—*Held*: the workman was not employed on, in, or about a “factory” within Factory & Workshop Act, 1878 (c. 16), s. 93, & therefore was not entitled to compensation under Workmen's Comp. Act, 1897 (c. 37), in respect of the injuries occasioned to him as before mentioned.—*NASH v. HOLLINSHEAD*, [1901] 1 K. B. 700; 70 L. J. K. B. 571; 84 L. T. 483; 65 J. P. 357; 49 W. R. 424; 17 T. L. R. 352; 3 W. C. C. 125, C. A.

Annotation:—*Folld. Curtis v. Shinner* (1906), 95 L. T. 31.

Compare No. 40, *post*.

grippers & other parts of the cars. The cars were always brought into the shed for repairs, & were repaired in it. No mechanical power was used in the shed except the power employed to move a travelling platform for moving the cars, which was derived from a steam-engine adjoining the shed:—*Held*: the machine-room was a factory.—*MOONEY v. EDINBURGH & DISTRICT TRAMWAYS CO., LTD.* (1901), 4 F. (Ct. of Sess.) 390.—*SCOT*.

a. “Bottle-washing works” — *Bottle-*

washing ancillary to another business — Wine cellar of hotel.]—In the wine cellars of an hotel there were two small revolving brushes (worked, when desired, by water-power from a tap) for washing the interior of the bottles. The cellars were primarily used for storage, & the processes of corking & bottle washing were ancillary to that object:—*Held*: the cellars were not a “bottle-washing works,” & therefore not a factory.—*KAVANAGH v. CALEDONIAN RY. CO.* (1903), 5 F. (Ct. of Sess.) 1128.—*SCOT*.

t. — — — *Grocer's premises.]*—On premises occupied by a firm of grocers, wine merchants, & Italian warehousemen, there was a portable bottle filling machine used for bottling beer:—*Held*: the premises were not “bottle washing works” in respect that the bottle washing was merely incidental to the firm's proper business.—*KEITH, LTD. v. KIRKWOOD*, [1914] S. C. (J.) 150.—*SCOT*.

a. “Manufacturing process” — *beer.]*—On premises occupied

Sect. 1.—Factories: Sub-sects. 3, 4, 5 & 6. Sect. 2: Sub-sects. 1, 2, 3 & 4. Sects. 3, 4 & 5.]

30. "Public place"—Workhouse—Containing electrical station for lighting.]—1901 Act, s. 149 (1), "non-textile factory" means any place named in Part I., Sched. VI., of above Act. By Part I., clause 20, of that sched. "electrical stations" are defined as being "any premises or that part of any premises in which electrical energy is generated or transformed for the purpose of supply by way of trade, or for the lighting of any street, public place, or public building, or of any hotel, or of any railway, mine, or other industrial undertaking." An engine-house & machinery, forming part of the premises of a workhouse, were used for the purpose of generating electrical energy for lighting the workhouse & infirmary, & for other purposes. One of the engines in the engine-house was unfenced:—*Held*: the workhouse was a public place within above clause, & was therefore a non-textile factory within above sub-sect.—*MILE END GUARDIANS v. HOARE*, [1903] 2 K. B. 483; 72 L. J. K. B. 651; 89 L. T. 276; 67 J. P. 395; 19 T. L. R. 606; 1 L. G. R. 732; 5 W. O. C. 100; 20 Cox, C. C. 536, D. C.

31. "Laundry incidental to public institution"—Asylum.]—Resps. were the occupiers of certain premises used as an asylum or home for orphan children, one of the buildings of which was set apart for use as a laundry. A mangle worked by mechanical power was used in the laundry, by otherwise it was a hand laundry. The work done at the laundry was confined to the washing of linen & clothes exclusively used at the asylum. The place was maintained by subscriptions & donations for which appeals were made to the public, & it was governed by a board of directors elected by subscribers. The children were elected by the subscribers, & some were admitted upon payment of a sum of money. The average number of children in the home was about 200, of both sexes, of all denominations, & from every part of the empire. The premises & grounds were private, no one being admitted without permission. The asylum received no Govt. grant & was not under public control. Upon an information for not affixing at the laundry the abstract prescribed by 1901 Act, s. 128:—*Held*: the orphan asylum was a "public institution" within Factory & Workshop Act, 1907 (c. 39), s. 1, & the laundry was carried on "incidentally to the purposes of a public institution," & was a factory, & resps. had committed an offence in not having the abstract affixed.—*SEAL v. BRITISH ORPHAN ASYLUM TRUSTEES* (1911), 104 L. T. 424; 75 J. P. 152; 9 L. G. R. 238; 22 Cox, C. C. 392, D. C.

*Annotations:—**Appld.* *Johnston v. Lalonde & Parham* (1912), 81 L. J. K. B. 1229; *Royal Masonic Institution for Boys, Trustees v. Parkes*, [1912] 3 K. B. 212.

32. — School maintained by private subscription—Factory & Workshop Act, 1907 (c. 39), s. 1.]—The Royal Masonic Institution for Boys was a school for boys. One of the buildings was used as a laundry for washing the clothes

of the inmates, the machinery being driven by mechanical power, & six resident servants were employed to work therein. This institution was almost entirely maintained by the subscriptions of Freemasons. In the year 1910 the institution received a grant of £654 from the Board of Education as a secondary school. The grounds & premises were strictly private, & no one was admitted without permission of the secretary:—*Held*: the institution was a "public institution" within above sect., which applies 1901 Act, to laundries "carried on incidentally to the purposes of any public institution."—*ROYAL MASONIC INSTITUTION FOR BOYS, TRUSTEES v. PARKES*, [1912] 3 K. B. 212; 82 L. J. K. B. 33; 106 L. T. 809; 76 J. P. 218; 28 T. L. R. 355; 10 L. G. R. 376; 22 Cox, C. C. 746, D. C.

*Annotations:—**Foll.* *Johnston v. Lalonde & Parham*, [1912] 3 K. B. 218. *Mentd.* *Shaw v. Halifax Corp.* (1915), 112 L. T. 921.

Compare No. 41, *post*.

SUB-SECT. 4.—TENEMENT FACTORIES.

See 1901 Act, s. 119.

33. Definition—Inclusion in same building of separate factories—Occupation by different persons.]—*TOLLER v. SPIERS & POND, LTD.*, No. 91, *post*.

34. What is same building—Inclusion in "same curtilage."]—*BRASS v. LONDON COUNTY COUNCIL*, No. 8, *ante*.

35. "Supply" of mechanical power—From external source.]—*TOLLER v. SPIERS & POND, LTD.*, No. 91, *post*.

36. — Must be from common source.]—*BRASS v. LONDON COUNTY COUNCIL*, No. 8, *ante*.

SUB-SECT. 5.—DOMESTIC FACTORIES.

1901 Act, s. 115.

SUB-SECT. 6.—PLACES DEEMED TO BE FACTORIES FOR SPECIAL PURPOSES.

Docks, quays & ships.]—*See* 1901 Act, s. 104, & Part IV., Sect. 2, sub-sect. 1, *post*.

Buildings in course of construction.]—*See* 1901 Act, s. 105, & Part IV., Sect. 2, sub-sect. 2, *post*.

Railways.]—*See* 1901 Act, ss. 16, 106.

Warehouses.]—*See* 1901 Act, s. 104, & Part IV., Sect. 2, sub-sect. 3,

Wharves.]—*See* 1901 Act, s. 104; Part IV., Sect. 2, sub-sect. 4, *post*.

by a firm of grocers, wine merchants, & Italian warehousemen, there was a portable bottle filling machine used for bottling beer & worked by electricity:—*Held*: the premises were not a "non-textile factory" in respect that the process of bottling beer was not a "manufacturing process."—*KERTH,*

LTD. v. KIRKWOOD, [1914] S. C. (J.) 150.—*SCOT*.

b. — Millinery room.]—A building was occupied by a tenant who used the ground floor as a shop, the first floor, partly as a shop & stock-room & partly as a millinery room for

the trimming of hats, no mechanical power being used, & the third floor as a storeroom. The floors were connected by internal stair-cases:—*Held*: the millinery room was not a factory or part of a factory.—*VINES v. INGLIS*, [1915] S. C. (J.) 18.—*SCOT*.

SECT. 2.—WORKSHOPS.

SUB-SECT. 1.—IN GENERAL.

See 1901 Act, s. 149, Sched. 6, Part II.; 1907 Act, s. 1.

Distinguished from factories—No mechanical power used.]—See 1901 Act, s. 149.

37. Straw-plaiting school—Child under prescribed age taught handicraft.]—BEADON v. PARROTT, No. 45, *post*.

38. “Adapting for sale”—Goods packed in shop—After shop closed.]—The packing in a shop of goods for sale to customers may, if it takes place after the ordinary shop hours, amount to “adapting” them for sale within 41 & 42 Vict. c. 10, s. 93, & make the shop a workshop within Factory & Workshop Acts, 1878 to 1895.—FULLERS, LTD. v. SQUIRE, [1901] 2 K. B. 209; 70 L. J. K. B. 689; 85 L. T. 249; 65 J. P. 660; 49 W. R. 683; 45 Sol. Jo. 539, D. C.

*Annotations:—*Consd. Hoare v. Green (1907), 76 L. J. K. B. 730; Paterson v. Hunt (1909), 101 L. T. 571.

39. — Room other than shop—Flowers made into bouquets.]—Resps. carried on the business of retail florists, & employed a number of young women & girls, whose duties consisted partly in serving customers in the shop & partly in making up natural flowers into wreaths, crosses & bouquets, & arranging floral decorations, for which purposes frames of wood or wire were sometimes used, in a room behind the shop:—*Held*: the room was a place in which manual labour was exercised by way of trade in or incidental to the making of an article, or the adapting for sale of an article, within 1901 Act, s. 149, & the room was therefore a workshop within that Act.—HOARE v. GREEN (ROBERT), LTD., [1907] 2 K. B. 315; 76 L. J. K. B. 730; 96 L. T. 724; 71 J. P. 341; 23 T. L. R. 483, D. C.

*Annotation:—*Consd. Paterson v. Hunt (1909), 101 L. T. 571.

40. “By way of trade or for purposes of gain”—Room for repairing fishing nets.]—A fishing boat owner occupied a warehouse with a chamber over it, in which persons in his employ repaired fishing nets belonging to his fishing boats & used by him in his fishing business, & no nets were repaired in this room except those which belonged to him & were used by him in his own fishing business. Upon an inspector of factories visiting the premises he found 4 persons engaged in manual labour in mending or repairing these nets:—*Held*: on the authority of *Nash v. Hollinshead*, No. 29, *ante*, as the labour employed in the room was employed in the repairing of nets belonging to the employer & solely used by him in his own business, there was no manual labour exercised “by way of trade or for purposes of gain” within 1901 Act, s. 149 & the room was not a “workshop” within the Act.—CURTIS v. SHINNER (1906), 95 L. T. 31; 70 J. P. 272; 22 T. L. R. 448; 50 Sol. Jo. 441; 21 Cox, C. C. 210, D. C.

Compare No. 29, *ante*.

41. “Ancillary” laundry business—For convenience of hotel—Factory & Workshop Act, 1907 (c. 39), s. 1.]—Resp., the occupier of a hotel where he carried on the business of a hotel pro-

prietor, on a certain day employed two women in a laundry in such circumstances as to constitute breaches of Factory & Workshop Acts if the laundry was, within above sect., carried on as ancillary to the business of hotel proprietor. The laundry was not used for the washing of visitors' linen, but was used only for washing the table linen sheets, etc., used in & for the purpose of the hotel, for which purpose two women were exclusively employed during the summer & one during the winter. Upon informations for offences under Factory & Workshop Acts, 1901 & 1907, the justices, being of opinion that the laundry was not carried on as ancillary to the hotel business, dismissed the informations:—*Held*: assuming that the place was in fact a laundry, as the justices must be taken to have found as a fact, the laundry was, within above sect., carried on as “ancillary” to the hotel business, & was a “laundry” to which the sect. applied, & resp. ought to have been convicted.—SADLER v. ROBERTS (1911), 105 L. T. 106; 75 J. P. 342; 22 Cox, C. C. 520, D. C.

Compare No. 32, *ante*.

SUB-SECT. 2.—DOMESTIC WORKSHOPS.

See 1901 Act, ss. 114, 115, & Workshop & Factory Act, 1907 (c. 39), s. 4.

SUB-SECT. 3.—TENEMENT WORKSHOPS.

See 1901 Act, s. 149.

SUB-SECT. 4.—MEN'S WORKSHOPS AND WOMEN'S WORKSHOPS.

Men's workshops—Exclusion of women & young persons.]—See 1901 Act, ss. 157, 158.

Women's workshops—Exclusion of young persons.]—See 1901 Act, s. 29.

SECT. 3.—CROWN FACTORIES AND WORKSHOPS.

See 1901 Act, s. 150.

SECT. 4.—SHOPS UNDER SHOP REGULATION ACTS.

See Part V., Sect. 3, Sub-sect. 1, *post*.

For licensed premises & refreshment houses see INTOXICATING LIQUORS, INNS & INNKEEPERS.

SECT. 5.—INSTITUTIONS.

42. “Public Institution”—Factory & Workshop Act, 1907 (c. 39), s. 1—Orphan asylum.]—SEAL v. BRITISH ORPHAN ASYLUM TRUSTEES, No. 31, *ante*.

PART I. SECT. 2, SUB-SECT. 1.

a. “By way of trade or for purpose of gain”—*Laundry attached to hotel.]—Held*: a laundry attached to an hotel, in which the work done was

washing (a) of hotel linen; (b) of hotel servants' clothes without charge & as part of the servants' remuneration; (c) of visitors' clothes who paid per article of clothing in the ordinary

way, was not a laundry within Factory & Workshop Act, 1895.—CALEDONIAN RY. CO. v. PATERSON (1898), 1 F. (Ct. of Sess.) 24; 2 Adam, 620; 36 So. L. R. 60; 6 S. L. T. 194, J.—SCOT.

Sect. 5.—*Institutions.* Sects. 6, 7, 8 & 9.]

43. ——— School maintained by private subscription.]—ROYAL MASONIC INSTITUTION FOR BOYS, TRUSTEES *v.* PARKES, No. 32, *ante*.

SECT. 6.—PERSONS AFFECTED BY FACTORY AND WORKSHOPS ACTS.

44. "Owner"—1901 Act, s. 14.]—LONDON COUNTY COUNCIL *v.* LEYSON, No. 90, *post*.

See, further, 1901 Act, s. 156 (1), Public Health Act, 1875, s. 4, & generally, PUBLIC HEALTH; LOCAL GOVERNMENT.

Occupier "of factory—In relation to docks & railways.]—See 1901 Act, ss. 104–106.

"Parent."—See 1901 Act, s. 156 (1).

"Woman."—See 1901 Act, s. 156 (1).

"Young person" & "child."—See 1901 Act, ss. 71, 156 (1).

"Apprentice"—A worker for hire.]—See 1901 Act, s. 156 (2).

Workman.]—See MASTER & SERVANT.

SECT. 7.—EMPLOYMENT.

See 1901 Act, s. 152 (1).

45. What constitutes employment — Child taught handicraft—When under "prescribed age."—An information was preferred against resp., as the occupier of a workshop, for employing a child under eight years of age, in contravention of 30 & 31 Vict. c. 146, s. 6. It appeared from the evidence that the child was found in a workroom occupied by resp., engaged in plaiting straw under his superintendence. The mother of the child sold the plait for her own benefit, found the straw, & paid resp. threepence a week for the teaching:—*Held*: the child was employed in a workshop in contravention of the Act, & resp. was liable to the penalty, although he had no interest in the work done, or in the proceeds of it.

The Act was intended to prevent the employment of children under the prescribed age in workshops. It is quite sufficient if the child is

occupied under a master, whether the work is done for his benefit or not (*per* CUR.).—BEADON *v.* PARROTT (1871), L. R. 6 Q. B. 718; 40 L. J. M. C. 200; 39 J. P. 647; 19 W. R. 1114.

46. ——— Child working during meal-time—Contrary to instructions.]—A young person in the employment of the occupiers of a spinning mill during the time allowed for a meal oiled part of the machinery of the mill. He stated that he did so contrary to orders & for his own amusement: *Held*: he was working in what he did, & he was employed during prohibited hours contrary to the provisions of the Factory & Workshop Act, 1878 (c. 16), & the occupiers of the mill were liable to a fine under sect. 83 of that Act.

Prima facie, the employer is to be held responsible for any breach of the provisions of the Act. If he can show that he has used all due diligence to enforce the execution of the Act & that the offence has really been committed by some other person, then under ss. 86 & 87 he is protected (KENNEDY, J.).—PRIOR *v.* SLAITHWAITE SPINNING CO., [1898] 1 Q. B. 881; 67 L. J. Q. B. 615; 78 L. T. 532; 62 J. P. 358; 46 W. R. 488; 14 T. L. R. 379; 42 Sol. Jo. 472; 19 Cox, C. O. 54, D. O.

Annotation:—*Reid*. Ward *v.* Smith, [1913] 3 K. B. 154.

47. ——— ———.]—A child was employed in a factory where the meal-time was from 5.30 to 6 p.m. Work was stopped for the day at 5.30, & the child was employed after that time in wiping the spindles of a machine in a room where the under-manager & several overlookers were present. Notices were exhibited calling attention to the provisions of the Factory Acts against working in meal-times. The justices dismissed an information against the masters for employing a child in meal-time, on the ground that they had used every possible means to carry out the 1901 Act:—*Held*: it could not be said that the masters had used due diligence to enforce the Act within sect. 141.—ROGERS *v.* BARLOW & SON (1906), 94 L. T. 519; 70 J. P. 214, D. C.

Annotation:—*Reid*. Walker *v.* Martindale (1916), 32 T. L. R. 447.

48. ——— Cleaning part of factory—1901 Act, sect. 152, sub-sect. 1.]—By 1901 Act, s. 62, the employment in a factory of a child under twelve years of age is forbidden, & by sect. 152 (1), a child working in cleaning any part of a factory is deemed to be employed therein. Appls. engaged a child under twelve years of age in

PART I. SECT. 6.

d. *Asiatics*.]—Factories Act, 1904, in its special discrimination against "persons of the Chinese or other Asiatic race" is not unconstitutional nor *ultra vires* Colonial Laws Validity Act, 1865. Deft., a Chinese, was convicted of having failed to register his premises as a factory under Factories Act, 1904, & was fined.—VINCENT *v.* AH YENG (1906), 8 W. A. L. R. 145.—AUS.

PART I. SECT. 7.

a. What constitutes employment—Not contract for piece work.]—The word "employer" in Factories & Shops Act, 1900 (Vict.), s. 15 (19), means a person who, in regard to any person for whom piece-work prices or rates are fixed, stands in the relation of employer to an operative, & the sub-sect. does not apply to the case of a contract between two independent persons not standing in that relation

to each other. A merchant who contracted with the registered occupier of a factory for the manufacture by the latter of articles of clothing out of material supplied by the merchant at a certain price per doz., could not be convicted of an offence under that Act.—BEATH SCHIESS & CO. *v.* MARTIN (1905), 2 C. L. R. 716.—AUS.

i. ——— "Preparing articles for sale."—ALDERSON *v.* GOLD, [1909] V. L. R. 219.—AUS.

g. ——— Casual employee—No contract for service or payment.]—A person who, without any contract, express or implied, for service or payment, casually & out of mere courtesy assists in a shop in connection with the sale of goods is not "employed" by the shopkeeper within Factories & Shops Act, 1912, s. 168. BALLANTINE *v.* HINCHOLIFFE, [1915] V. L. R. 69.—AUS.

h. ——— ———.]—A waitress was employed by a café proprietor, coming

under the determination of the Hotel Employees Board, for fifteen hours every week, & there was reasonable expectation of both sides & a probability that such employment would continue:—*Held*: the waitress was a "casual employee."—HALL *v.* CENTREWAY CAFE CO. PROPRIETARY, LTD., [1916] V. L. R. 560.—AUS.

k. ——— Females engaged in "adapting" an article.]—The employment of females after the closing of a place of business is not confined to work upon the substance or texture of a manufactured article. Putting up, wrapping, marking, & the like, is "adapting" an article "by way of trade for sale," & persons so engaged are "employed" within Employment of Females & Others Act, 1881.—BROWN *v.* KENNEDY (1888), 7 N. Z. L. R. 255.—N.Z.

l. ——— When occupier of factory "employed."—The words "employed in any factory" in Factories Act,

sweeping the floor of the factory :—*Held* : there was evidence upon which the magistrate could find that the child worked in cleaning part of the factory, & she was “employed” in the factory within 1901 Act, s. 62, & an offence within the Act had been committed by appls.

The legislature by sect. 152 intended to give an extended meaning to the word “employed” in sect. 62, which contains an absolute prohibition against the employment of a child under twelve years of age in a factory. In order to make it clear that the meaning of “employed” was not limited to working in a manufacturing process sect. 152 (1) was introduced (AVORY, J.).—*WALKER (T.), LTD. v. MARTINDALE* (1916), 85 L. J. K. B. 1543; 114 L. T. 1130; 80 J. P. 270; 32 T. L. R. 447; 14 L. G. R. 1069; 25 Cox, C. C. 411, D. C.

“Continuous employment.”]—*See* 1901 Act, s. 156 (2).

Employment “in or about shop.”]—*See* Part V., Sect. 3, sub-sect. 1, *post*.

SECT. 8.—TIME.

See, generally, TIME.

“Night,” “Week,” and “Bank holiday.”]—*See* 1901 Act, s. 156 (1); Holidays Extension Act, 1875 (c. 13).

SECT. 9.—PARTICULAR DEFINITIONS.

See 1901 Act, s. 156 (1).

49. “Boiler”—Pipe conveying steam.]—*R. v. BOILER EXPLOSIONS ACT, 1882, COMRS., No. 101, post*.

50. — “Used exclusively for domestic purposes.”]—A boiler used to warm offices or business premises where the occupier does not reside, & also to supply warm water for cleaning purposes & for household purposes of a resident

caretaker, is “used exclusively for domestic purposes” within the exception in Boiler Explosions Act, 1882 (c. 22), s. 4, & Boiler Explosions Act, 1890 (c. 35), s. 2.—*SMITH v. MÜLLER*, [1894] 1 Q. B. 192; 70 L. T. 170; 58 J. P. 167; 10 T. L. R. 30; 38 Sol. Jo. 26; 10 R. 622, D. C.

Annotations :—*Reid. South West Suburban Water Co. v. St. Marylebone Union*, [1904] 2 K. B. 174; *Chester Waterworks Co. v. Chester Union Grdns.* (1907), 96 L. T. 566; *Metropolitan Water Board v. Avery*, [1914] A. C. 118.

51. “Steam whistle”—Blown by compressed air.]—*L.* formerly used a whistle directly connected with an engine boiler, but disconnected it, & used thereafter a gas engine to compress air, & store it in a reservoir, & the same pipe connected therewith produced the same noise :—*Held* : this was a steam whistle, & required the consent of the sanitary authority pursuant to Steam Whistle Act, 1873 (c. 61), s. 2.—*HERBERT v. LEIGH MILLS Co.* (1889), 53 J. P. 679; 5 T. L. R. 449, D. C.

See, further, Boiler Explosions Acts, 1882 (c. 22), & 1890 (c. 35).

52. “Machinery”—Not in use pursuant to orders—Employers’ Liability Act, 1880 (c. 42), s. 1 (1).]—A machine used in defts.’ business broke down & the foreman directed that it should be removed from the position in which it had been placed while in use. Pltf., who was a workman in the employment of defts., assisted in removing the machine & was injured while doing so by reason of a defect in the machine which was within the knowledge of the foreman. In an action under above Act :—*Held* : the fact that the machine at the time of the accident had broken down & was no longer in use, did not necessarily show that it had ceased to be “machinery or plant connected with or used in the business of the employer” within above sub-sect.—*THOMPSON v. CITY GLASS BOTTLE Co.*, [1902] 1 K. B. 233; 71 L. J. K. B. 145; 85 L. T. 661; 18 T. L. R. 69, C. A.

— For unloading ships.]—*See* Part IV., *post*.

“Mill-gearing.”]—*See* 1901 Act, s. 156 (1).

“Accident.”]—*See* MASTER & SERVANT.

“Plant.”]—*See* MASTER & SERVANT.

“Way.”]—*See* MASTER & SERVANT.

“Ship.”]—*See* SHIPPING.

1901, ss. 2 & 62, do not mean only employed for hire, but also the persons actually engaged in the work. The occupier or occupiers of the factory are included in the definition if they are engaged in the work of the factory.—*ROBB v. BULLEN* (1905), 25 N. Z.

L. R. 258.—N.Z.

m. — *Manager of establishment*—*No fixed hours.*]—A woman, who was manager of a millinery establishment at a fixed wage with a per centage of the profits, superintended the business generally, bought the goods therefor,

was mistress of her own hours & could go & come as she choose :—*Held* : she was “employed” by the proprietor of the establishment.—*GRAVES v. DUNCAN* (1899), 1 F. (Ct. of Sess.) 72; 2 Adam, 711; 36 Sc. L. R. 490; 6 S. L. T. 391, J.—*SCOT*.

Part II.—Health and Sanitation.

SECT. 1.—GENERAL PROVISIONS.

See 1901 Act, ss. 1-9; Public Health Act, 1875 (c. 55), s. 91; Public Health (London) Act, 1891 (c. 76), s. 2 (1), (g); Police, Factories (Miscellaneous Provisions) Act, 1916 (c. 21); & generally, PUBLIC HEALTH.

Exemption from general provisions—Of men's workshops.]—See 1901 Act, s. 157.

53. Sufficiency of sanitary conveniences—Necessity for in cabmen's stables—Public Health (London) Act, 1891 (c. 76), s. 38.]—Above sect. enacts that every factory, workshop, or workplace shall be provided with sufficient & suitable accommodation in the way of sanitary convenience, regard being had to the number of persons employed in or in attendance at such building:—*Held*: a stable-yard & stables at which a large number of cabmen were daily in attendance for the purpose of hiring cabs was a workplace within the meaning of the sect., & must, therefore, be provided with sufficient & suitable sanitary conveniences for the cabmen.—*BENNETT v. HARDING*, [1900] 2 Q. B. 397; 69 L. J. Q. B. 701; 83 L. T. 51; 64 J. P. 676; 48 W. R. 647; 16 T. L. R. 445; 44 Sol. Jo. 574, D. C.

54. — Jurisdiction of justices to inquire.]—By Factory & Workshop Act, 1891 (c. 75), s. 2 (2), where notice of an act, neglect, or default is given by a factory inspector under Factory & Workshop Act, 1878 (c. 16), s. 4, to a sanitary authority, & proceedings are not taken within a reasonable time for punishing or remedying the act, neglect, or default, the inspector may take "the like proceedings for punishing or remedying the same as the sanitary authority might have taken." A factory inspector having given notice to a sanitary authority that there was a deficiency of sanitary accommodation in a certain factory within their district, & the sanitary authority not having taken within a reasonable time any proceedings for punishing or remedying the same, the inspector gave notice to the factory owner under this sub-sect. & under Public Health Acts Amendment Act, 1890 (c. 59), s. 22, which had been adopted in the district, requiring him to erect certain specified sanitary conveniences, & on his neglect to comply with the notice summoned him before justices in petty sessions:—*Held*: (1) the justices had no jurisdiction to inquire into the suitability or sufficiency of the sanitary accommodation existing at the factory, or required by the notice of the inspector.

(2) *Semble*: an appeal lies to quarter sessions under Public Health Acts Amendment Act, 1890 (c. 59), s. 7, from the requirement of the factory inspector in such a case.—*TRACEY v. PRETTY & SONS*, [1901] 1 K. B. 444; 70 L. J. K. B. 234; 83 L. T. 767; 65 J. P. 196; 49 W. R. 282;

17 T. L. R. 200; 45 Sol. Jo. 221; 19 Cox, C. C. 503, D. C.

55. Requirements of factory inspector—For enforcement of provisions—Appeal to quarter sessions.]—*TRACEY v. PRETTY & SONS*, No. 54, ante.

Alkali works.]—See PUBLIC HEALTH.

SECT. 2.—SPECIAL PROVISIONS.

See 1901 Act, ss. 90-115; Factory & Workshop Act, 1907 (c. 39); Factory & Workshop (Cotton Cloth Factories) Act, 1911 (c. 21), & Regulations made thereunder.

Retail shops.]—See Seats for Shop Assistants Act, 1899 (c. 21), s. 1.

56. Penalties for breach—No jurisdiction in justices to reduce—Under Summary Jurisdiction Act, 1879 (c. 49), s. 4.]—The power given to cts. of summary jurisdiction by above sect., to reduce the prescribed amount of a fine, if it be imposed as in respect of a first offence, does not enable them to reduce the prescribed amount of the fine imposed by Cotton Cloth Factories Act, 1889 (c. 62), s. 13, which enacts that where there is a contravention of or non-compliance with the provisions of the Act, & after written notice from the inspector the acts are continued or not remedied, the occupier of the factory is to be liable, on summary conviction for the first offence to a penalty of not less than £5 nor more than £10.—*OSBORN v. WOOD BROTHERS*, [1897] 1 Q. B. 197; 66 L. J. Q. B. 178; 76 L. T. 60; 61 J. P. 118; 45 W. R. 319; 41 Sol. Jo. 143; 18 Cox, C. C. 494, D. C.

57. Underground bakehouse — Prohibition against use—Unless "used at commencement of act"—What constitutes use.]—By Factory & Workshop Act, 1895 (c. 37), s. 27 (3), "A place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act." Premises which had long been used as an underground bakehouse were vacant at the commencement of the Act, but their owner was seeking a tenant for them as a bakehouse:—*Held*: they were used as a bakehouse at the commencement of the Act.—*SCHWERZERHOF v. WILKINS*, [1898] 1 Q. B. 640; 67 L. J. Q. B. 476; 78 L. T. 229; 62 J. P. 247; 19 Cox, C. C. 22, D. C.

58. — Unless certificate by local authority—Of structural suitability.]—1901 Act, s. 101, absolutely prohibits the use of underground bakehouses after Jan. 1, 1904, unless certified as structurally suitable for the purpose by the local

PART II. SECT. 1.

n. Sufficiency of sanitary conveniences—Duty of owner to provide—Who is "owner."—In Ontario Factories Act, R. S. O. 1897, c. 256, s. 15 (as amended by 4 Edw. VII., c. 27, s. 3), which provides that the owner of every factory shall provide a sufficient number of privies, etc., the owner of

the building is plainly intended, who may or may not be also the employer.—*BURKE v. FERGUSON* (1907), 13 O. L. R. 479.—CAN.

o. Infectious Disease—Tuberculosis.]—Consumption is not an infectious disease within Factories Act, 1901, s. 48, which contains no prohibition against allowing a consumptive patient

to work in a factory.—*DONALDSON v. ANDREWS* (1906), 26 N. Z. L. R. 330.—N.Z.

PART II. SECT. 2.

p. White lead factory—Statutory provisions—Whether applicable to sulphate of lead factory.]—A workman, engaged in a sulphate of lead factory,

authority.—*EVANS v. GALLON & SON* (1904), 68 J. P. 537 ; 2 L. G. R. 1004, D. C.

59. — Expenses of structural alterations—Apportionment by court of summary jurisdiction—Between owner & occupier.]—By 1901 Act, s. 101, an underground bakehouse must be certified by the district council to be suitable for the purpose, & if premises are let as a bakehouse, & the certificate can only be obtained on structural alterations being made, a ct. of summary jurisdiction may make such order concerning the expenses or their apportionment between the owner & occupier as appears just & equitable under the circumstances, regard being had to the terms of any contract between the parties.

The lease of premises used as a bakehouse contained a covenant by the lessee to pay "all existing & future . . . impositions & outgoings of every description for the time being payable either by landlord or tenant in respect of the premises." In order to obtain the certificate of the district council for the use of the premises as an underground bakehouse the expenditure of a considerable sum upon structural alterations was requisite:—*Held*: the expenditure came within the expression "impositions & outgoings" in lessee's covenant, & a ct. of summary jurisdiction was justified upon a consideration of all the circumstances in refusing to order the landlord to pay an apportioned part of the expenses.—*GOLDSTEIN v. HOLLINGSWORTH*, [1904] 2 K. B. 578 ; 73 L. J. K. B. 826 ; 91 L. T. 85 ; 68 J. P. 383 ; 20 T. L. R. 550 ; 2 L. G. R. 879, D. C.

Annotations:—*Fold*. *Morris v. Beal*, [1904] 2 K. B. 585. *Consd.* *Stuckey v. Hooke*, [1906] 2 K. B. 20. *Refd.* *Horner v. Franklin*, [1905] 1 K. B. 479.

60. — — — — — When excluded by covenant.]—(1) Although premises may have been let as a bakehouse, & although the certificate required by 1901 Act, s. 101, cannot be obtained unless structural alterations are made, if the lease contains a covenant by the tenant to pay all "outgoings" a magistrate has no jurisdiction to make an order under sub-sect. 8 of that sect. apportioning the expenses of those alterations between the land & the tenant.

(2) *Semble*: premises are not "let as a bakehouse" within the meaning of the sect. unless the terms of the lease impose an obligation upon the tenant to use them as a bakehouse, & not merely to confer a permission so to use them.—*MORRIS v. BEAL*, [1904] 2 K. B. 585 ; 73 L. J. K. B. 830 ; 91 L. T. 486 ; 68 J. P. 542 ; 20 T. L. R. 682 ; 2 L. G. R. 1171, D. C.

Annotations:—*As to* (1) *Consd.* *Stuckey v. Hooke*, [1906] 2 K. B. 20. *Refd.* *Horner v. Franklin*, [1905] 1 K. B. 479.

61. — — — — — Exclusion of jurisdiction of High Court.]—A lease of premises, which were used for the purposes of a baker's shop, & comprised an underground bakehouse, contained a covenant by the lessee to pay & discharge all burdens, duties, assessments, outgoings or impositions, charged, assessed or imposed on the demised premises, or upon the landlord or tenant in respect thereof. The borough council having refused to grant the certificate necessary for the use of the bakehouse under 1901 Act, s. 101 (2), unless certain structural alterations were made, the assignee of the lease, who was in occupation of the premises, applied to a police magistrate, under sub-sect. 8 of the above sect., to apportion the expenses of the alterations between lessors as owners & himself as occupier of the premises, & the magistrate made an order that three-fourths of the expenses should be borne by the owners & one-fourth by the occupier. Lessors, having carried out the requisite alterations, sued assignee of the lease upon above covenant to recover the total amount of the expenses of those alterations. Debt. paid into ct. the proportion of the expenses which the magistrate had ordered to be paid by him:—*Held*: on the authority of *Horner v. Franklin*, No. 98, *post*, the jurisdiction of the High Court was excluded in such a case by 1901 Act, s. 101 (8), & therefore the action was not maintainable.—*STUCKEY v. HOOKE*, [1906] 2 K. B. 20 ; 75 L. J. K. B. 504 ; 94 L. T. 723 ; 70 J. P. 393 ; 54 W. R. 509 ; 22 T. L. R. 508 ; 50 Sol. Jo. 463 ; 4 L. G. R. 815, C. A.

Annotation:—*Mentd.* *Monro v. Burghclere*, [1918] 1 K. B. 291.

Compare Nos. 93, 98, *post*.

suffered from lead poisoning & sued his employers for damages, founding on their alleged neglect to conform to Factory & Workshops Act, 1893, &

to take the precautions specified in the schedule:—*Held*: sulphate of lead was not "white lead" within the Act, & the provisions in regard to white

lead factories did not apply.—*CREEVEY v. HANNAY'S PATENTS CO., LTD.* (1889), 16 R. (Ct. of Sess.) 993 ; 26 Sc. L. R. 679.—*SCOT*.

Part III.—Accidents.

SECT. 1.—PROVISIONS FOR SECURING SAFETY.

SUB-SECT. 1.—MACHINERY.

A. In General.

See, now, 1901 Act, s. 10.

62. Duty to ensure security—At common law —Not affected by Factory Acts.]—Declaration for an injury to pltf., alleged to have been caused by the neglect of defts. to fence the shaft of certain machinery in motion for the manufacture of carpets, contrary to the provisions of 7 & 8 Vict. c. 15. Defts. pleaded, admitting that the shaft was in motion & not properly fenced, that the part of the machinery, namely, a certain driving strap, by which pltf. was entangled, was not in motion at the time of the alleged injury, but, on the contrary, wholly at rest; that pltf. wilfully & wrongfully touched & thereby set in motion the strap, pltf. then well knowing that it was dangerous, & contrary to the express command of defts. for him to touch the same, & thereby, & not by reason merely of the negligence of defts., the injury was occasioned:—*Held*: assuming the common law right to bring an action for an injury occasioned by the alleged unlawful act, it was subject to the principle that pltf. did not by his own negligence or misconduct contribute to the injury, & therefore the plea was an answer to the present action.

It is clear that the penalties are cumulative & that an action in some shape may be brought by or on behalf of the party injured. I cannot see that his common law right to sue is affected by anything contained in the Act (CROMPTON, J.).

There can be no doubt that a party receiving bodily injury through such omission [to fence] has the right of suing at common law. The action, however, must be subject to the rules of common law; & one of those is that a want of ordinary care or wilful misconduct on the part of pltf. is an answer to the action (COLERIDGE, J.).—(CASWELL v. WORTH (1856), 5 E. & B. 849; 26 L. T. O. S. 216; 20 J. P. 54; 2 Jur. N. S. 116; 4 W. R. 231; 119 E. R. 697; *sub nom.* CASSWELL v. WORTH, 25 L. J. Q. B. 121.

Annotations:—*Distd.* Britton v. Great Western Cotton Co. (1872), L. R. 7 Exch. 130. *Refd.* Holmes v. Clarke (1861), 6 H. & N. 349.

63. — — —.]—Pltf., a servant of deft., was employed to oil certain mill machinery, of a nature required by the statute to be fenced & which at the commencement of the employment, was properly fenced, but the fence subsequently became broken. Upon pltf.'s complaining of this to deft.'s manager, in deft.'s hearing, the manager promised that the fence should be

presently repaired, & pltf. thereupon continued in the service, but before the fence was repaired & whilst pltf., in discharge of his duty, was oiling the machinery, an accident happened by which, without negligence on pltf.'s part, he was injured. An action having been thereupon brought by him against his master the mill-owner, the Ct. of Ex. Ch.:—*Held*: the master was liable, & pltf. could maintain an action against him for the injury & independently of any statutory obligation, there was negligence in deft. in not fencing the dangerous machinery on which pltf. was employed.—CLARKE v. HOLMES (1862), 7 H. & N. 937; 8 Jur. N. S. 992; 158 E. R. 751; *sub nom.* HOLMES v. CLARKE, 31 L. J. Ex. 356; 9 L. T. 178; 10 W. R. 405, Ex. Ch.

Annotations:—*Appld.* Britton v. Great Western Cotton Co. (1872), L. R. 7 Exch. 130. *Consd.* Thomas v. Quartermaine (1887), 18 Q. B. D. 685. *Refd.* Butler v. Birnbaum (1891), 7 T. L. R. 287. *Mentd.* Waller v. S. E. Ry. (1863), 2 H. & C. 102; Lovegrove v. L. B. & S. C. Ry., Gallagher v. Piper (1864), 18 C. B. N. S. 669; Murphy v. Smith (1865), 19 C. B. N. S. 361; Feltham v. England (1866), 7 B. & S. 676; Indermaur v. Dames (1866), L. R. 1 C. P. 274; Hocoy v. Dublin & Belfast Ry. (1870), 18 W. R. 930; Smith v. Howard (1870), 22 L. T. 130; Weblin v. Ballard (1886), 17 Q. B. D. 122; Cole v. De Trafford, [1918] 2 K. B. 523.

64. — — —.]—The owners of dangerous machinery, who by their foreman employ a young person about it unacquainted with its nature & use, are bound to take due care that such person is duly instructed therein, & if they either neglect this, or if express directions are given by the foreman to use the machinery in a manner which must lead to danger, of which the young person is not likely to be fully aware, they are liable for any injury sustained by such person in the use of the machinery in that manner.—GRIZZLE v. FROST (1863), 3 F. & F. 622.

Annotations:—*Refd.* Cribb v. Kynoch, [1907] 2 K. B. 548; Young v. Hoffmann Manufacturing Co., [1907] 2 K. B. 646. *Mentd.* Feltham v. England (1866), 7 B. & S. 676.

See, generally, MASTER & SERVANT.

65. Statutory duty to fence—Whether absolute.]—SCHOFIELD v. SCHUNCK (1855), 24 L. T. O. S. 253; 19 J. P. Jo. 81.

Annotation:—*Refd.* Doel v. Sheppard (1856), 20 J. P. 56.

66. — — —.]—BRITTON v. GREAT WESTERN COTTON CO., No. 79, *post*.

67. — — —.]—PURSELL v. CLEMENT TALBOT, LTD., No. 72, *post*.

68. — — — When mechanically impossible.]—While pltf., who was employed in defts.' factory, was at work he was injured by a machine not being securely fenced, as to which the jury found that it was commercially impracticable to fence it securely, & that if it were fenced, it would be

PART III. SECT. 1, SUB-SECT. 1.—A.

65 i. Statutory duty to fence—Whether absolute.]—Factories & Shops Act, 1896, s. 28, imposes an absolute obligation on the occupier of a factory to fence all dangerous parts of the machinery therein, whether they are the particular parts specified in sect. (1), (2), & (3) or not; & the fact that an inspector of factories had not taken steps to force him to fence any machinery as dangerous does not relieve the occupier of his liability to a workman injured by such machinery

if it was in fact dangerous & not securely fenced. But where an inspector proceeds under s. 29 & an award is made that it is unnecessary or impracticable to fence certain machinery, the occupier is relieved of his statutory liability in respect thereof.—DAVIS v. LANGDON (1911), 11 S. R. N. S. W. 149.—AUS.

65 ii. — — —.]—General instructions not to go near machinery when in motion cannot obviate the necessity of complying with the require-

ments of the statute.—HILTON v. ROBIN HOOD MILLS, LTD., [1919] 2 W. W. R. 134; 47 D. L. R. 282; 12 Sask. L. R. 245.—CAN.

65 iii. — — — Electricity regulations.]—The giving of a warning is no substitute for due compliance with the obligation to provide screens or other suitable means to prevent danger imposed by the electricity regulations under Factory & Workshop Acts, 1901–1911.—FOTHERINGHAM v. BABCOCK, [1922] S. C. (J.) 60.—SCOT.

more dangerous than in its then condition. In an action claiming damages for the injuries sustained:—*Held*: (1) as the obligation imposed upon defts. to fence securely the machine was absolute, & as they had failed in this duty, they were liable in damages; (2) the obligation imposed by 1901 Act, s. 10 (1) (c), is unaffected by the fact that with regard to some particular machine it may be commercially impracticable or mechanically impossible to fence it securely.—*DAVIES v. OWEN (THOMAS) & CO.*, [1919] 2 K. B. 39; 88 L. J. K. B. 887; 121 L. T. 156; 83 J. P. 193; 17 L. G. R. 407.

69. — Machine not in motion.]—Under 7 & 8 Vict. c. 15, s. 21, the occupier of a mill is only bound to provide a secure fence for the mill-gearing & machinery, & to keep up the fence when the parts required to be fenced are in motion for some manufacturing process. Therefore, where the declaration stated that defts. were the occupiers of a building in which steam-power was used to work machinery employed in manufacturing cotton, & in part of which building there was certain mill-gearing, being a shaft, which was worked & put in motion by steam-power, yet defts. disregarded their duty in this, that the shaft was not securely fenced, contrary to the form of the statute, whereby deft. received great bodily injury, etc., such declaration was held bad in arrest of judgment, for not showing that, at the time of the accident, the machinery was in motion for some manufacturing process.—*COR v. PLATT* (1852), 7 Exch. 460; 21 L. J. Ex. 146; 18 L. T. O. S. 319; 17 J. P. 181; 16 Jur. 174; 155 E. R. 1030, Ex. Ch.; *subsequent proceedings*, 7 Exch. 923.

Annotations:—*Refd.* *Clarke v. Holmes* (1862), 7 H. & N. 937; *Indermaur v. Dames* (1866), Har. & Ruth. 243; *Jackson v. A. G. Mulliner Motor Body Co.*, [1911] 1 K. B.

70. — “All dangerous parts of machinery” — Machinery included under.]—By Factory & Workshop Act, 1878 (c. 16), s. 5 (3), “Every part of the mill-gearing” in a factory shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced.

By Factory & Workshop Act, 1891 (c. 75), s. 6, the words “all dangerous parts of the machinery &” shall be inserted in Factory & Workshop Act, 1878 (c. 16), s. 5 (3), before the words “every part”:—*Held*: the words “all dangerous parts of the machinery” in sect. 6 of the later Act were not limited to such machinery as supplied

or conveyed the motive power to the machines by which the industrial operations of the factory were immediately effected, but that these words applied to all the machinery in the factory.

I think he [the magistrate] ought to have inquired whether the part of the machinery at which the accident happened was a part of the machinery which was dangerous (*CAVE, J.*).—*REDGRAVE v. LLOYD & SONS*, [1895] 1 Q. B. 876; 64 L. J. M. C. 155; 72 L. T. 565; 59 J. P. 293; 43 W. R. 527; 11 T. L. R. 326; 39 Sol. Jo. 382; 18 Cox, C. C. 149; 15 R. 403, D. C.

Annotations:—*Consd.* *Hindle & Hindle v. Birtwistle* (1896), 60 J. P. 249. *Refd.* *Lewis v. Gilbertson* (1904), 91 L. T. 377.

71. — — — —.]—By Factory & Workshop Act, 1878 (c. 16), s. 5 (3), as amended by Factory & Workshop Act, 1891 (c. 75), s. 6 (2), “all dangerous parts of the machinery” in a factory shall be securely fenced or otherwise rendered safe.

The occupier of a cotton factory was summoned under above sect. for neglecting to fence the shuttles of his looms. It appeared that shuttles do occasionally in the process of weaving fly out from the bed upon which they slide to & fro (called the shuttle-race) under circumstances which render them dangerous to any persons who happen to be in the line of flight. The flying out of the shuttles may be caused by the negligence of the weaver in charge of the machine, or by reason of some foreign substance getting accidentally into the shuttle-race, or by defect in the yarn:—*Held*: the obligation to fence under the above sect. was not confined to machinery which was dangerous in itself in the ordinary course of careful working; & the shuttles, even though not in themselves defective, were “dangerous parts of the machinery” if any of the above-mentioned causes of their flying out of the shuttle-race were likely to occur with any degree of frequency.—*HINDLE v. BIRTWISTLE*, [1897] 1 Q. B. 192; 76 L. T. 159; 61 J. P. 70; 45 W. R. 207; 13 T. L. R. 129; 41 Sol. Jo. 171; 18 Cox, C. C. 508; *sub nom.* *BIRTWISTLE v. HINDLE*, 66 L. J. Q. B. 173, D. C.

72. — — — Manner in which machine worked.]—By 1901 Act, s. 10 (1), “all dangerous parts of the machinery” in a factory must be securely fenced or otherwise rendered safe:—*Held*: the section imposed an absolute obligation on the owner of the factory so to fence all dangerous parts of the machinery as to be equally safe to the workman which ever way the machine was worked.—*PURSELL v. CLEMENT TALBOT, LTD.* (1914), 111 L. T. 827; 79 J. P. 1, C. A.

70 i. — “All dangerous parts of machinery” — Machinery included under.]—Factories Act, R. S. B. C. 1911, c. 81, s. 32, which requires dangerous machinery in a factory to be, as far as practicable, securely guarded, applies only to machinery which is part of the plant used in the manufacture of the product of the factory, & does not include a machine which is in course of construction in the factory, although such machine, for the purpose of being tested, is connected with the motive power of the factory, & is being operated as a machine for the purpose of testing.—*EVERETT v. SCHAAKE MACHINE WORKS, LTD.* (1912), 21 W. L. R. 525; 2 W. W. R. 572; 17 B. C. R. 271; 4 D. L. R. 147.—*CAN.*

70 ii. — — — —.]—A drum around which coil the steel cables attached to a lift & a hole between the

drum & the side of the platform on top of which the lift is placed are within Factories Act, R. S. S. 1909, c. 17, s. 19 (a) (c) should be guarded & protected.—*HILTON v. ROBIN HOOD MILLS, LTD.*, [1918] 3 W. W. R. 168; *affd.* 12 Sask. L. R. 245.—*CAN.*

q. — “Securely fenced” — Meaning of.]—The words “securely fenced” in Factories & Shops Act, 1905 (No. 1975, s. 58 (c), as amended by Factories & Shops Act, 1910 (No. 2) (No. 2305), s. 23, mean fenced as against persons in the factory other than the person actually working at the machine in question.—*MARTIN v. EMERSON BROTHERS PROPRIETARY, LTD.*, [1913] V. L. R. 107.—*AUS.*

r. — For protection of all persons in factory.]—The provision of guards for dangerous parts of machinery required by Factories & Shops Act,

1915, s. 59, is intended for the protection of the person actually working at the machine in question as well as of other persons in the factory.—*HOWARD v. NASH BROTHERS*, [1918] V. L. R. 154.—*AUS.*

Electricity regulations.]—The electricity regulations under Factory & Workshop Acts, 1901–1911, are not meant for the protection only of the workman who is never careless or remiss.—*FOTHERINGHAM v. BABCOCK*, [1922] S. C. (J.) 60.—*SCOT.*

t. — Moving parts of machinery — Extent of duty.]—Factories Act, R. S. O. 1887, c. 208, s. 15, provides that all belting, shafting, gearing, flywheels, drums, & other moving parts of the machinery shall be guarded:—*Held*: the word “moving” is used in its transitive sense, &

Sect. 1.—Provisions for securing safety: Sub-sect. 1, A.]

73. — Machinery within factory precincts—Not used for manufacturing process.]—LEWIS v. GILBERTSON & Co., LTD., No. 4, ante.

74. — Machinery "directly connected with mechanical power"—Hoist not so connected.]—1901 Act, s. 10, which enacts, with respect to the fencing of machinery in a factory, that "every hoist or teagle & every fly-wheel directly connected with the steam or water or other mechanical power" must be securely fenced, applies to a hoist which is not connected with mechanical power.—**JACKSON v. A. G. MULLINER MOTOR BODY Co., LTD., [1911] 1 K. B. 546; 80 L. J. K. B. 173; 104 L. T. 181; 75 J. P. 103, D. C.**

75. — What is sufficient compliance—Method of fencing required.]—Upon the trial of an action against mill-owners for not securely fencing a part of the machinery of their mill, whereby injury was occasioned to one of the persons employed there, the learned judge left the question to the jury whether the machinery was fenced in the ordinary manner used & approved as sufficient at the best-regulated mills in the district:—**Held**: a misdirection, the proper question being whether the mill was securely fenced according to the best known method of fencing at the time.—**SCHOFIELD v. SCHUNCK (1855), 24 L. T. O. S. 253; 19 J. P. Jo. 84.**

Annotation:—Reid. Doel v. Sheppard (1856), 20 J. P. 56.

76. — —.]—7 & 8 Vict. c. 15, s. 21, which requires mill-gearing in a factory to be "securely fenced" is not complied with by merely keeping the machinery in such a situation as not to be dangerous to any one; & in an action for not securely fencing a shaft, whereby pltf. sustained injury, a plea that the shaft was at such a height from the floor that no person was or was liable to be endangered thereby, & that the same was sufficiently guarded & protected without such fencing as in the declaration alleged was bad.—**DOEL v. SHEPPARD (1856), 5 E. & B. 856; 25 L. J. Q. B. 124; 26 L. T. O. S. 216; 20 J. P. 56; 2 Jur. N. S. 118; 4 W. R. 232; 119 E. R. 700.**

77. Penalties for breach—Time within which enforceable—1901 Act, ss. 135, 146.]—1901 Act, s. 10, provides that a factory in which there is a contravention of the provisions of that sect. with regard to the fencing of machinery "shall be deemed not to be kept in conformity with"

the Act, & by s. 135, if a factory is not kept in conformity with the Act, the occupier thereof shall be liable to a fine. By s. 136, if any person suffers any bodily injury in consequence of the occupier of a factory "having neglected to observe any provision" of the Act, the occupier shall be liable to a fine. Sect. 146 provides that the information for an offence under the Act shall be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district within which the offence is charged to have been committed. On Jan. 21, the fact that certain machinery of defts.' factory was unfenced, in contravention of s. 10, came to the knowledge of the inspector of the district. On July 31, in consequence of the machinery still being unfenced, a person suffered bodily injury. On Oct. 24 an information was laid charging that, on July 31, defts.' factory was not kept in conformity with the Act, whereby a person suffered bodily injury. The magistrate dismissed the information on the ground that it was out of time, inasmuch as it had not been laid within three months of Jan. 21:—**Held**: ss. 135 & 136 create separate & distinct offences. The offence with which defts. were charged was the offence under s. 136, & that offence having been committed on July 31, information had been laid in time.—**R. v. TAYLOR, [1908] 2 K. B. 237; sub nom. R. v. TAYLOR, Ex p. GAILEY, 77 L. J. K. B. 531; 98 L. T. 751; 72 J. P. 238; 21 Cox, C. C. 592, D. C.**

Annotation:—Reid. Verney v. Fletcher, [1909] 1 K. B. 444.

78. — —.]—In May, 1905, & again on Mar. 12, 1908, an inspector of factories for the district in which a factory of resps. was situated visited the factory & found that the fly-wheel of an engine was not fenced as required by 1901 Act. He again visited the factory on July 1, 1908, & found that the fly-wheel was still unfenced. On July 22, 1908, he laid an information against resps. under s. 135 of the Act for that the factory was on July 1, 1908, not kept in conformity with the Act, in that the fly-wheel was not securely fenced as required by s. 10 of the Act:—**Held**: the information had been laid within three months after the date at which the offence charged in the information came to the knowledge of applt. within s. 146 of the Act.—**VERNEY v. FLETCHER (MARK) & SONS, LTD., [1909] 1 K. B. 444; 78 L. J. K. B. 292; 100 L. T. 348; 73 J. P. 131; 25 T. L. R. 218; 21 Cox, C. C. 783, D. C.**

signifies "propelling," & no duty is imposed by the sect. upon owners of saw-mills to guard the saws which are propelled by the moving parts of the machinery.—**HAMILTON v. GROESBECK (1891), 18 A. R. 437.—CAN.**

a. — Failure to furnish guard—Evidence of negligence.]—Pltf. worked at a stamp-machine in defts.' factory, his duty being to keep it clean. Being refused proper material for this purpose, he used pieces of bagging. Attempting to clean it while in motion, the bagging got caught in the cog-wheel, & he was injured:—**Held**: as the place where pltf. worked was dangerous, & called for a guard under Factories Act, the failure to furnish one was *per se* evidence of negligence on the part of defts.—**THOMPSON v. WRIGHT (1892), 22 O. R. 127.—CAN.**

b. — Extent of obligation.]—To comply with Factories Act, s. 19 (a), it is necessary not only to furnish the guard but to take reasonable care

to see that it is kept in its proper position. A master is under obligation not only to see that suitable instrumentalities are provided for his servants to work with, & that these are maintained in proper condition, but also to see that these instrumentalities are safely used. This latter involves the giving of proper instructions to inexperienced servants employed on dangerous work, to enable them to appreciate the nature & extent of the dangers likely to arise, & the best means of guarding against injury from such dangers.—**AIMER v. CUSHING BROTHERS, LTD., [1920] 3 W. W. R. 1009; 55 D. L. R. 611.—CAN.**

c. — —.]—SCOTT v. BROOKFIELD LINEN Co., [1910] 2 L. R. 509.—IR.

d. — —.]—Held: where the machine was driven by hand, & there was no danger in the use of it, there was no obligation to fence it.—

MILLIGAN v. MUIR & Co. (1891), 19 R. (Ct. of Sess.) 18; 29 Sc. L. R. 36.—SCOT.

e. — —.]—ROBB v. BULLOCK, LADE & Co. (1892), 19 R. (Ct. of Sess.) 971; 29 Sc. L. R. 832.—SCOT.

f. — — Mill gearing—Accessible to women & children.]—7 & 8 Vict. c. 15, requires all parts of the mill gearing in a factory to be securely fenced. 19 & 20 Vict. c. 38, limits the obligation to fencing those parts of the mill gearing "with which children & young persons & women are liable to come in contact, either in passing or in their ordinary occupations in the factory":—Held: there is still an obligation to fence such mill gearing as is accessible to women & children, & not merely such as they are liable to come in contact with in the regular course of their employment.—TRAILL v. SMALL & BOASE (1873), 11 Macp. (Ct. of Sess.) 888.—SCOT.****

79. Action for breach of statutory duty—Defences not available—*Volenti non fit injuria*.]—B., aged twenty-two, was employed by defts., the owners of a "factory" within 7 & 8 Vict. c. 15, to grease the bearings between the fly & spur-wheel of a steam-engine in their engine-house. In order to do the work he had to stand on a wall 2 ft. 3 in. thick, in a cavity made for the purpose, into which he crawled through the spokes of the fly-wheel, the fly-wheel being on his left hand revolving in a "wheel-race" in the engine-house, & the spur-wheel on his right hand, revolving in another room in the factory. The distance between the spokes of the two wheels was 2 ft. 10 in. There was no fence along the wall edge of the wheel-race, on which B. was placed to do his work, & the fly-wheel, near to which, however, children or young persons were not liable to pass or be employed, was unfenced. At the time of the accident B. had been at the work for five days. On the sixth morning he was caught by the fly-wheel, whirled into the air, & killed. At the trial of an action by his widow & administratrix for pecuniary loss sustained by his death, the jury found that he had not been guilty of contributory negligence, either in undertaking the employment or whilst engaged upon it, & returned a verdict for pltf. On a rule to set it aside, pursuant to leave, on the ground that there was no statutory duty to fence the place in question, & that deceased had voluntarily encountered the risk incidental to his employment:—*Held*: (1) defts. were bound under 7 & 8 Vict. c. 15, s. 21, to fence the place where B. had to stand, it being the edge of a wheel-race not otherwise secured; (2) the dangerous character of the employment was not so obvious as that he must necessarily be taken to have known it, or that even assuming he did know it, that circumstance alone was not enough to constitute him a "volunteer" in such a sense as to exonerate defts. from liability for the consequences of their breach of their statutory duty.

79 i. Action for breach of Statutory duty—Defences not available—*Volenti non fit injuria*.]—The maxim *volenti non fit injuria* does not apply where an accident is caused by the breach of a statutory duty.—*ROGERS v. HAMILTON COTTON CO.* (1893), 23 O. R. 425.—**CAN.**

79 ii. ————.]—*Semble*: the defence of *volens* is not available to the employer in an action founded on the violation by him of a statutory duty.—*EVERETT v. SCHAAKE MACHINE WORKS, LTD.* (1912), 21 W. L. R. 525; 2 W. W. R. 572; 17 B. C. R. 271; 4 D. L. R. 117.—**CAN.**

79 iii. ————.]—The maxim *volenti non fit injuria* is not applicable in relief of a deft. guilty of a violation of a statutory duty such as is imposed by Factories Act.—*McCLEMENT v. KILGOUR MANUFACTURING CO.* (1913), 27 O. L. R. 305; 4 O. W. N. 313; 8 D. L. R. 148.—**CAN.**

80 i. ———— Common employment.]—An action will lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer, the occupier of the factory, of the duty to maintain fencing or guards to dangerous machinery imposed upon him by Factory & Workshop Act, & the defence of common employment is not applicable in a case where an injury has been caused to a servant by a breach of an absolute duty imposed by statute upon his master for his protection.—*MYERS v. SAULT STE. MARIE PULP CO.* (1902), 33

S. C. R. 23; 23 C. L. T. 81.—**CAN.**

g. ———— Workman's mistake contributing to accident.]—When a worker in a factory is injured by an accident which would not have happened if the mill-gearing had been properly fenced the employer will not be liberated from liability by the fact that the accident was partly due to a mistake on the worker's part.—*PRINGLE v. GROSVENOR* (1894), 21 R. (Ct. of Sess.) 532; 32 Sc. L. R. 420.—**SCOT.**

81 i. ———— Contributory negligence—Whether available as defence.]—In an action against an employer to recover damages for injuries received in the course of employment, the jury found deft. guilty of a breach of Factories Act, pltf. guilty of contributory negligence, & returned a verdict for deft.:—*Held*: deft.'s non-performance of his statutory duty did not estop him from setting up the defence of contributory negligence.—*McKINNON v. BARNES* (1912), 12 S. R. N. S. W. 129; 29 N. S. W. W. N. 27.—**AUS.**

81 ii. ————.]—SHARP v. PATHHEAD SPINNING CO., LTD. (1885), 12 R. (Ct. of Sess.) 574; 23 Sc. L. R. 368.—**SCOT.**

h. ————.]—RICHARDS v. ELLIOTT (1901), 1 S. R. N. S. W. 99; 18 N. S. W. W. N. 126.—**AUS.**

k. ———— Burden of proof.]—By Factories Act, R. S. O. 1877, c. 208, s. 15 (4), "All elevator cars or cars, whether used for freight or passengers, shall be provided with some suitable

(3) *Semble*: 7 & 8 Vict. c. 15, s. 21, imposed on defts. an unqualified duty to fence the fly-wheel, whether children were liable to pass or be employed near it or not.—*BRITTON v. GREAT WESTERN COTTON CO.* (1872), L. R. 7 Exch. 130; 41 L. J. Ex. 99; 27 L. T. 125; 20 W. R. 525.

Annotations:—As to (1) *Apld.* *Groves v. Wimborne*, [1898] 2 Q. B. 402. **As to (2) *Refd.*** *Thomas v. Quartormaine* (1887), 56 L. J. Q. B. 340. **Generally, *Refd.*** *Chapman v. Nitro-Phosphate Co.* (1885), 1 T. L. R. 493.

80. ———— Common employment.]—(1) An action will lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer, the occupier of the factory, of the duty to maintain fencing for dangerous machinery imposed upon him by Factory & Workshop Act, 1878 (c. 16), s. 5 (4).

(2) The defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection.—*GROVES v. WIMBORNE (LORD)*, [1898] 2 Q. B. 402; 67 L. J. Q. B. 862; 79 L. T. 284; 47 W. R. 87; 14 T. L. R. 493; 42 Sol. Jo. 633, C. A.

Annotations:—As to (1) *Apld.* *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146. **Consd.** *Watkins v. Naval Colliery Co.* (1897), Ltd., [1911] 2 K. B. 162. **Refd.** *Gibson v. Dunkerley*, *Lees v. Sykes*, *Third Parties* (1910), 102 L. T. 587; *Butler (or Black) v. Fife Coal Co.*, [1912] A. C. 149; *Woods v. Winskill*, [1913] 2 Ch. 303; *R. v. Marshland Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155; *Fowler v. Kibble*, [1922] 1 Ch. 487. **As to (2) *Fold.*** *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146. **Apld.** *Jones v. Canadian Pacific Ry.* (1913), 83 L. J. P. C. 13. **Refd.** *Butler (or Black) v. Fife Coal Co.*, [1912] A. C. 149; *Pursell v. Clement Talbot* (1914), 111 L. T. 827. **Generally, *Mentd.*** *Crossfield v. Manchester Ship Canal Co.* (1904), 73 L. J. Ch. 345; *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1920] 3 K. B. 131; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832.

81. ———— Contributory negligence — Whether available as defence.]—ILES v. ABERCARN WELSH FLANNEL CO. (1886), 2 T. L. R. 547, D. C.

See, further, MASTER & SERVANT.

mechanical device, to be approved by the inspector, whereby the cab or car will be securely held in the event of accident":—*Held*: the onus was upon pltf. to prove that the catch had not been approved.—*BLACK v. ONTARIO WHEEL CO.* (1890), 19 O. R. 578.—**CAN.**

l. ————.]—By Ontario Factories Act, R. S. O. 1897, c. 256, s. 20 (1) (d), in every factory all elevator cars are to be provided with some suitable mechanical device to be approved by the inspector, whereby the cab will be securely held in the event of accident:—*Held*: (1) the onus of proving that the brake & "dogs" in use in connection with the elevator in the store, by the fall of which pltf. was injured, were suitable was upon defts. but it was not necessary for them to show that the device in its concrete form as part of the elevator had been approved; it was sufficient that the kind of device used had been approved; (2) in order to render the employers liable to a civil action, it was incumbent on pltf. to make out the casual connection between the omission to provide the statutory safeguards & the injury complained of.—*CARNAHAN v. SIMPSON (ROBERT) CO.* (1900), 21 C. L. T. 74; 32 O. R. 328.—CAN.****

m. ————.]—Defts. were held liable in damages for death of pltf.'s husband by accident while employed in defts.' mill. Deceased met his death in the performance of his duty, having gone on the platform where the machinery causing the accident was

Sect. 1.—Provisions for securing safety: Sub-sect. 1, A., B. & C.; sub-sects. 2 & 3.]

Action for breach of common law duty.]—
See No. 62, *ante*, & generally, MASTER & SERVANT.

B. Self-acting Machines.

See 1901 Act, s. 12.

82. Space between fixed & traversing part—“Allowing” person therein.]—A young person who was employed in a factory by a person in charge of a self-acting machine, was ordered by the person in charge of the machine to clean a part of the machine, & for this purpose the boy was obliged to go into the space between the fixed & traversing portions of the machine. When the order was given the machine was properly stopped, but while the boy was still in this space the person in charge of the machine, thinking the boy was clear of the space, started the machine, whereby the boy received injuries from which he died:—*Held*: as the person in starting the machine was acting under the belief that the boy was clear of the space, the boy was not “allowed” by him to be in the prohibited space at the time of the accident, within Factory & Workshop Act, 1895 (c. 37), s. 9 (2 & 3), & the employers, the occupiers of the factory, were not liable in consequence thereof to a fine under Factory & Workshop Act, 1878 (c. 16), s. 83, though such occupiers would have been liable for an “allowance” by their servant.

The sect. is not confined to any act that the occupier himself has allowed, but it also includes an allowance by a servant or agent of the occupier, otherwise I do not think that any proper effect would be given to the words that “a person allowed to be in the space” shall be deemed to be employed contrary to the provisions of the principal Act (LORD ALVERSTONE, C.J.).—*CRABTREE v. FERN SPINNING CO., LTD.* (1901), 85 L. T. 519; 66 J. P. 181; 50 W. R. 167; 18 T. L. R. 91; 46 Sol. Jo. 87; 20 Cox, C. O. 82.

C. Machinery in Motion.

See 1901 Act, s. 13.

83. Children prohibited from cleaning—Fixed parts not moving with machine.]—By Factory & Workshop Act, 1878 (c. 16), s. 9, “a child shall not be allowed to clean any part of the machinery

placed to get his dusting cloth:—*Held*: the machinery was dangerous & the failure to guard same a breach by defts. of Factories Act; therefore the onus was thrown on defts. of proving that, in spite of such breach, the accident was due to deceased’s negligence, & defts. were liable if deceased’s death resulted from such breach, & not from his own negligence. To establish liability in such case, pltf. must prove that deft. was guilty of negligence, & that it was that negligence that caused the death of deceased.—*HILTON v. ROBIN HOOD MILLS, LTD.*, [1919] 2 W. W. R. 134.—CAN.

n. —.]—Pltf. sued as the personal representative of her deceased husband to recover damages for injuries sustained by him while working as a sawyer in the employment of defts., which, as she alleged, resulted in his death, & were caused by a defect in the condition or arrangement of a “joiner” at which the deceased was working, the revolving

knives of which it was, as she contended, the duty of defts. under Factories Act to guard, & which were not so guarded:—*Held*: failure to obey the direction of Factories Act as to guarding dangerous machinery, which resulted in injury being caused to an employee, gives a right of action.—*BILLING v. SEMMENS* (1904), 24 C. L. T. 83; 8 O. L. R. 540; 4 O. W. R. 218.—CAN.

o. —.]—Where defts. allowed machinery in their mill to be in such unguarded state as that so long as the attention of the person operating it was intent upon it danger could be avoided, but when his attention was momentarily diverted from it to something else connected with his work, injury was caused to him, defts. were held to be guilty of a breach of statutory duty under Nova Scotia Factory Act, 1901, c. 1, s. 20.—*KIZER v. KENT LUMBER CO.* (1912), 11 E. L. R. 41; 46 N. S. R. 83; 5 D. L. R. 317.—CAN.

p. —.]—Pltf., an infant, em-

in a factory while the same is in motion by the aid of steam, water, or other mechanical power”:—*Held*: “the same” meant “the machinery” & not the “part” cleaned, so that this sect. prohibited allowing a child, while a machine was in motion, to clean any fixed part, which did not move, of the machine.—*PEARSON v. BELGIAN MILLS CO.*, [1896] 1 Q. B. 244; 65 L. J. M. C. 48; 74 L. T. 101; 60 J. P. 151; 44 W. R. 334; 12 T. L. R. 197; 40 Sol. Jo. 260; 18 Cox, C. O. 241, D. O.

84. — Process considered as “cleaning”—Removing by-products from machine.]—By 1901 Act, s. 13, it is enacted that a child must not be allowed to clean in any factory any part of any machinery whilst the machinery is in motion by the aid of steam, water, or other mechanical power. A child of twelve years of age was employed in removing, partly by hand & partly by means of a stick, from the rollers & top board of a cap-spinning machine for spinning woollen yarn, certain fluff formed in the course of spinning. If this fluff were not removed the rollers would become choked & the process would stop. The fluff was not mere refuse, but had a saleable value & was in fact sold:—*Held*: the child was cleaning machinery within the enactment.—*TAYLOR & DAWSON (MARK) & SON, LTD.*, [1911] 1 K. B. 145; 80 L. J. K. B. 102; 103 L. T. 508; 71 J. P. 5; 27 T. L. R. 45, D. C.

SUB-SECT. 2.—STEAM BOILERS.

See 1901 Act, s. 11.

85. Steam crane—Whether “locomotive”—Employers Liability Act, 1880 (c. 42), s. 1 (5).]—In the course of the widening of a line of railway there was being worked on a temporary line & rails laid down over the new part of a viaduct a steam-crane, the engine of which served the double purpose of moving the machine from place to place, & of raising stones with which to build the parapet. M., a labourer in the employ of V the contractor for the work, was, while employed, injured by the negligence of the driver of the steam-crane, who was also in the service of W. In an action by M. against W. under above Act to recover compensation, for the injury:—*Held*: the steam-crane was not a “locomotive

employed by defts. as a workman in their factory, was injured in attempting to place a belt upon a pulley, falling upon the shafting:—*Held*: defts. were liable to pltf. in damages for his injury under Factories Act because the shafting & pulley were dangerous part of the machinery should have been guarded.—*GOW v. GLEN WOOLLEN MILLS* (1913), O. L. R. 193; 4 O. W. N. 796; D. L. R. 394.—CAN.

q. — Relevancy of defendant’s negligence.]—*Held*: in case of breach of a statutory duty causing an injury the action is not for negligence but simply for the breach & no question of defts.’ negligence is relevant.—*OWEN v. SAULTS & POLLARD* (1934 W. L. R. 647; 10 W. W. R. 726 Man. L. R. 362.—CAN.

r. —.]—*GIBB v. CROMBIE* (182 R. (Ct. of Sess.) 886; 12 Sc. L. 574.—SCOT.

s. —.]—*SHIELDS v. MURDOCK CAMERON* (1893), 20 R. (Ct. of S.

engine upon a railway" within above sub-sect., & judgment must be entered for defts.—**MURPHY v. WILSON & SON** (1883), 52 L. J. Q. B. 524; 48 L. T. 788; 47 J. P. 565; 48 J. P. 24.

SUB-SECT. 3.—MEANS OF ESCAPE FROM FIRE.

See 1901 Act, ss. 14, 15, 16.

86. Notice to construct—How far compliance excused—When rights of third persons affected—House containing factory & tenants.]—LONDON COUNTY COUNCIL v. LEWIS, No. 6, *ante*.

87. ——— ——— ———.]—CONSOLIDATED PROPERTIES CO. v. CHILVERS (1901), 18 T. L. R. 59.

88. ——— ——— ———.]—Where the sanitary authority gave notice under Factory & Workshop Act, 1891 (c. 75), s. 7 (2), to the owner of a factory to provide certain works as a means of escape in case of fire, & the works specified would, if carried out, involve an act of trespass on other premises in the occupation of third persons as tenants to the owner of the factory, though the latter did not claim arbn. under the sect.:—*Held*: the notice was not final & conclusive as against the factory owner, & the magistrate ought not to convict the owner for refusing to comply with the notice.—LONDON COUNTY COUNCIL v. BRASS** (1901), 17 T. L. R. 504.**

89. ——— ——— ——— Separate factories treated as one.]—TOLLER v. SPIERS & POND, LTD., No. 91, *post*.

90. ——— ——— ——— Notice to owner of part of factory only.]—In a certain road were four houses, which were found, as a fact, by the magistrate before whom the information was laid in the first instance, to constitute a factory. More than forty persons were employed in the factory. The four houses were owned by different persons, resp. being the owner of two of them. These two houses alone did not constitute a factory. Applt. served a notice upon resp. requiring him to provide on his own premises means of escape from fire. In the notice resp. was described as the owner of the two houses of which he received the rack-rent, & in the notice it was recited that these two houses, together with two other adjoining houses, constituted a factory in which more than forty persons were employed. As resp. failed to comply with the notice, appls. instituted proceedings against him. No approval had been given by the chief inspector that the part of the factory should be taken to be a separate factory:—*Held*: as resp. was not the owner of the whole of the factory, he was under no obligation to comply with the notice served upon him by appls. [under 1901 Act, s. 14 (2)].—LONDON COUNTY COUNCIL v. LEYSON** (1913), 110 L. T. 200; 78 J. P. 91; 12 L. G. R. 253, D. C.**

—— **Dispute arises from—Arbitration.]—See** 1901 Act, s. 14 (3), Sched. 1.

727; 30 Sc. L. R. 650; 1 S. L. T. 39.—**SCOT**.

t. ———.]—**KELLY v. GIERRE SUGAR REFINING CO.** (1893), 20 R. (Ct. of Sess.) 833; 30 Sc. L. R. 758; 1 S. L. T. 88.—**SCOT**.

PART III. SECT. 1, SUB-SECT. 3.

a. **Notice to construct—Necessity for**

approval of alterations or additions—By chief officer of fire brigade.]—Appot. was owner of a building used as a factory by his tenants. He was served with a notice under the Factories & Shops Act, No. 39, 1912, s. 3, that he was regarded as occupier of the premises for the purpose of certain structural alterations, to wit, provision of means of escape in case of fire:—*Held*: appot. could not be convicted

91. ——— Necessity for separate notice—Separate factories in same building.]—(1) Pltf. owned a building, the whole of which up to & including the fourth floor, but with the exception of the second floor, formed one factory, & was leased to & occupied by defts. The second floor was not a factory. The fifth, sixth, & seventh floors formed another factory. Each of these factories produced its own motive power. The county council gave notice to pltf. to provide better means of escape from fire. An arbn. took place at which defts. were not present, & an award was made to the effect that an additional staircase ought to be made starting at the level of the third floor & extending to the seventh floor, & communicating with each of the intermediate floors. The county council served notice on pltf. requiring him to construct the works. The notices & the award treated the building as a whole, & did not deal with the factories as separate factories. In an action brought by pltf. for an injunction to restrain defts. from hindering him in making the staircase:—*Held*: the factories were separate factories & the whole building was not a tenement factory inasmuch as the occupiers produced their own power, & the building was therefore not one "where mechanical power is supplied" within 1901 Act, s. 149, there was nothing in the Act which gave pltf. any right to enter on one of the factories in order to construct works for the benefit of the other factory. The fact that defts. were not present did not exempt them from being bound by the arbn. but the notices & the award ought to have treated the factories as separate factories, & as this had not been done the proceedings were ineffectual, & pltf. was not entitled to enter upon defts.' premises.

(2) To ascertain whether these factories, A. & B. are a tenement factory, or not, I must first see whether they are in one building. The answer is in the affirmative. Then is each of them in law a separate factory? I think it is. . . . But is this a factory where mechanical power is "supplied to different parts of the same building occupied by different persons?" I think plainly it is not. Those words obviously do not mean simply a factory where mechanical power is used. That is already involved in the word "factory." They point not to the user, but to the "supply" of mechanical power to different parts of the same building, a supply for instance by the occupier of one factory to the occupier of the other factory, or a supply to both from some external source by a third person, including & perhaps meaning the person of whom the tenement is held. . . . The verb is not "used" but "supplied," meaning "taken by the factory occupier from a source of supply external to himself" (**BUCKLEY, J.**).—**TOLLER v. SPIERS & POND, LTD.**, [1903] 1 Ch. 362; 72 L. J. Ch. 191; 87 L. T. 578; 67 J. P. 234; 51 W. R. 381; 19 T. L. R. 110; 47 Sol. Jo. 159; 1 L. G. R. 193.

Annotation:—**Folld. Brass v. L. C. C.**, [1904] 2 K. B. 336.

of the offence of disobeying the said notice until it was shown that the chief officer of the fire brigade had approved some means of escape from fire which involved structural alterations or building additions as distinguished from movable ropes or ladders.—*Ex p. SHEEHY* (1914), 14 S. R. N. S. W. 288; 31 N. S. W. W. N. 115.—**AUS.**

b. **Absence of fire appliances—**

Sect. 1.—Provisions for securing safety: Sub-sect. 1, A., B. & C.; sub-sects. 2 & 3.]

Action for breach of common law duty.]—
See No. 62, *ante*, & generally, MASTER & SERVANT.

B. Self-acting Machines.

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82. Space between fixed & traversing part—“Allowing” person therein.]—A young person who was employed in a factory by a person in charge of a self-acting machine, was ordered by the person in charge of the machine to clean a part of the machine, & for this purpose the boy was obliged to go into the space between the fixed & traversing portions of the machine. When the order was given the machine was properly stopped, but while the boy was still in this space the person in charge of the machine, thinking the boy was clear of the space, started the machine, whereby the boy received injuries from which he died:—*Held*: as the person in starting the machine was acting under the belief that the boy was clear of the space, the boy was not “allowed” by him to be in the prohibited space at the time of the accident, within Factory & Workshop Act, 1895 (c. 37), s. 9 (2 & 3), & the employers, the occupiers of the factory, were not liable in consequence thereof to a fine under Factory & Workshop Act, 1878 (c. 16), s. 83, though such occupiers would have been liable for an “allowance” by their servant.

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83. Children prohibited from cleaning—Fixed parts not moving with machine.]—By Factory & Workshop Act, 1878 (c. 16), s. 9, “a child shall not be allowed to clean any part of the machinery

in a factory while the same is in motion by the aid of steam, water, or other mechanical power”

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84. — Process considered as “cleaning” — Removing by-products from machine.]—By 1901 Act, s. 13, it is enacted that a child must not be allowed to clean in any factory any part of any machinery whilst the machinery is in motion by the aid of steam, water, or other mechanical power. A child of twelve years of age was employed in removing, partly by hand & partly by means of a stick, from the rollers & top board of a cap-spinning machine for spinning woollen yarn, certain fluff formed in the course of spinning. If this fluff were not removed the rollers would become choked & the process would stop. The fluff was not mere refuse, but had a saleable value & was in fact sold:—*Held*: the child was cleaning machinery within the enactment.—TAYLOR v. DAWSON (MARK) & SON, LTD., [1911] 1 K. B. 145; 80 L. J. K. B. 102; 103 L. T. 508; 75 J. P. 5; 27 T. L. R. 45, D. C.

SUB-SECT. 2.—STEAM BOILERS.

See 1901 Act, s. 11.

85. Steam crane—Whether “locomotive” — Employers Liability Act, 1880 (c. 42), s. 1 (5).]—In the course of the widening of a line of railway there was being worked on a temporary line of rails laid down over the new part of a viaduct, a steam-crane, the engine of which served the double purpose of moving the machine from place to place, & of raising stones with which to build the parapet. M., a labourer in the employ of W. the contractor for the work, was, while so employed, injured by the negligence of the driver of the steam-crane, who was also in the service of W. In an action by M. against W. under above Act to recover compensation, for the injury:—*Held*: the steam-crane was not a “locomotive

placed to get his dusting cloth:—*Held*: the machinery was dangerous & the failure to guard same a breach by defts. of Factories Act; therefore the onus was thrown on defts. of proving that, in spite of such breach, the accident was due to deceased's negligence, & defts. were liable if deceased's death resulted from such breach, & not from his own negligence. To establish liability in such case, pltf. must prove that deft. was guilty of negligence, & that it was that negligence that caused the death of deceased.—HILTON v. ROBIN HOOD MILLS, LTD., [1919] 2 W. W. R. 134.—CAN.

n. —.]—Pltf. sued as the personal representative of her deceased husband to recover damages for injuries sustained by him while working as a sawyer in the employment of defts., which, as she alleged, resulted in his death, & were caused by a defect in the condition or arrangement of a “joiner” at which the deceased was working, the revolving

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ployed by defts. as a workman in their factory, was injured in attempting to place a belt upon a pulley, by falling upon the shafting:—*Held*: defts. were liable to pltf. in damages for his injury under Factories Act, because the shafting & pulley were a dangerous part of the machinery & should have been guarded.—GOWER v. GLEN WOOLLEN MILLS (1913), 28 O. L. R. 193; 4 O. W. N. 796; 12 D. L. R. 394.—CAN.

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r. —.]—GIBB v. CROMBIE, 2 R. (Ct. of Sess.) 836; 11 Sc. L. 574.—SCOT.

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engine upon a railway" within above sub-sect., & judgment must be entered for defts.—**MURPHY v. WILSON & SON** (1883), 52 L. J. Q. B. 524; 48 L. T. 788; 47 J. P. 565; 48 J. P. 24.

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727; 30 Sc. L. R. 650; 1 S. L. T. 39.—**SCOT**.

t. — — — — —.]—**KELLY v. GIBBE SUGAR REFINING CO.** (1893), 20 R. (Ct. of Sess.) 833; 30 Sc. L. R. 758; 1 S. L. T. 88.—**SCOT**.

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approval of alterations or additions—By chief officer of fire brigade.]—Appot. was owner of a building used as a factory by his tenants. He was served with a notice under the Factories & Shops Act, No. 39, 1912, s. 3, that he was regarded as occupier of the premises for the purpose of certain structural alterations, to wit, provision of means of escape in case of fire:—Held: appot. could not be convicted

91. — — — — — Necessity for separate notice—Separate factories in same building.]—(1) Pltf. owned a building, the whole of which up to & including the fourth floor, but with the exception of the second floor, formed one factory, & was leased to & occupied by defts. The second floor was not a factory. The fifth, sixth, & seventh floors formed another factory. Each of these factories produced its own motive power. The county council gave notice to pltf. to provide better means of escape from fire. An arbn. took place at which defts. were not present, & an award was made to the effect that an additional staircase ought to be made starting at the level of the third floor & extending to the seventh floor, & communicating with each of the intermediate floors. The county council served notice on pltf. requiring him to construct the works. The notices & the award treated the building as a whole, & did not deal with the factories as separate factories. In an action brought by pltf. for an injunction to restrain defts. from hindering him in making the staircase:—Held: the factories were separate factories & the whole building was not a tenement factory inasmuch as the occupiers produced their own power, & the building was therefore not one "where mechanical power is supplied" within 1901 Act, s. 149, there was nothing in the Act which gave pltf. any right to enter on one of the factories in order to construct works for the benefit of the other factory. The fact that defts. were not present did not exempt them from being bound by the arbn. but the notices & the award ought to have treated the factories as separate factories, & as this had not been done the proceedings were ineffectual, & pltf. was not entitled to enter upon defts.' premises.

(2) To ascertain whether these factories, A. & B. are a tenement factory, or not, I must first see whether they are in one building. The answer is in the affirmative. Then is each of them in law a separate factory? I think it is. . . . But is this a factory where mechanical power is "supplied to different parts of the same building occupied by different persons?" I think plainly it is not. Those words obviously do not mean simply a factory where mechanical power is used. That is already involved in the word "factory." They point not to the user, but to the "supply" of mechanical power to different parts of the same building, a supply for instance by the occupier of one factory to the occupier of the other factory, or a supply to both from some external source by a third person, including & perhaps meaning the person of whom the tenement is held. . . . The verb is not "used" but "supplied," meaning "taken by the factory occupier from a source of supply external to himself" (**BUCKLEY, J.**).—**TOLLER v. SPIERS & POND, LTD.**, [1903] 1 Ch. 362; 72 L. J. Ch. 191; 87 L. T. 578; 67 J. P. 234; 51 W. R. 381; 19 T. L. R. 119; 47 Sol. Jo. 159; 1 L. G. R. 193.

—**Fold. Brass v. L. C. C.**, [1904] 2 K. B. 336.

of the offence of disobeying the said notice until it was shown that the chief officer of the fire brigade had approved some means of escape from fire which involved structural alterations or building additions as distinguished from movable ropes or ladders.—**Ex p. SHEEHY** (1914), 14 S. R. N. S. W. 288; 31 N. S. W. W. N. 115.—**AUS.**

b. **Absence of fire appliances—**

Sect. 1.—Provisions for securing safety: Sub-sect. 3. Sect. 2. Part IV. Sects. 1 & 2: Sub-sect. 1, A.]

92. Costs of construction — Whether apportioned between landlord and tenant—Construction of covenant.]—A lease contained two covenants by the tenant, one was to pay "all rates & taxes, sewers rate, & main drainage rate, parish dues, & all other rates, taxes, & impositions, & outgoings whatsoever" which might be in any wise imposed upon or in respect of the demised premises or upon the landlords in respect thereof by authority of Parliament or otherwise howsoever. The other was to pay a fair share & proportion of all costs & expenses which lessors, in respect of being the owners of the demised premises, might, during the continuance of the term, be called upon to pay in or about "any reparation . . . or in or about any drainage or sewerage or otherwise by virtue of any Act or Acts of Parliament already made," or thereafter to be made. During the continuance of the term the landlords were compelled, under Factory & Workshop Act, 1891 (c. 75), s. 7, to spend money in making structural alterations on the demised premises. In an action by the landlord to recover from the tenant the whole of the amount so spent:—*Held*: upon the true construction of the two covenants the tenant was liable to pay, not the whole, but only a fair share & proportion of the amount so spent.—*ARDING v. ECONOMIC PRINTING & PUBLISHING CO., LTD.* (1898), 69 L. T. 622; 15 T. L. R. 111, C. A. *Annotations*:—*Reid*, *Antil v. Godwin* (1899), 63 J. P. 441; *Monk v. Arnold* (1902), 86 L. T. 580; *Horner v. Franklin* (1904), 73 L. J. K. B. 1019.

93. — — — — —.]—A tenant of a factory who has covenanted to pay & discharge all parliamentary, parochial, & other rates, assessments & impositions which shall or may be imposed on or payable in respect of the demised premises must indemnify the landlord, if the latter is compelled by the local authority to expend money in providing the factory with means of escape in case of fire. The landlord may sue upon such a covenant in the High Ct., & is not restricted to the remedy in the county ct. provided by 1901 Act, s. 14.—*SHEPHARD v. BARBER* (1902), 67 J. P. 238; 1 L. G. R. 157.

94. — — — — —.]—Jurisdiction of county court to apportion—How affected by covenant as to outgoings.]—Where lessor of a factory to which Factory & Workshop Act, 1891 (c. 75), s. 7 (2), applies has, pursuant to that sub-sect. provided the means of escape in case of fire for the persons employed in the factory, the county ct. has jurisdiction under the last clause of the sub-sect., on the application of lessor, to apportion the expense between the lessor & the lessee in such manner as appears to the ct. just & reasonable in all the circumstances, notwithstanding that the lease contains a general covenant to pay outgoings.—*MONK v. ARNOLD*, [1902] 1 K. B. 761; 71 L. J. K. B. 441; 86 L. T. 580; 50 W. R. 667; 46 Sol. Jo. 340, D. C.

Annotations:—*Reid*, *Shephard v. Barber* (1902), 67 J. P. 238; *Goldstein v. Hollingsworth*, [1904] 2 K. B. 578; *Morris v. Beal* (1904), 73 L. J. K. B. 830; *Horner v. Franklin*, [1905] 1 K. B. 479; *Stuckey v. Hooke* (1906), 94 L. T. 723; *Monro v. Burghclere*, [1918] 1 K. B. 291.

*Death of workman—Proof that death resulted from absence.]—*Proof that fire escapes were not provided in accordance with Factory Shop & Office Building Act, R. S. O. 1914,

c. 229, is not enough to entitle his personal representative or dependants to recover damages for his death; but there must be, in addition, reasonable evidence to warrant the con-

95. — — — — —.]—*SHEPHARD v. BARBER*, No. 93, ante.

96. — — — — —.]—Matters relevant to apportionment—Terms of tenancy.]—*HORNER v. FRANKLIN*, No. 98, post.

97. — — — — —.]—Action on covenant in lease—Whether maintainable in High Court—1901 Act, s. 14.]—*SHEPHARD v. BARBER*, No. 93, ante.

98. — — — — —.]—Factory & Workshop Act, 1891 (c. 75), s. 7 (2).]—Factory & Workshop Act, 1891 (c. 75), s. 7 (2), provides that the sanitary authority shall serve on the owner of any factory which is not provided with proper means of escape from fire a notice specifying the measures necessary for providing such means of escape, & requiring him to carry out the same before a specified date, & thereupon the owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirement, & that, if the owner alleges that the occupier ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county ct., & thereupon that ct., after hearing the occupier, may make such order as appears to the ct. just & equitable under all the circumstances of the case. Lessees of a factory covenanted that they would during the term "pay all the existing & future taxes, sewer rates, & rates, assessments, & outgoings of every description for the time being payable by the landlord or tenant in respect of the demised premises. The landlord expended money in complying with the requirements of the sanitary authority under the above sect., & then brought an action in the High Ct. against the tenants on their covenant to recover the sum thus expended:—*Held*: (1) the effect of above sub-sect. was to exclude the jurisdiction of the High Ct., & the action could not be maintained, the only remedy of the landlord being by means of an application to the county ct.

(2) *Seem*: in determining what is "just & equitable" the county ct. judge must take into consideration the terms of the tenancy, expressed or implied.—*HORNER v. FRANKLIN*, [1905] 1 K. B. 479; 74 L. J. K. B. 291; 92 L. T. 178; 69 J. P. 117; 21 T. L. R. 225; 3 L. G. R. 423, C. A.

Annotations:—*As to* (1) *Fold*, *Stuckey v. Hooke*, [1906] 2 K. B. 20. *As to* (2) *Reid*, *Monro v. Burghclere*, [1918] 1 K. B. 291.

Compare No. 61, ante.

SECT. 2.—NOTICE AND INVESTIGATION OF ACCIDENTS.

See, now, 1901 Act, ss. 19–22, Notice of Accidents Act, 1906 (c. 53), Workmen's Comp. Acts, 1906 (c. 58), 1923 (c. 42).

*Meaning of "accident."—**See* MASTER & SERVANT.

99. Duty to report—Person "prevented from returning to work"—What is "prevention."—

clusion that the death resulted from the contravention.—*BIRCH v. STEPHENSON, McDougall v. STEPHENSON* (1915), 33 O. L. R. 427; 8 O. W. N. 159; 22 D. L. R. 404.—CAN.

By 7 & 8 Vict. c. 15, s. 22, if any accident occur in a factory which shall cause bodily injury to any person employed therein, of such a nature as to prevent him from returning to his work in the factory before nine o'clock the following morning, the occupier of the factory shall, within twenty-four hours of such absence, send notice thereof in writing to the certifying surgeon of the district:—*Held*: any accident taking place in a factory, whether caused by the machinery or not, must be reported, & if the person injured returns the next morning with the intention of temporarily working, but without the ability to continue at his ordinary work, he is "prevented from returning to his work" within the meaning of the sect., & the occupier of the factory is bound to send notice to the surgeon.—*LAKEMAN v. STEPHENSON* (1868), L. R. 3 Q. B. 192; 9 B. & S. 54; 37 L. J. M. C. 57; 17 L. T. 539; 32 J. P. 164; 16 W. R. 509.

100. Boiler explosion—Notice to Board of Trade.]—*SMITH v. MÜLLER*, No. 50, *ante*.

101. — Jurisdiction of Board of Trade — To order inquiry.]—A pipe conveying steam from a boiler outside to an engine inside a coal mine exploded:—*Held*: (1) the effect of Boiler Explosions Act, 1890 (c. 35), s. 2, was to give the Board of Trade jurisdiction to order an inquiry: (2) the pipe was a "boiler" within the interpretation clause of Boiler Explosions Act, 1882 (c. 22).—*R. v. BOILER EXPLOSIONS ACT, 1882, COMRS.*,

[1891] 1 Q. B. 703; 60 L. J. Q. B. 544; 64 L. T. 674; 39 W. R. 440; 7 T. L. R. 371, C. A.

See, further, Boiler Explosions Acts, 1882 (c. 22), 1890 (c. 35).

102. Building higher than thirty feet—No mechanical power used—1901 Act, s. 105 (2).]—A workman was injured by accident in the course of his employment in a building exceeding thirty feet in height, & in which more than twenty persons, not being domestic servants, were employed for wages, & certain provisions of 1901 Act, as to notice of accident & the formal investigations of accidents, were by sect. 105 (2) of that Act to have effect in the case of such a building as if it were included in the word "factory." The building contained no machinery or plant worked by mechanical power, but was used for exhibiting & selling bicycles & tricycles, & also for repairing the same:—*Held*: the building was not by virtue of above sub-sect. a "factory" so as to be brought within the definition of that word contained in Workmen's Comp. Act, 1897 (c. 37), s. 7 (2).—*DYER v. SWIFT CYCLE CO.*, [1904] 2 K. B. 36; 73 L. J. K. B. 566; 90 L. T. 613; 68 J. P. 394; 52 W. R. 483; 20 T. L. R. 429; 48 Sol. Jo. 415; 5 W. C. C. 74, C. A.

Accidents during building operations.]—*See* Part IV., Sect. 3, sub-sect. 2, *post*.

Under Workmen's Compensation Acts.]—*See* MASTER & SERVANT.

Part IV.—Dangerous and Unhealthy Industries.

SECT. 1.—IN GENERAL.

See 1901 Act, ss. 73–86; White Phosphorus Matches Prohibition Act, 1908 (c. 42); Celluloid & Cinematograph Film Act, 1922 (c. 35); Employment in Lead Processes Act, 1920 (c. 62); Workmen's Comp. Act, 1923 (c. 42), s. 29, & generally, PUBLIC HEALTH.

103. Generation of dust—Injurious inhalation—How proved.]—By Factory & Workshop Act, 1878 (c. 16), s. 36, where in any factory a process is carried on by which dust is "generated & inhaled by the workers to an injurious extent" the factory inspector has power to require a fan or other means of ventilation to be provided. In proceedings under this sect.:—*Held*: it was not necessary to prove that any worker had sustained actual injury from inhaling the dust, but it was sufficient if it was proved that dust was generated & inhaled by the workers to an extent that must in the long run be injurious.—*HOARE v. RITCHIE & SONS*, [1901] 1 K. B. 434; 70 L. J. Q. B. 279; 84 L. T. 54; 65 J. P. 261; 49 W. R. 351; 17 T. L. R. 212; 45 Sol. Jo. 220.

Alkali works—Special jurisdiction of county court.]—*See* Alkali Works Regulation Act, 1906 (c. 14), & generally, PUBLIC HEALTH.

PART IV. SECT. 1.

a. Spinning factory—Accommodation for workers' clothing.]—Regulation 11 issued on Feb. 26, 1906, made under Factory & Workshop Act, 1901, s. 79, which requires that

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occupiers of factories in which spinning is carried on shall provide suitable & convenient accommodation in which to keep clothing belonging to the workers, taken off before starting to work, does not impose an obligation

on such occupiers to have a separate cloak-room outside the work-room. What is "suitable & convenient accommodation" is a question of fact in each particular case.—*ERAUT v. ROSS*, [1910] 2 I. R. 591.—*IR.*

C C

SECT. 2.—EMPLOYMENT IN OR ABOUT DOCKS, BUILDING OPERATIONS, RAILWAYS, ETC.

SUB-SECT. 1.—DOCKS, QUAYS, AND SHIPS.

A. In General.

See 1901 Act, ss. 104–106, & Workmen's Comp. Act, 1897 (c. 37), s. 7 (2), & now, Workmen's Comp. Act, 1906 (c. 58), s. 7.

See, generally, MASTER & SERVANT.

104. Dock—How defined.]—(1) Workmen's Comp. Act, 1897 (c. 37), does not apply to seamen.

(2) The owner of a ship floating in a dock is not the "occupier" of the dock within Factory Act, 1895 (c. 37), s. 23. The word "dock" in that Act means the solid structure & body of the dock, not the water space within its limits, & a ship floating in a dock is not "premises within the same or forming part thereof." A seaman, therefore, doing the ordinary work of a seaman on a ship so situated is not, under 1897 Act, entitled to compensation for injury sustained in the course of such work.

To treat the owner of a ship afloat in the dock & waiting to get out to sea as the occupier of a factory appears to me opposed to all good

Sect. 2.—Employment in or about docks, building operations, railways, etc.: Sub-sect. 1, A. & B.]

sense (LORD LINDLEY).—HOULDER LINE, LTD. v. GRIFFIN, [1905] A. C. 220; 74 L. J. K. B. 466; 92 L. T. 580; 53 W. R. 609; 21 T. L. R. 436; 49 Sol. Jo. 445; 7 W. C. C. 87, H. L.; *reversg.* S. C. *sub nom.* GRIFFIN v. HOULDER LINE, LTD., [1904] 1 K. B. 510, C. A.

Annotations:—As to (2) *Appld.* Smith v. Standard Steam Fishing Co., Burdon v. Gregson, [1906] 2 K. B. 275. *Folld.* Thompson v. Sinclair, [1906] 2 K. B. 278, n.; Morgan v. Tydvil Engineering & Ship Repairing Co. (1908), 98 L. T. 762. *Refd.* Owens v. Campbell, [1904] 2 K. B. 60; Harrison v. Oceanic Steam Navigation Co., [1907] 2 K. B. 420, n.

105. — Whether a factory.]—Resps. were ship repairers, & were employed to clean a ship. In order to do so, they put the ship into a dry dock which they had hired for that purpose. A labourer in their employment fell while walking along a plank from the ship to the side of the dock, & was killed:—*Held*: the dock was a "factory" within Workmen's Comp. Act, 1897 (c. 37), s. 7 (2), & resps. were the "occupiers" within Factory & Workshop Act, 1895 (c. 37), s. 23, & the representative of the workman was entitled to compensation.—RAINE v. JOBSON & Co., [1901] A. C. 404; 70 L. J. K. B. 771; 85 L. T. 141; 49 W. R. 705; 17 T. L. R. 627; 45 Sol. Jo. 614; 3 W. C. C. 135, H. L.

Annotations:—*Folld.* Cattermole v. Atlantic Transport Co., [1902] 1 K. B. 204. *Expld.* Barrett v. Kemp, [1904] 1 K. B. 517. *Distd.* Houlder Line v. Griffin, [1905] A. C. 220. *Consd.* Smith v. Standard Steam Fishing Co., Burdon v. Gregson, [1906] 2 K. B. 275. *Refd.* Bartell v. Gray, [1902] 1 K. B. 225; Kenny v. Harrison, [1902] 2 K. B. 168; Owens v. Campbell, [1904] 2 K. B. 60.

106. — — —.]—PACIFIC STEAM NAVIGATION Co. v. PUGH & SON, No. 125, *post*.

107. — Wet or dry—Distinction immaterial.]—CATTERMOLE v. ATLANTIC TRANSPORT Co., No. 129, *post*.

108. — — —.]—SMITH v. STANDARD STEAM FISHING Co., BURDON v. GREGSON & Co., No. 124, *post*.

109. Ship—Whether a dock.]—A workman employed on board a ship lying in dock is not employed on, in, or about a dock, & is therefore not employed on, in, or about a factory within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1), whether the dock itself is a factory within sub-sect. 2 of that sect. or not.—FLOWERS v. CHAMBERS, [1899] 2 Q. B. 142; 68 L. J. Q. B. 648; 80 L. T. 834; 47 W. R. 513; 15 T. L. R. 352; 1 W. C. C. 51, C. A.

Annotations:—*Folld.* Durrie v. Warren (1899), 15 T. L. R. 365. *Apprvd.* Raine v. Jobson, [1901] A. C. 404. *N.F.* Cattermole v. Atlantic Transport Co., [1902] 1 K. B. 204. *Consd.* Smith v. Standard Steam Fishing Co., Burdon v. Gregson, [1906] 2 K. B. 275. *Refd.* Hennessey v. McCabe, [1900] 1 Q. B. 491; Bartell v. Gray, [1902] 1 K. B. 225.

110. — Repaired in dock—Whether a

factory.]—The fact that repairs are being done to a ship in a dock does not make the dock a "ship-building yard" within Factory & Workshop Act, 1878 (c. 16), Sched. 4, Part 2 (24), & therefore a "factory" within Workmen's Comp. Act, 1897 (c. 37), s. 7.—SPENCER v. LIVETT, FRANK & SON, [1900] 1 Q. B. 498; 69 L. J. Q. B. 338; 82 L. T. 75; 64 J. P. 196; 48 W. R. 323; 16 T. L. R. 179; 2 W. C. C. 112, C. A.

Annotation:—*Refd.* Burdon v. Gregson (1906), 95 L. T. 45.

111. — — —.]—BARTELL v. GRAY (W.) & Co., No. 122, *post*.

112. — Floating in dock—Whether premises within, or part of dock.]—HOULDER LINE, LTD. v. GRIFFIN, No. 104, *ante*.

113. — — — Circumstances to be considered.]—SMITH v. STANDARD STEAM FISHING Co., BURDON v. GREGSON & Co., No. 124, *post*.

114. — — —.]—THOMPSON v. SINCLAIR (1905), cited, [1906] 2 K. B. 278, n., C. A.

Annotations:—*Folld.* Harrison v. Oceanic Steam Navigation Co., [1906] 2 K. B. 420, n. *Consd.* Smith v. Standard Steam Fishing Co., Burdon v. Gregson, [1906] 2 K. B. 275.

115. — — —.]—HARRISON v. OCEANIC STEAM NAVIGATION Co., LTD., [1907] 2 K. B. 420, n.; 76 L. J. K. B. 959, n.; 97 L. T. 125, n.; 9 W. C. C. 82, C. A.

Annotation:—*Folld.* Handford v. Clark, [1907] 2 K. B. 409.

116. — Juxtaposition to quay—Not sufficient to constitute factory.]—The mere juxtaposition of a ship to a quay is not of itself sufficient to make the person who meets with an accident in the ship a person employed on, in, or about a factory, & he will not be entitled to compensation unless the operations going on in the ship involve such a use of the quay as will bring in the provisions of 1901 Act, s. 104.—HANDFORD v. CLARKE (GEORGE) & Co., [1907] 2 K. B. 409; 76 L. J. K. B. 958; 97 L. T. 124; 9 W. C. C. 87, C. A.

B. "Actual Use or Occupation."

See 1901 Act, ss. 104–106.

117. What constitutes—Use of machinery—For unloading.]—The person using machinery in the process of loading a ship from a quay is an occupier of a factory within Factory & Workshop Act, 1895 (c. 37), s. 23 (1), & therefore an "undertaker" within Workmen's Comp. Act, 1897 (c. 37), s. 7.—CARRINGTON v. BANNISTER & Co., [1901] 1 K. B. 20; 70 L. J. K. B. 31; 83 L. T. 457; 3 W. C. C. 146, C. A.

Annotations:—*Refd.* Merrill v. Wilson (1900), 83 L. T. 490; Burdon v. Gregson (1906), 95 L. T. 45.

118. — — For loading.]—Stevedores were loading a vessel in a dock by means of machinery. The cargo had been put into the hold, & the men employed by the stevedores were

employed on a ship lying in a dock & not employed on, in, or about a factory even when the dock itself is a factory.—LAW v. ABERNETHY & Co. (1900), 2 F. (Ct. of Sess.) 722.—SCOT.

PART IV. SECT. 2, SUB-SECT. 1.—B.

1. What constitutes—Use of portion of quay—For loading.]—STEWART v. DARGAVIL COAL Co., LTD. (1902), 4 F. (Ct. of Sess.) 425.—SCOT.

—.]—STEWART v.

PART IV. SECT. 2, SUB-SECT. 1.—A.

105 i. Dock—Whether a factory.]—HANLON v. NORTH CITY MILLING Co., [1903] 2 I. R. 163.—IR.

105 ii. — — —.]—JACKSON v. — & Co. (1900), 2 F. (Ct. of Sess.) 533.—SCOT.

d. Transit shed in dock—Whether a factory.]—W. & Co., were employed by the Post Office to carry parcels for them during the Christmas season. The Post Office had taken temporarily

from the dock authorities a transit shed in the docks, for the storage of parcels, which were brought from different parts of the city, including the quays. From the transit shed the parcels were forwarded to their destination:—*Held*: the transit shed was a factory within Factory & Workshop Act, 1895.—FOGARTY v. WALLIS & Co., [1903] 2 I. R. 522.—IR.

e. Ship lying in dock—Whether a factory.]—A steamship lying in a dock is not a factory, & a workman em-

"finishing off" by slinging iron beams across the hatchway. The machinery having become entangled, one of the workmen went to disentangle it, was caught by it, & injured so that he died:—*Held*: the stevedores were occupying a "factory," namely, the machinery, within Workmen's Comp. Act, 1897 (c. 37), s. 7 (2), & Factory & Workshop Act, 1895 (c. 37), s. 23 (1) (ii), & deceased was injured in the course of his employment in loading from the wharf, the process of loading not being complete till the hatchway was secured, within the meaning of those Acts.—*LYSONS v. KNOWLES (ANDREW) & SONS, LTD., STUART v. NIXON & BRUCE*, [1901] A. C. 79; 70 L. J. K. B. 170; 81 L. T. 65; 65 J. P. 388; 49 W. R. 636; 17 T. L. R. 156; 45 Sol. Jo. 150; 3 W. C. C. 1, H. L.

Annotations:—*Refd.* Houlder Line v. Griffin, [1905] A. C. 220; Howlett v. Shaw, Savill & Albion Co. (1924), 40 T. L. R. 538. *Mentd.* Hathaway v. Argus Printing Co., [1901] 1 K. B. 96; Watters v. Clover, Clayton (1901), 18 T. L. R. 60; Ayres v. Buckridge, Whale v. Rhymney Iron Co., Jones v. Rhymney Iron Co., [1902] 1 K. B. 57; Bartlett v. Tutton, [1902] 1 K. B. 72; Giles v. Belford, Smith, [1903] 1 K. B. 843; Case v. Colonial Wharves (1905), 53 W. R. 514; Ball v. Hunt, [1912] A. C. 496; Que v. Port of London Authority, [1914] 3 K. B. 892; Churm v. Dalton Main Collieries, [1916] 1 A. C. 612; Gill v. Grainger (1916), 10 B. W. C. C. 515; Wild v. Brown, [1919] 1 K. B. 134; Bones v. Associated Portland Cement Manufacturers (1900), Ltd. (1920), 90 L. J. K. B. 456; King v. Port of London Authority, [1920] A. C. 1; Russell v. Corser, [1921] 1 A. C. 351.

119. — Use of portion of quay—Owners acting as stevedores.]—Where the owners of a ship moored alongside of a quay, who acted as their own stevedores, had the use of the portion of the quay alongside of which their ship lay, for the purpose of unloading the ship's cargo on to the quay, & a workman employed by them was killed through an accident arising out of & in the course of his employment on the quay:—*Held*: the shipowners having the "actual use" of a portion of the quay within Factory & Workshop Act, 1895 (c. 37), s. 23 (1), were "undertakers" in respect of a factory within the meaning of the Workmen's Comp. Act, 1897 (c. 37), s. 7, & liable to make compensation to the dependants of the workman under that Act.—*MERRILL v. WILSON, SONS & Co., LTD.*, [1901] 1 K. B. 35; 70 L. J. K. B. 97; 83 L. T. 490; 65 J. P. 53; 49 W. R. 161; 17 T. L. R. 49; 45 Sol. Jo. 58; 3 W. C. C. 155, C. A.

Annotations:—*Folld.* Hainsborough v. Halli (1901), 18 T. L. R. 21. *Apprvd.* Raine v. Jobson, [1901] A. C. 404. *Apld.* Houlder Line v. Griffin, [1905] A. C. 220. *Consd.* Smith v. Standard Steam Fishing Co., Burdon v. Gregson, [1906] 2 K. B. 275. *Refd.* Bartell v. Gray, [1902] 1 K. B. 225; Weaving v. Kirk & Randall (1903), 52 W. R. 209.

120. — — —.]—*HAINSBOROUGH v. RALLI BROTHERS* (1901), 18 T. L. R. 21, C. A.

121. — Hire of dock by ship repairers.]—*RAINE v. JOBSON & Co.*, No. 105, *ante*.

122. — Possession for limited purpose—Painting & plumbing.]—A firm of employers contracted to do the painting & plumbing on a ship lying in a dock & sent workmen on board to do the work. Some of the crew were in charge of the ship for the owners, but the firm were in possession of the ship so far as was necessary for the work that they had contracted to do:—*Held*: the ship was a factory within Workmen's

Comp. Act, 1897 (c. 37), & the possession of the shipowners for a purpose not inconsistent with the possession of the employers, did not prevent the latter from having the actual use or occupation of the ship within Factory & Workshop Act, 1895 (s. 37).

From the decision of the House of Lords in *Raine v. Jobson*, No. 105, *ante*, it is clear that persons repairing a ship in dock are occupiers of a factory (*COLLINS, M.R.*).—*BARTELL v. GRAY (W.) & Co.*, [1902] 1 K. B. 225; 71 L. J. K. B. 115; 85 L. T. 658; 66 J. P. 308; 50 W. R. 310; 18 T. L. R. 70; 46 Sol. Jo. 67; 4 W. C. C. 95, C. A.

Annotations:—*Apld.* Weavings v. Kirk & Randall, [1904] 1 K. B. 213. *Consd.* Harrison v. Oceanic Steam Navigation Co., [1906] 2 K. B. 420, n. *Refd.* Griffin v. Houlder Line, [1904] 1 K. B. 510; Burdon v. Gregson (1906), 95 L. T. 45; Mackey v. Monks (Preston), [1918] A. C. 59.

Compare No. 145, *post*.

123. — Ship afloat in dock—Ready to go to sea.]—*HOULDER LINE, LTD. v. GRIFFIN*, No. 104, *ante*.

124. — Purpose of occupation material.]—(1) A workman employed on a ship in dock is not necessarily employed on, in, or about a "factory" within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1), neither does a ship in dock of necessity become a part of a dock "or of premises within the same or forming part thereof" so as to render the owner or employer liable as the occupier of a factory, but the circumstances & purpose of the "actual use & occupation" of the dock & the nature of the employment at the time of the accident must be taken into consideration in each case. (2) In cases of this kind no true distinction can be drawn between a ship in a wet dock & a ship in a dry dock or from the fact that the ship is actually moored to the structure of the dock.—*SMITH v. STANDARD STEAM FISHING CO., BURDON v. GREGSON & Co.*, [1906] 2 K. B. 275; 75 L. J. K. B. 640; 95 L. T. 42, 45; 54 W. R. 582; 22 T. L. R. 578; 50 Sol. Jo. 513; 8 W. C. C. 76, C. A.

Annotations:—*As to* (1) *Apld.* Handford v. Clark, [1907] 2 K. B. 409. *Consd.* Harrison v. Oceanic Steam Navigation Co., [1907] 2 K. B. 420, n.

125. — Tenancy of hut in dock.]—Defts. were the tenants of a small hut in a dock, & they supplied horses, men, & gear for hauling railway wagons loaded with coal for ships using the dock from the railway sidings to the quay where the ships lay. One of the men in the employment of defts., while engaged in hauling a wagon to the quay with coal belonging to pl'ts.' ship fell, & the wagon went over his foot. He took proceedings against pl'ts. under Workmen's Comp. Act, 1897 (c. 37), & a third party notice was served on defts. An award of compensation having been made in his favour, pl'ts. brought an action claiming an indemnity from defts. under s. 4:—*Held*: defts. had the actual use of occupation of the dock, which was a factory, for the purpose of carrying on their business there, & were therefore the occupiers thereof, & so were "undertakers" & liable to indemnify pl'ts. under s. 4.—*PACIFIC STEAM NAVIGATION CO. v. PUGH & SON* (1907), 23 T. L. R. 622; 9 W. C. C. 39, C. A.

126. — Presence of employee on board—For

DUBLIN & GLASGOW STEAM PACKET Co. (1902), 5 F. (Ct. of Sess.) 57.—SCOT.

h. — Ship afloat in dock—Being loaded by contractors.]—*BRUCE*

v. HENRY & Co. (1900), 2 F. (Ct. of Sess.) 717.—SCOT.

k. — Erection of machinery—For ice-making.]—*PURVES v. STERNE & Co., LTD.* (1900), 2 F. (Ct. of Sess.)

887.—SCOT.

l. — Purchaser of goods lying in warehouse—Whether "occupier of warehouse."—*RAMSAY v. MACKIE* (1904), 7 F. (Ct. of Sess.) 106.—SCOT.

Sect. 2.—Employment in or about docks, building operations, railways, etc.: Sub-sect. 1, B., C. & D.; sub-sect. 2.]

repairing purposes.]—A workman, a foreman engineer, was sent on board a steamship, then in dock, to take notes of repairs which were to be executed by his employers. He fell & received injury:—*Held*: the employer of the workman was not the occupier of a factory within the meaning of Factory Act, 1895 (c. 37), & Workmen's Comp. Act, 1897 (c. 37), s. 7 (2).

In that case [*Houlder Line, Ltd. v. Griffin*, No. 104, ante] the shipowner was paying dock dues; he therefore, when his ship was lying in the dock for the purpose of coaling, was "occupying" in a sense only, in the sense, as it were, that he was the renter of a right to lie in the dock, but he was held not to be liable. But in this case the occupation does not go so far as that of the shipowner. Here the person whom it is sought to make liable is a person who sent applt. on board the ship-owners' ship. It was not his ship; he had nothing there that caused any occupation. He simply employed a person to take notes of work to be done on board that ship (LORD JAMES).—*MORGAN v. TYDVIL ENGINEERING & SHIP REPAIRING CO.* (1908), 98 L. T. 762; 24 T. L. R. 403; 1 B. W. C. C. 78, H. L.

C. Use of Machinery or Plant.

127. For loading or unloading ship—Employment in "factory."]—A ship in dock was unloading by means of an hydraulic crane standing on the quay. Employment on the ship at the end of the chain worked by the crane was held to be employment on, or in, or about a "factory," because the crane was machinery or plant used for the purpose of unloading the ship to the quay.—*WOODHAM v. ATLANTIC TRANSPORT CO.*, [1899] 1 Q. B. 15; 68 L. J. Q. B. 17; 79 L. T. 395; 47 W. R. 105; 15 T. L. R. 51; 43 Sol. Jo. 60; 1 W. C. C. 52, C. A.

Annotations:—*Follá. Lawson v. Atlantic Transport Co.* (1900), 82 L. T. 77. *Reid. Flowers v. Chambers*, [1899] 2 Q. B. 142; *Hennessey v. McCabe* (1899), 81 L. T. 575.

128. ———.]—A workman was employed in unloading bags from a ship in dock to the quay; his work was, with another man, to make up sets of bags in the hold which were laid across a rope strop. When a set was made up the strop was fastened to the hook of the runner of a crane which stood upon the quay & was hoisted from the hold to the quay. While he was making up a set a bag fell on him from behind & he was killed. The runner of the crane was not at that time on the ship at all, but was ashore:—*Held*: the workman was being employed on, in, or about machinery which was being used in the process of unloading to a quay, & therefore on, in, or about a "factory" within the meaning of Workmen's Comp. Act, 1897 (c. 37), s. 7.—*LAWSON v. ATLANTIC TRANSPORT CO.* (1900), 82 L. T. 77; 16 T. L. R. 181; 2 W. C. C. 53, C. A.

129. ———.]—(1) A workman employed in loading or unloading a ship lying in a dock is

employed on, or in, or about a factory within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1).

(2) The Act speaks of a dock in general terms without reference to whether it is wet or dry (STIRLING, L.J.).—*CATTERMOLE v. ATLANTIC TRANSPORT CO.*, [1902] 1 K. B. 204; 71 L. J. K. B. 173; 85 L. T. 513; 66 J. P. 4; 50 W. R. 129; 18 T. L. R. 102; 46 Sol. Jo. 83; 4 W. C. C. 28, C. A.

Annotations:—*As to* (1) *Reid. Burdon v. Gregson* (1906), 95 L. T. 45. *Generally, Mentd. Cribb v. Kynoch* (No. 2), [1908] 2 K. B. 551.

130. ———.]—The addition of the words "harbour or canal" in the definition of "factory" contained in 1901 Act, s. 104 (1), which re-enacts Factory Act, 1895 (c. 37), s. 23, is a "modification" of the provisions of the repealed Act of 1895, within Interpretation Act, 1889 (c. 63), s. 38 (1); & therefore in the definition of "factory" in Workmen's Comp. Act, 1897 (c. 37), s. 7 (2), the reference to the Factory & Workshop Act, 1895 (c. 37), must now be construed as a reference to 1901 Act, s. 104. Machinery used in the process of unloading a ship in a "harbour," which term includes a navigable river, is therefore a "factory" within Workmen's Comp. Act, 1897 (c. 37).—*STEVENS v. GENERAL STEAM NAVIGATION CO.*, [1903] 1 K. B. 890; 72 L. J. K. B. 417; 88 L. T. 542; 67 J. P. 415; 51 W. R. 578; 19 T. L. R. 418; 47 Sol. Jo. 469; 5 W. C. C. 95, C. A.

131. ——— What constitutes—Staging round ship.]—Nor was the staging outside the ship machinery or plant used in the process of loading or unloading to or from a dock (A. L. SMITH, L.J.).—*DURRIE v. WARREN & CO.* (1899), 15 T. L. R. 365; 1 W. C. C. 78, C. A.

Annotation:—*Reid. Hennessey v. McCabe*, [1900] 1 Q. B. 491.

132. ——— Movable doors in ship's side.]—Iron gangway doors in the side of a ship through which cargo is taken & discharged are not plant used in the process of loading or unloading.—*MEDD v. MACIVER* (1899), 15 T. L. R. 364; 1 W. C. C. 76, C. A.

133. ——— Steam-winch on deck.]—A stevedore's labourer sustained injury by an accident while employed on board a steamer lying in dock in loading cargo on to the steamer from a lighter lying alongside; the cargo was lifted out of the lighter & lowered into the hold by means of a steam-winch on the ship's deck:—*Held*: the steam-winch was not a factory, it not being machinery used in the process of loading from a dock, wharf, quay or warehouse within Factory & Workshop Act, 1895 (c. 37), s. 23, & the workman was not entitled to compensation under Workmen's Comp. Act, 1897 (c. 37).—*HENNESSEY v. MCCABE*, [1900] 1 Q. B. 491; 69 L. J. Q. B. 173; 81 L. T. 575; 64 J. P. 4; 48 W. R. 231; 16 T. L. R. 77; 2 W. C. C. 80, C. A.

Annotations:—*Reid. Haddock v. Humphreys* (1900), 48 W. R. 292; *Spencer v. Livett, Frank*, [1900] 1 Q. B. 498; *Burdon v. Gregson* (1906), 95 L. T. 45.

134. "Process of loading"—When completed—Hatchway secured.]—*LYSONS v. KNOWLES (ANDREW) & SONS, LTD., STUART v. NIXON & BRUCE*, No. 118, ante.

PART IV. SECT. 2, SUB-SECT. 1.—C.

1271. For loading or unloading ship—Employment in "factory."]—A shipowner was unloading a vessel at a

quay, by means of a steam winch derrick on board the vessel. In the course of unloading a workman employed by the shipowner fell from a ladder in the ship & was killed:—

Held: when the accident happened, the workman was employed on, or in, or about a "factory."—*REID v. THE ANCHOR LINE* (1903), 5 F. (Ct. of Sess.) 435.—SCOT.

D. Regulations for Securing Safety.

135. 1901 Act, s. 79—Powers of Secretary of State.]—The Secretary of State has power under above sect. of above Act to impose duties, either positive or negative, upon any person upon whom it may be necessary to impose such duties in order to make the regulations made under the Act reasonably practicable for the purpose of securing the safety of persons engaged in work certified to be dangerous; & therefore regulations purporting to impose upon the owner of a ship lying at a wharf or quay for the purpose of unloading the duty of having a gangway from the ship to the shore for the use of the persons employed are not *ultra vires*.—*MACKAY v. MONKS (PRESTON)*, [1918] A. C. 59; 87 L. J. P. C. 28; 118 L. T. 65; 82 J. P. 105; 34 T. L. R. 34, H. L.

136. ——— Order of 1904, reg. 6—Duty of shipowner.]—Pltf., a dock labourer in the employment of defts., a firm of stevedores, was, with other servants of defts., working on the loading of a ship in a dock. During the loading defts.' servants so blocked up the iron hold ladders that they could not be used, & in consequence some of them obtained from the ship a rope ladder which was fastened at the top to the coamings of the hatch & swung loose some feet from the bottom of the hold. Pltf. was going up this ladder when it swung & caught his hand between the ladder & the coamings, & in trying to free himself he fell to the bottom of the hold & was seriously injured. There was evidence that after the rope ladder had been supplied pltf. complained to defts.' foreman that the ladder was unsafe, & that one of defts. himself came & saw the ladder in use & did not interfere. Pltf. based his claim on the ground that defts. were guilty of statutory negligence under Order of 1904, Part II., reg. 6, under 1901 Act, s. 79, & on common law negligence:—*Held*: when once it was ascertained that the original safe mode of access had gone, that another one of obvious danger had been substituted, & that defts. had seen the obviously dangerous substitute & did not interfere, it followed that defts. were negligent, & were therefore responsible to pltf. for the accident.

The statutory duty under Order of 1904, reg. 6, of maintaining safe means of access by ladder or steps from the deck to the hold in which work is being done is imposed on the shipowner & not on the stevedore (*LORD STERNDALÉ, M.R.*).—*MONAGHAN v. RHODES (W. H.) & SON*, [1920] 1 K. B. 487; 89 L. J. K. B. 379; 122 L. T. 537, C. A.

Annotations:—*Reid. Abbott v. Isham* (1920), 90 L. J. K. B. 309; *Baker v. James*, [1921] 2 K. B. 674.

137. Uncovered hatchway — Regulations for Docks, 1904, reg. 19.]—Resps., who were stevedores, were employed to unload the cargo from a ship in dock, & while unloading the grain from No. 2 hold was proceeding, the hatch covers were left off No. 3 hold, & the hatchway was left unprotected. No. 3 hold contained bunker coals & not cargo, & the unloading of the cargo did not involve resps.' using No. 3 hold or its hatchway. Resps. were summoned for failing to fence or cover the No. 3 bunker hatchway, as required by

above reg., made under 1901 Act, ss. 79, 104. No. 3 hold & hatchway were under the control of the owners, master, & crew, & not of resps., & while the unloading was proceeding at No. 2 hold the crew were removing bunker coal from No. 3 hold. The justices found that the hatch covers of No. 3 hold were removed by the crew, & on the ground that the regulations made each employer responsible only for the protection of the hatchways where he had been employed to carry out work, they dismissed the summons:—*Held*: the words of reg. 19, read in connection with the other regs., only referred to a case where there was more than one hatchway within the sphere of the activity of the person carrying out the work or of his employees, & therefore the justices were right.—*OWNER v. KING (C. J.) & SONS, LTD.* (1922), 128 L. T. 307; 86 J. P. 218; 39 T. L. R. 22; 67 Sol. Jo. 97; 20 L. G. R. 791; 16 Asp. M. L. C. 107.

.]—Pltf.'s son, who was a joiner's labourer, was working on a steamship in dock at a time when the physical task of lifting the cargo had been suspended, but when the process of unloading was not yet completed, & in going to fetch an article for a blacksmith employed by defts., the owners of the ship, he was killed by falling down an unfenced hatchway, which was not being used, & which, by above reg., made under 1901 Act, ought to have been fenced by the owners when the ship was being loaded or unloaded. In an action by pltf. under the Fatal Accidents Act, 1846 (c. 93), for the loss of her son:—*Held*: as pltf.'s son was not employed on unloading the vessel & therefore there was no breach of duty towards him since he was not employed in any of the processes mentioned in above regs., & as the unloading, though not finished, had so completely stopped that it could not be said to be still going on within the meaning of above reg., the action failed.—*HOWLETT v. SHAW SAVILL & ALBION CO., LTD.* (1924), 40 T. L. R. 778, C. A.

SUB-SECT. 2.—WAREHOUSES.

See 1901 Act, s. 104.

139. What constitutes "warehouse"—Within Workmen's Compensation Acts—Contiguity to water or docks.]—*WILLMOTT v. PATON*, No. 1, ante.

140. ——— Store attached to retail business.]—The term "factory" was described by Factory & Workshop Act, 1901. Taking the widest description given in the Act—namely, that in sect. 149 (1) (c)—the question was whether the case came within it. . . . The judge had come to the conclusion that appct. was not at the time of the accident employed on, in, or about a factory. Unless they could say as a matter of law that the particular point in the corridor where appct. was injured was "about" a factory, the decision could not be disturbed. . . . It was then said that the block in Westbourne Grove was a "warehouse"

PART IV. SECT. 2, SUB-SECT. 1.—D.

135 i. 1901 Act, s. 79—Powers of Secretary of State—To whom regulations apply.]—Regulations of Oct. 24, 1904, Part II., s. 4 (made by the Secretary of State under Factory & Workshop Act, 1901, s. 79), contains a regulation

as to the use of a gangway when a ship is lying at a quay:—*Held*: this regulation applied only in the case of persons employed in loading, unloading, or coaling the vessel, & did not affect the liability at Common Law of the shipowner to third parties.—*O'BRIEN v. ENRICO ARBIB & Co.*, [1907] S. C.

975; 44 Sc. L. R. 686; 15 S. L. T. 78.—SCOT.

PART IV. SECT. 2, SUB-SECT. 2.

m. What constitutes "warehouse"—Within Workmen's Compensation Acts—Store attached to retail business.]

Sect. 2.—Employment in or about docks, building operations, railways, etc.: Sub-sects. 2, 3 & 4.]

within Workmen's Comp. Act, 1897 (c. 37), s. 7. Unless appct. could show as a matter of law that the particular stores, used & situated as they were, necessarily constituted a warehouse, he could not succeed. . . . The judge said he regarded the storage as merely ancillary to the retail business carried on in that part of the premises (COLLINS, M.R.).—**BURR v. WHITELEY (WILLIAM), LTD.** (1902), 19 T. L. R. 117; 5 W. C. C. 102.

Annotations:—*Reid*. Green v. Britten & Gilson, [1904] 1 K. B. 350; Moreton v. Reeve, [1907] 2 K. B. 401.

—.]—There is no absolute rule of law that a store attached to a retail business cannot be a warehouse within Workmen's Comp. Act, 1897 (c. 37), s. 7 (2).—**MORETON v. REEVE**, [1907] 2 K. B. 401; 76 L. J. K. B. 850; 97 L. T. 63; 11 W. C. C. 72, C. A.

142. ——— Store attached to wholesale business.]—A place used in connection with, or as ancillary to, a wholesale business, for the storage of goods in large quantities to be sold in the business, is a warehouse within Workmen's Comp. Act, 1897 (c. 37), s. 7 (2).—**GREEN v. BRITTEN & GILSON**, [1904] 1 K. B. 350; 73 L. J. K. B. 126; 89 L. T. 713; 68 J. P. 139; 52 W. R. 198; 20 T. L. R. 116; 48 Sol. Jo. 177; 11 W. C. C. 82, C. A.

Annotations:—*Expld.* Moreton v. Reeve, [1907] 2 K. B. 401. *Reid*. Adams v. G. W. Ry. (1903), 6 W. C. C. 87; Carter v. Shipway (1906), 8 W. C. C. 37; Doswell v. Cowell (1906), 95 L. T. 38.

143. ——— Not dumping ground for waste material.]—Resps. were the owners of a yard which was open to the sky where they chiefly kept stacks of old wood paving & stacks of old scrap iron. There was also a blacksmith's forge & shop, & some stables in the yard, & the yard was also used by resps.' servants for the purpose of sharpening picks, facing hammers, & repairing & painting carts. Resps. sometimes sold the old wood paving to dealers as fire wood. A workman in the employment of resps. was injured by an accident while shifting scrap iron in the yard. In proceedings to assess compensation, under Workmen's Comp. Act, 1897 (c. 37), the county ct. judge found that the yard was a general dumping ground for waste & other materials, & was not a "warehouse" within the definition of "factory" in Workmen's Comp. Act, 1897 (c. 37), s. 7 (2):—*Held*: the county ct. judge was justified in so finding, a mere dumping ground being outside anything which could be called a warehouse.—**BUCKINGHAM v. FULHAM CORPN.** (1905), 69 J. P. 297; 53 W. R. 628; 21 T. L. R. 511; 49 Sol. Jo. 515; 3 L. G. R. 926; 7 W. C. C. 79, C. A.

144. ——— Whether necessity for roof.]—**MIDDLETON v. WADE & SON** (1905), cited in 53 W. R. at p. 629, C. A.

Annotation:—*Consd.* Buckingham v. Fulham B. C. (1905), 69 J. P. 297.

See, now, Workmen's Comp. Act, 1906 (c. 58); &, generally, **MASTER & SERVANT**.

145. "Actual use or occupation"—Contractors occupation limited—To purposes of work required.]

A warehouse used in connection with a retail business is a "warehouse" within Workmen's Compensation Act, R. S. 1920, c. 210, s. 3 (5), defining "factory." The distinction made in certain cases by English decisions between such a warehouse & a ware-

house used in connection with a wholesale business is not applicable to said Act.—**WEISBROT v. REINHORN**, [1921] 2 W. W. R. 510; 14 Sask. L. R. 265; 59 D. L. R. 558.—**CAN.**

n. ——— ———.]—**COLVINE v.**

—*Resps.* contracted with the Govt. to erect certain pigeon-holes upon the upper floor of a warehouse which had just been built within the precincts of Woolwich Dockyard by other contractors. A workman who, with other men, was employed by resps. upon that work, was killed by an accident arising out of & in the course of his employment. At the time when the accident happened the lower floor of the warehouse was already used by the Govt. for the storage of military accoutrements; the foreman & two workmen of the contractor for the building were working on the upper floor; & the Govt. by their own men were fixing hydraulic cranes at each end of the upper floor. The Govt. clerk of the works was in charge of the work to see that the men did their duty, & that the contractors complied with the specifications. The warehouse was locked & unlocked by the person in charge of the dockyard, & the keys were kept by the man at the gates. Upon a claim by the wife of the deceased man for compensation:—*Held*: resps. had the actual use or occupation of the warehouse so far as was necessary to enable them to execute the work they had contracted to do, & they were therefore occupiers of a factory within 1901 Act, s. 104; & consequently "undertakers" within Workmen's Comp. Act, 1897 (c. 37), s. 7 (2).—**WEAVINGS v. KIRK & RANDALL**, [1904] 1 K. B. 213; 73 L. J. K. B. 77; 89 L. T. 577; 68 J. P. 91; 52 W. R. 209; 20 T. L. R. 152; 6 W. C. C. 95, C. A.

Annotation:—*Reid*. Burdon v. Gregson (1906), 95 L. T. 45.

Compare Nos. 117–126, ante.

SUB-SECT. 3.—WHARVES.

See 1901 Act, s. 104.

146. Whether a factory—Under Workmen's Compensation Acts—No machinery used.]—A wharf at the side of a canal, on which no machinery is used, is not a factory within Workmen's Comp. Act, 1897 (c. 37), s. 7, unless it is a wharf to which some provision of the Factory Acts is applied by the Factory & Workshop Act, 1895 (c. 37).—**HALL v. SNOWDEN, HUBBARD & CO.**, [1899] 2 Q. B. 136; 68 L. J. Q. B. 645; 80 L. T. 554; 47 W. R. 486; 15 T. L. R. 326; 1 W. C. C. 73, C. A.

Annotations:—*N.F.* Barrett v. Kemp, [1904] 1 K. B. 517. *Reid*. Hennessy v. McCabe (1899), 69 L. J. Q. B. 173.

147. ———.]—Every wharf is a factory within Workmen's Comp. Act, 1897 (c. 37), whether any provision of the Factory Acts is applied to it or not.—**BARRETT v. KEMP BROTHERS**, [1904] 1 K. B. 517; 73 L. J. K. B. 138; 90 L. T. 305; 68 J. P. 196; 52 W. R. 257; 20 T. L. R. 162; 48 Sol. Jo. 176; 6 W. C. C. 78, C. A.

Annotation:—*Apld.* Pacific Steam Navigation Co. v. Pugh (1907), 23 T. L. R. 622.

148. What is a wharf—Timber yard—Distant from water.]—For the purpose of unloading timber from timber-ships a dock board provided quay or wharf space running inland for 150 yards from the water's edge; at the further end of this space was a fence with gates at intervals, behind which

ANDERSON & GIBB (1902), 5 F. (Ct. of Sess.) 255.—**SCOT.**

o. ——— Yard used for storing materials—For road repairs.]—**M'EWAN v. PERTH MAGISTRATES** (1905), 7 F. (Ct. of Sess.) 714.—**SCOT.**

came a series of yards leased by the dock board to different timber merchants for storing their timber, the whole being the property of the dock board, & separated by a wall from the surrounding property. A workman employed by a firm of carters was killed while moving a log of timber in one of the yards leased to a firm of timber merchants:—*Held*: (1) the word "wharf" as used in Factory & Workshop Act, 1895 (c. 37), s. 23, & Workmen's Comp. Act, 1897 (c. 37), s. 7 (2), must be construed in its ordinary & popular signification of a place contiguous to water over which goods pass in the process of loading & unloading; (2) the yard where the accident happened was not a wharf within those sects., & the employment of deceased was therefore not one to which the Workmen's Comp. Act, 1897 (c. 37), applied.—*HADDOCK v. HUMPHREY*, [1900] 1 Q. B. 609; 69 L. J. Q. B. 327; 82 L. T. 72; 64 J. P. 86; 48 W. R. 292; 16 T. L. R. 143; 2 W. C. O. 77, C. A.

Annotations:—*As to* (1) *Reid*. *Moreton v. Reeve* (1907), 97 L. T. 63. *As to* (2) *Distd.* *Kenny v. Harrison*, [1902] 2 K. B. 168.

149. ————.]—An accident happened in Oct. 1900, to a workman, while engaged in removing timber from a stack upon a piece of land, which was within the ambit of a system of docks belonging to a railway co. & which had been let by the co. to timber merchants, for the storage of timber. This piece of land was about forty yards from the water of a dock. Between it & the water ran the lines of a dock railway or tramway, but it was not separated from the adjoining wharf or quay space by any fence or other such physical barrier. Timber had sometimes been landed from the dock, & brought to the piece of land, but during the year 1900 all the timber stacked thereon had been landed from other docks forming part of the dock system more or less remote, & brought to the piece of land by rail. On a claim by the workman for compensation under the Workmen's Comp. Act, 1897 (c. 37), the county ct. judge found as a fact that the place where the accident happened was a factory as being a dock, wharf or quay within Workmen's Comp. Act, 1897 (c. 37), s. 7 (2):—*Held*: there was evidence to support his finding, & therefore the ct. were bound by it.—*KENNY v. HARRISON*, [1902] 2 K. B. 168; 71 L. J. K. B. 783; 87 L. T. 318; 4 W. C. O. 60, C. A.

150. ———— Moored structure in river—Not connected with shore.]—A structure moored in a river at some distance from, & not connected with, the shore, which was used for the purpose of discharging coal from ships into barges:—*Held*: to be a "wharf" within Factory & Workshop Act, 1895 (c. 37), s. 23, (1), & therefore a "factory" within Workmen's Comp. Act, 1897 (c. 37), s. 7 (2).—*ELLIS v. CORY & SON, LTD.*, [1902] 1 K. B. 38; 71 L. J. K. B. 72; 85 L. T. 499; 66 J. P. 116; 50 W. R. 181; 18 T. L. R. 28; 46 Sol. Jo. 67; 4 W. C. O. 62, C. A.

151. ———— Pontoon.]—Appct., a seaman employed on a steamship as a fireman, was injured by accident while attending to the boilers. At the time of the accident the ship was made fast by ropes to a pontoon & gangways were out, connecting the pontoon with the ship, for the purpose of embarking passengers. In proceedings under

Workmen's Comp. Act, 1897 (c. 37):—*Held*: the employment of appct. had no connection with the purpose for which his employers had the use of the pontoon, & therefore, he was not employed "about" a wharf, & consequently not "about" a "factory" within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1).—*OWENS v. CAMPBELL, LTD.*, [1904] 2 K. B. 60; 73 L. J. K. B. 634; 90 L. T. 811; 68 J. P. 410; 52 W. R. 481; 20 T. L. R. 459; 48 Sol. Jo. 456; 6 W. C. O. 54, C. A.

Annotation:—*Consd.* *Houlder Line v. Griffin*, [1905] A. C. 220.

See, now, Workmen's Comp. Act, 1906 (c. 58); &, generally, MASTER & SERVANT.

SUB-SECT. 4.—BUILDING OPERATIONS.

NOTE.—Cases decided under Workmen's Compensation Act, 1897 (c. 37) (repealed) are inserted as interpreting similar provisions under the Factory Acts.

See 1901 Act, s. 105.

152. "Building"—Temporary wooden platform—For steam crane.]—A temporary wooden structure of a substantial nature, such as a platform of sixty-two feet in height for a steam crane, to be used in the construction of a building may be a building within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1).—*AYLWARD v. MATTHEWS*, [1905] 1 K. B. 343; 92 L. T. 189; 53 W. R. 292; 21 T. L. R. 196; 49 Sol. Jo. 221; 7 W. C. O. 49, C. A.

153. "Mechanical power"—Steam engine driving mortar pan.]—A workman was employed in a shed to look after a steam engine connected with a mortar pan for mixing mortar for use on a building near at hand. While so employed he sustained personal injuries through an accident:—*Held*: as the engine was being temporarily used for the purpose of the construction of a building, the provisions mentioned in Factory & Workshop Act, 1895 (c. 37), s. 23, had effect as if the shed were a factory; so that a provision of the Act, namely s. 4 relating to the power to make an order as to a dangerous machine used in a factory, applied to the engine, which therefore came within the definition of a factory in Workmen's Comp. Act, 1897 (c. 37), s. 7, & compensation could be claimed under that sect.—*McNICHOLAS v. DAWSON & SON*, [1899] 1 Q. B. 773; 68 L. J. Q. B. 470; 80 L. T. 317; 47 W. R. 500; 15 T. L. R. 242; 43 Sol. Jo. 212; 1 W. C. O. 80, C. A.

Annotations:—*Consd.* *Fenn v. Miller*, [1900] 1 Q. B. 788. *Reid*. *Hennessey v. McCabe* (1899), 69 L. J. Q. B. 173; *Rees v. Thomas* (1899), 68 L. J. Q. B. 539; *Pomfret v. L. & Y. Ry.* (1903), 89 L. T. 176; *Upton v. G. C. Ry.*, [1924] A. C. 302.

154. "Exceeding thirty feet in height"—Date at which ascertained—Time of accident—Building not completed.]—Where an accident happens to a workman employed on, in, or about a building in the course of construction which, although intended when completed to exceed thirty feet in height, does not at the time of the accident exceed that height the Workmen's Comp. Act, 1897 (c. 37), does not apply.—*BILLINGS v. HOLLOWAY*, [1899] 1 Q. B. 70; 68 L. J. Q. B. 16; 79 L. T. 396; 47

PART IV. SECT. 2, SUB-SECT. 4.
p. "Repair"—What is—Whether painting interior of building.]—The word "repair" in Workmen's Com-

pensation Act, 1897, s. 7 (1), may include painting, white washing, & dubbing the ceiling & walls of the interior of a building, where the

painting & white washing is portion of the work necessary to finish the building.—*REDDY v. BRODERICK*, [1901] 2 I. R. 328.—IR.

Sect. 2.—Employment in or about docks, building operations, railways, etc.: Sub-sect. 4.]

W. R. 105; 15 T. L. R. 53; 43 Sol. Jo. 60; 1 W. C. C. 59, C. A.

Annotations:—*Consd.* Hoddinott v. Newton, Chambers, [1901] A. C. 49. *Foll.* McGrath v. Neill, [1902] 1 K. B. 211. *Refd.* Knight v. Cubitt, [1902] 1 K. B. 31.

155. ——— ——— ——— ———.]—McGRATH v. NEILL & SONS, No. 158, post.

156. ——— How ascertained—Contiguous buildings of greater & lesser height—Used for same purpose.]—Internal communication between a building over thirty feet high & an adjoining building less than that height, coupled with the fact that the same business is carried on in both buildings, is not evidence to justify a finding that the lower building is a part of the higher & that a workman injured while engaged in demolishing the lower building is employed on the demolition of a building exceeding thirty feet in height within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1).

All that had happened was that a connection had been made internally between the two buildings, but this does not make the lesser a part of the greater. The mere fact that the public house business was carried on in both buildings does not make them both thirty feet high (*A. L. SMITH, L.J.*).—*RIXSOM v. PRITCHARD & RENWICK*, [1900] 1 Q. B. 800; 69 L. J. Q. B. 494; 82 L. T. 186; 16 T. L. R. 250; 2 W. C. C. 65, C. A.

Annotation:—*Consd.* Hartley v. Quick, [1905] 1 K. B. 359.

157. ——— ——— Measurement from ground to roof.]—Was the height of this building to be measured from the ground to the top of the upright walls, or to the top of the roof? It is not necessary to say whether the height of the building below the ground level can be taken into consideration, for in this case the building was admittedly more than thirty feet high from the ground up to the ridge of the roof, to which point, I think, the measurement should be taken (*A. L. SMITH, L.J.*).—*HODDINOTT v. NEWTON, CHAMBERS & CO.*, [1899] 1 Q. B. 1018; 68 L. J. Q. B. 495; 80 L. T. 559; 47 W. R. 499; 15 T. L. R. 299; 43 Sol. Jo. 397; 1 W. C. C. 62, C. A.; *on appeal*, [1901] A. C. 49, H. L.

Annotations:—*Refd.* Mason v. Dean (1900), 82 L. T. 139. *Mentd.* Maude v. Brook, [1900] 1 Q. B. 575; Dredge v. Conway, Jones, [1901] 2 K. B. 42; Ferguson v. Green, [1901] 1 K. B. 25; Cooper & Crann v. Wright, [1902] A. C. 302; McGrath v. Neill, [1902] 1 K. B. 211; Marshall v. Rudeforth (1902), 71 L. J. K. B. 781; Veazey v. Chattle, [1902] 1 K. B. 494; Elvin v. Woodward, [1903] 1 K. B. 838; Fenton v. Thorley, [1903] A. C. 443; Crowther v. West Riding Window Cleaning Co., [1904] 1 K. B. 232; O'Brien v. Dobbie, [1905] 1 K. B. 346; Bagnall v. Levinstein, [1907] 1 K. B. 531.

158. ——— ——— Whether from top or bottom of footings.]—On an application for compensation under Workmen's Comp. Act, 1897 (c. 37), it was proved that appct. was injured in the course of his employment on a building which, whether measured from the bottom or from the top of the footings, was more than thirty feet in height. There was evidence that, at the time of the accident, the footings had been filled in, & that the building had not reached the stage at which more than the footings had been covered in. The county ct. judge took the lowest part of the footings as the point from which to estimate the height of the building, & made an award in favour of appct.:—*Held*: the height of the building to be determined was the height at the time of the accident, & there being no evidence that at the time anything more than the footings had

been covered in, the height of the building might have been taken from the top of the footings, & as the height so measured exceeded thirty feet, the award must be upheld.—*McGRATH v. NEILL & SONS*, [1902] 1 K. B. 211; 71 L. J. K. B. 58; 66 J. P. 180; 18 T. L. R. 36; 46 Sol. Jo. 48; 4 W. C. C. 47, C. A.

159. ——— Demolition below thirty feet—Party wall over thirty feet left standing.]—A firm of builders entered into a contract with the owner of two adjoining houses in a street, numbered respectively 16 & 17, for the demolition of No. 17 & the erection of a new building on the site of it, & for alterations & repairs to No. 16. The firm habitually entered into contracts for the demolition of buildings & the erection of new buildings on their sites. It was, however, their practice not to execute the work of demolition themselves, but to sub-contract for that work with another person, which they accordingly did with regard to the house No. 17. The two houses respectively, & the party wall common to both, were of a height exceeding thirty feet. An accident happened to a workman employed by the sub-contractor in the demolition of No. 17 in the course of his employment, which caused his death. At the time of the accident No. 17 had been reduced to a height of about eleven feet, excepting the party wall, which was not to be pulled down, & remained standing. On a claim by the workman's widow for compensation for herself & children as dependants on the deceased under the Workmen's Comp. Act, 1897 (c. 37), the county ct. judge found that the workman was employed in the demolition of a building which at the time of the accident exceeded thirty feet in height, & that the builders were liable to make compensation to his dependants under Workmen's Comp. Act, 1897 (c. 37), s. 4:—*Held*: there was evidence to support the county ct. judge's finding as above mentioned; the builders were "undertakers" of the work of demolition within the meaning of the Workmen's Comp. Act, 1897 (c. 37), s. 7 (2); that work was not merely ancillary to their business; & therefore they were liable under Workmen's Comp. Act, 1897 (c. 37), s. 4.—*KNIGHT v. CUBITT & CO.*, [1902] 1 K. B. 31; 71 L. J. K. B. 65; 85 L. T. 526; 66 J. P. 52; 50 W. R. 113; 18 T. L. R. 26; 46 Sol. Jo. 49; 4 W. C. C. 42, C. A.

Annotations:—*Consd.* Bush v. Hawes, [1902] 1 K. B. 216; Hartley v. Quick, [1905] 1 K. B. 359. *Refd.* Wagstaff v. Perks, Firth, Third Party (1902), 87 L. T. 558.

160. ——— Extension of building over thirty feet—Accident before thirty feet reached.]—The employer of a workman entered into a contract for the construction of a building by way of addition to an existing building, which exceeded thirty feet in height. The new building, when completed, was to form one building with the existing building, to be used as a station for generating electric power; & for that purpose it was intended that the walls of the new building should be built into the end wall of the existing building, & that alterations should be made in that building. At the time when the accident happened, the new building was being constructed by means of a scaffolding, but no part of it had reached the height of thirty feet. Its walls had not been connected with that of the old building, but some of the footing for the walls were in actual contact with that building. The workman, while engaged in the building operations of the new building, sustained injuries from an accident arising out of & in the course of his employment, in respect of

which he claimed compensation under the Workmen's Comp. Act, 1897 (c. 37):—*Held*: the case being one of a new building by way of an extension of the old building, which involved alteration of that building, the workman might be regarded as having been employed about a building which exceeded thirty feet in height, & therefore, was entitled to compensation.—*HARTLEY v. QUICK*, [1905] 1 K. B. 359; 74 L. J. K. B. 257; 92 L. T. 191; 21 T. L. R. 207; 7 W. C. C. 51, C. A.

161. "Construction" — Operation included under—Building altered after completion.]—(1) Workmen's Comp. Act, 1897 (c. 37), s. 7 (1), applies only (*inter alia*) to employment on, in, or about any building which exceeds thirty feet in height, "& is being constructed or repaired by means of scaffolding." These words do not confine the employment to the construction or repair of the building as a whole. "Construction" here includes a case where the building has been constructed & believed to be complete, but having been afterwards thought to be faulty & unstable is being strengthened by the addition of stays & supports.

The question, after all, must be what is construction & what is repair in this Act of Parliament. I do not think that "construction" can be limited to the original construction. That would be in effect substituting "erection" for "construction." Nor do I think that "construction" & "repair" can be limited to the construction & repair of a building "as a whole." It seems to me that whenever new material is put into a building so that it becomes an integral part of the structure, you have something in the nature of construction, & that a building which is being so treated is being constructed within the Act. Now if this be "construction" it cannot matter in the least whether the work is taken in hand immediately after the erection of the building, or not commenced until months or even years later. What has to be looked to is the thing done, not the motive for doing it, or the relative dates of the erection of the building & its subsequent alteration. Construction, repair, demolition, these three operations cover every phase in the life of a building (LORD MACNAGHTEN).

(2) "Scaffolding" may be external or internal & includes an internal staging arranged with planks & trestles & without poles.

(3) The question whether a temporary staging is a scaffolding within the Act, is not a mere question of fact on which the finding of the county ct. judge is final. It is a mixed question of fact & law. When the facts are ascertained it is a question of law on which the Ct. of Appeal is, I think, bound to express an opinion (LORD MACNAGHTEN).—*HODDINOTT v. NEWTON, CHAMBERS & Co.*, [1901] A. C. 49; 70 L. J. Q. B. 150; 84 L. T. 1; 49 W. R. 380; 17 T. L. R. 134; 45 Sol. Jo. 115; 3 W. C. C. 74, H. L.; *reversg.*, [1899] 1 Q. B. 1018, C. A.

Annotations:—*As to* (1) *Appl.* *Dredge v. Conway, Jones*, [1901] 2 K. B. 42. *Consd.* *Vcazey v. Chattle*, [1902] 1 K. B. 494. *Refd.* *McGrath v. Neill*, [1902] 1 K. B. 211. *As to* (2) *Consd.* *Maude v. Brook*, [1900] 1 Q. B. 575; *Marshall v. Rudeforth* (1902), 71 L. J. K. B. 781. *As to* (3) *Consd.* *Elvin v. Woodward*, [1903] 1 K. B. 838. *Refd.* *Ferguson v. Green*, [1901] 1 K. B. 25; *Fenton v. Thorley*, [1903] A. C. 443; *Crowther v. West Riding Window Cleaning Co.*, [1904] 1 K. B. 232; *O'Brien v. Dobbie*, [1905] 1 K. B. 346; *Bagnal v. Levinstein*, [1907] 1 K. B. 531. *Generally, Mentd.* *Cooper & Crane v. Wright*, [1902] A. C. 302.

162. — — — Whether decorative work.]—The facts are simple. A firm had contracted to

build a theatre. In the contract there was a provision that as regards part of the work, the building owner might, if he pleased, take it out of their hands & give it to somebody else; this was done, & the work, which has been called decorative work, was put in the hands of resps., who contracted separately with the owner for it. While resps. were carrying out this work, applt.'s husband a workman in their employment, met with his death through an accident to the scaffold board on which he was standing. It is to be remarked that at the time of the accident the theatre was not a completed building. The work which resps. contracted to do was work done to the building while in course of construction, & was necessary to make it a completed building as regards construction. They had to supply & fix a moulded ceiling of considerable weight, to provide & fix columns & caps for the private boxes, arches for the stalls & such like matters. Under the contract there was also decoration pure & simple which resps. had to execute, but it is not necessary for us to say whether decoration comes within the meaning of construction, for there is ample evidence to show that resps. had to perform matters of construction under their contract (*A. L. SMITH, L.J.*).—*MASON v. DEAN (A. R.), LTD.*, [1900] 1 Q. B. 770; 69 L. J. Q. B. 358; 82 L. T. 139; 64 J. P. 244; 48 W. R. 353; 16 T. L. R. 212; 2 W. C. C. 91, C. A.

Annotations:—*Consd.* *Cass v. Butler*, [1900] 1 Q. B. 777; *Cooper & Crane v. Wright*, [1902] A. C. 302; *Wagstaff v. Perks, Firth, Third Party* (1902), 87 L. T. 558. *Refd.* *Stead v. Moore* (1900), 2 W. C. C. 96; *Fletcher v. Hawley* (1905), 21 T. L. R. 191.

163. — — — When completed—After scaffolding removed—Though in use before.]—A building constructed by means of a scaffolding is "being constructed" within Workmen's Comp. Act, 1897 (c. 37), s. 7, until the scaffolding has been taken down. A builder erected a scaffolding for the purpose of raising building materials from a lower level to the higher level on which stood the building which he was constructing. After the building was complete & while it was in actual use a workman was injured as he was removing gear from this scaffolding:—*Held*: the workman was employed on a building which was "being constructed" by means of a scaffolding, & was entitled to compensation under Workmen's Comp. Act, 1897 (c. 37).—*FRID v. FENTON* (1900), 69 L. J. Q. B. 436; 82 L. T. 193; 16 T. L. R. 267; 44 Sol. Jo. 312; 2 W. C. C. 66, C. A.

Annotations:—*Appl.* *Plant v. Wright*, [1905] 1 K. B. 353. *Refd.* *McCabe v. Jopling & Palmer's Travelling Cradle*, [1904] 1 K. B. 222.

164. — — — After plumbing work measured up.]—The employers of a workman had entered into a sub-contract for the execution by them of the plumbing work included in a contract for the erection of a factory, which exceeded thirty feet in height. It was necessary under the sub-contract that the plumbing work should be measured up when completed. At the time when the accident occurred, the plumbing work had been finished, though not measured up, but the construction of the factory was not complete, & steam pipes were being fitted in it by means of a scaffolding. The workman, while employed in measuring up the plumbing work, sustained injury through an accident arising out of & in the course of that employment, in respect of which he claimed compensation under the Workmen's Comp. Act, 1897 (c. 37):—*Held*: the measuring up of the plumbing work being incidental to part of the work of

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constructing the building, the workmen was entitled to compensation under the Workmen's Comp. Act, 1897 (c. 37), as having been, at the time of the accident, employed by the undertakers on, in, or about a building which exceeded thirty feet in height, & was being constructed by means of a scaffolding, within Workmen's Comp. Act, 1897 (c. 37).—*PLANT v. WRIGHT & Co.*, [1905] 1 K. B. 353; 71 L. J. K. B. 331; 92 L. T. 720; 53 W. R. 358; 21 T. L. R. 217; 7 W. C. C. 63, C. A.

165. "Repair"—What is—Whether painting outside of building.]—By Workmen's Comp. Act, 1897 (c. 37), s. 7 (1), the Act is to apply (*inter alia*) to employment "on, in, or about any building which exceeds thirty feet in height, & is either being constructed or repaired by means of a scaffolding." The outside of a house, more than thirty feet high, was being painted by workmen using ladders for the purpose; one of the men was killed by the breaking of the rung of the ladder on which he was standing. There was a board, one end of which was tied to a rung of one of the ladders, the other end resting on the sill of a window:—*Held*: (1) the house was not being constructed or repaired by means of a scaffolding, & the Act did not apply. (2) Painting the outside of a house is not "repair," nor are ladders "scaffolding" within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1).—*WOOD v. WALSH & SONS*, [1899] 1 Q. B. 1009; 68 L. J. Q. B. 492; 80 L. T. 345; 63 J. P. 212; 47 W. R. 504; 15 T. L. R. 279; 43 Sol. Jo. 350; 1 W. C. C. 68, C. A.

Annotations:—As to (1) *Consd. Mason v. Dean*, [1900] 1 Q. B. 770. *N.F. Dredge v. Conway, Jones*, [1901] 2 K. B. 42. *Overd. Hoddinott v. Newton, Chambers*, [1901] A. C. 49. *Refd. Ferguson v. Green*, [1901] 1 K. B. 25. As to (2) *Consd. Maude v. Brook*, [1900] 1 Q. B. 575; *Veazey v. Chattle*, [1902] 1 K. B. 494. *Refd. Marshall v. Rudeforth* (1902), 71 L. J. K. B. 781. *Generally, Refd. Lyons v. Knowles* (1900), 82 L. T. 189; *Spencer v. Livett* (1900), 80 L. T. 75.

.]—A workman employed in whitewashing a ceiling, in a house exceeding thirty feet in height, fell from a scaffolding on which he was standing, & was killed. In an action by his widow to recover compensation:—*Held*: the employment of deceased was in a building which was being repaired within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1), & that appct. was entitled to an award.

Painting, as one of the operations to which a building is exposed, comes under the head of repair, & if painting, then equally whitewashing (*A. L. SMITH, M.R.*).—*DREDGE v. CONWAY, JONES & Co.*, [1901] 2 K. B. 42; 70 L. J. K. B. 494; 84 L. T. 345; 49 W. R. 518; 17 T. L. R. 355; 3 W. C. C. 104, C. A.

Annotation:—*Refd. McCabe v. Jopling & Palmer's Travelling Cradle*, [1904] 1 K. B. 222.

167. ——— Whitewashing.]—*DREDGE v. CONWAY, JONES & Co.*, No. 166, *ante*.

168. ——— When completed—After scaffolding removed.]—The contractor for the repair of a building over thirty feet in height entered into a sub-contract with another person for the supply & erection of a scaffolding for the purpose of the work & its subsequent removal. A workman in the employ of the sub-contractor, while engaged in the removal of the scaffolding, met with an accident which caused his death. His dependants having recovered compensation under Workmen's

Comp. Act, 1897 (c. 37), s. 4, against the principal contractor:—*Held*: the latter was entitled to indemnify against the sub-contractor under that sect. on the ground that he was the "undertaker" in respect of an essential portion of the work of repair.—*MCCABE v. JOPLING & PALMER'S TRAVELLING CRADLE, LTD.*, [1904] 1 K. B. 222; 73 L. J. K. B. 129; 89 L. T. 624; 68 J. P. 121; 52 W. R. 358; 20 T. L. R. 119; 6 W. C. C. 100, C. A.

Annotation:—*Appld. Plant v. Wright*, [1905] 1 K. B. 353.

Compare No. 163, *ante*.

169. "Scaffolding"—What is—Whether question of fact alone.]—By Workmen's Comp. Act, 1897 (c. 37), s. 7 (1), the Act is to apply (*inter alia*) to employment "on, in, or about any building which exceeds thirty feet in height, & is either being constructed or repaired by means of a scaffolding." A new house more than thirty feet high had been roofed in & the external scaffolding removed. Appct. was engaged in plastering the walls & ceiling in one of the rooms, & in order to reach his work was standing on a structure of trestles with boards on them. While at work in this manner he met with an accident, for which he claimed compensation. An arbitrator appointed by a county ct. judge decided that the structure was not a scaffolding & refused to make an award of compensation, but referred the matter to the county ct. judge, who reversed the decision of the arbitrator & awarded compensation provisionally settled by the arbitrator:—*Held*: the question whether the structure was a scaffolding or not was a question of fact for the arbitrator, & his finding was not open to review.—*FERGUSON v. GREEN*, [1901] 1 K. B. 25; 70 L. J. Q. B. 21; 83 L. T. 461; 64 J. P. 819; 49 W. R. 105; 17 T. L. R. 41; 3 W. C. C. 113; 45 Sol. Jo. 58, C. A. *Annotation*:—*Refd. Hoddinott v. Newton, Chambers*, [1901] A. C. 49.

170. ——— ———.]—*HODDINOTT v. NEWTON, CHAMBERS & Co.*, No. 161, *ante*.

171. ——— Decision of county court judge—How far binding.]—A workman, employed on a building which was under repair & exceeded thirty feet in height fell, from a ladder, on one of the rungs of which he was standing, for the purpose of doing work which was necessary on the building. The ladder had been used on previous occasions & on the same day for a similar purpose. On a claim for compensation the county ct. judge held that the ladder was scaffolding within Workmen's Comp. Act, 1897 (c. 37), & made an award in favour of appct.:—*Held*: (1) there was no legal principle on which a ladder could be excluded from the category of possible scaffolding, & (2) as there was evidence on which the county ct. judge could arrive at his conclusion of fact, the ct. was bound by his finding.—*O'BRIEN v. DOBBIE & SON*, [1905] 1 K. B. 346; 74 L. J. K. B. 268; 92 L. T. 721; 53 W. R. 374; 21 T. L. R. 218; 7 W. C. C. 68, C. A.

Compare No. 161, *ante*.

172. ——— Arrangement of boards & trestles.]—A new house more than thirty feet high had been roofed in & workmen employed by the builder were plastering the walls & ceilings inside the house, for which purpose trestles & boards were being used. One of the men while standing on the floor of the top landing plastering the wall, fell down the well of the staircase, there being no railing, & was killed. At that time other workmen were at work plastering some of the rooms, &

were standing on boards placed across trestles four feet high in order to enable them to reach the ceilings & upper part of the walls. A county ct. judge having awarded compensation to the widow of deceased:—*Held*: there was evidence to justify a finding of the county ct. judge that the arrangement of the trestles & boards was a scaffolding within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1), & that the employment of deceased was therefore one to which the Act applied.—*MAUDE v. BROOK*, [1900] 1 Q. B. 575; 69 L. J. Q. B. 322; 82 L. T. 39; 64 J. P. 181; 48 W. R. 290; 16 T. L. R. 164; 44 Sol. Jo. 209; 2 W. C. C. 69, C. A.

Annotations:—*Appld.* *Ferguson v. Green*, [1901] 1 K. B. 25; *Hoddinott v. Newton, Chambers*, [1901] A. C. 49. *Refd.* *Mason v. Dean* (1900), 82 L. T. 139; *Marshall v. Rudeforth* (1902), 71 L. J. K. B. 781; *Veazey v. Chattle*, [1902] 1 K. B. 494; *Elvin v. Woodward*, [1903] 1 K. B.

173. ————.]—*HODDINOTT v. NEWTON, CHAMBERS & Co.*, No. 161, *ante*.

174. ———— *Whether ladder excluded.*—A workman was injured through an accident while employed on a house exceeding thirty feet in height, which was being repaired by means of a ladder. On a claim for compensation under Workmen's Comp. Act, 1897 (c. 37), the county ct. judge found that the ladder was not "a scaffolding" within the meaning of Workmen's Comp. Act, 1897 (c. 37), s. 7 (1):—*Held*: it being impossible to say, as a matter of law, that the ladder must be "a scaffolding" within the meaning of the Act, the ct. was bound by the finding of the county ct. judge.—*MARSHALL v. RUDEFORTH*, [1902] 2 K. B. 175; 71 L. J. K. B. 781; 86 L. T. 752; 66 J. P. 627; 50 W. R. 596; 18 T. L. R. 649; 46 Sol. Jo. 569; 4 W. C. C. 55, C. A.

Annotation:—*Consd.* *Elvin v. Woodward* (1903), 72 L. J. K. B. 468.

175. ————.]—Where, during the operation of whitewashing a building, workmen used a ladder by placing it against a wall, & standing or sitting on the rungs of it for the purpose of applying the whitewash, & a county ct. judge found, on a claim for compensation under the Workmen's Comp. Act, 1897 (c. 37), that the ladder so used was not a scaffolding within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1):—*Held*: it was impossible to say as a matter of law that the ladder must be a scaffolding within the meaning of the Act, & therefore the ct. was bound by the finding of the county ct. judge.—*CROWTHER v. WEST RIDING WINDOW CLEANING Co.*, [1904] 1 K. B. 232; 73 L. J. K. B. 71; 68 J. P. 122; 52 W. R. 374; 6 W. C. C. 72, C. A.

176. ————.]—*O'BRIEN v. DOBBIE & SON*, No. 171, *ante*.

177. ———— *Crawling-board.*—A workman suffered injury while engaged in the repair of the roof of a house more than thirty feet high by means of a ladder & a crawling board, which was a contrivance ordinarily used in the repair of roofs, & consisted of a wooden plank about eighteen to twenty feet long & ten inches wide, across which were nailed transverse pieces of wood to give support to the men while working upon it; on the under side at one end was fastened a cross-piece of wood which fitted over the ridge

of the roof & kept the board in position. At the time of the accident the workman was on the roof fixing the crawling-board, while the lower end of the board was being steadied by an assistant standing on the ladder:—*Held*: there was evidence to justify the finding of a county ct. judge that the crawling-board was a scaffolding within Workmen's Comp. Act, 1897 (c. 37), s. 7.—*VEAZEY v. CHATTLE*, [1902] 1 K. B. 494; 71 L. J. K. B. 252; 85 L. T. 574; 66 J. P. 389; 50 W. R. 263; 18 T. L. R. 99; 46 Sol. Jo. 83; 4 W. C. C. 49, C. A.

Annotation:—*Refd.* *Elvin v. Woodward* (1903), 72 L. J. K. B. 468.

178. ———— *Painter's steps.*—A workman was injured by an accident while painting the outside of a house more than thirty feet high, which was being repaired. In order to paint the lower part of the outside of the house he was standing, at the time of the accident, on painter's steps of a height of eight feet, constructed with steps on one side & wooden supports on the other:—*Held*: there was evidence on which the county ct. judge could have found that the house was being repaired by means of a scaffolding within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1).—*ELVIN v. WOODWARD & Co.*, [1903] 1 K. B. 838; 72 L. J. K. B. 468; 88 L. T. 671; 67 J. P. 413; 51 W. R. 518; 19 T. L. R. 410; 47 Sol. Jo. 468; 5 W. C. C. 90, C. A.

179. ———— *May be internal or external.*—*HODDINOTT v. NEWTON, CHAMBERS & Co.*, No. 161, *ante*.

180. *Factory constituted by building machinery*—*Employment "about"*—*Accident at distance from locality.*—*Employment "about"* a factory means employment about the locality of the factory, & does not include employment about the business of the factory at a distance from the factory itself. A builder was erecting houses on a building estate which was in course of development; on the estate was a barn containing a steam-engine & mortar-mill, which were used for the purposes of the building operations, & which constituted a factory within Workmen's Comp. Act, 1897 (c. 37), s. 7 (1). Resp., a labourer in the builder's employment, whose duty it was to fetch water in a cart from a brook at some distance along the main road for the mortar-mill & buildings, was injured while returning with the cart at a spot about one hundred & ten to one hundred & sixty yards distant from the engine & mortar-mill owing to the horse running away:—*Held*: there was no evidence upon which a county ct. judge could properly find that the employment of resp. was employment "about" a factory within the meaning of the Act.—*FENN v. MILLER*, [1900] 1 Q. B. 788; 69 L. J. Q. B. 439; 82 L. T. 284; 64 J. P. 356; 48 W. R. 369; 16 T. L. R. 265; 44 Sol. Jo. 312; 2 W. C. C. 55, C. A.

Annotations:—*Consd.* *Spacey v. Dowlais Gas & Coke Co.*, [1905] 2 K. B. 879. *Refd.* *Turnbull v. Lambton Collieries Co.* (1900), 82 L. T. 589; *McGregor v. Wright* (1901), 3 W. C. C. 121; *Owen v. Clark* (1901), 3 W. C. C. 170; *Atkinson v. Lumb* (1903), 72 L. J. K. B. 460; *Back v. Dick, Kerr* (1905), 7 W. C. C. 45.

SUB-SECT. 5.—RAILWAYS.

See 1901 Act, ss. 16, 106, & generally, RAILWAYS.

1741. *Scaffolding—What is—Whether ladder excluded.*—A ladder used in the ordinary way by a painter in painting beams in a building over thirty feet in height is not a "scaffolding."—*McDONALD v. HOBBS & Co.*

(1899), 2 F. (Ct. of Sess.) 3.—*SCOT.*

1742. ————.]—*CAMPBELL v. SELLARS* (1903), 5 F. (Ct. of Sess.) 900.—*SCOT.*

Internal staging ar-

ranged with planks.—"Scaffolding" includes the internal staging arranged with planks resting on the step of a ladder & upon one of the roof principals in the centre of a room.—*REDDY v. BRODERICK*, [1901] 2 I. R. 328.—*IR.*

Part V.—Conditions as to Employment and Wages.

SECT. 1.—EMPLOYMENT OF CHILDREN.

See 1901 Act, ss. 61-67, & Employment of Women, Young Persons & Children Act, 1920 (c. 65).

181. Under twelve years of age—Absolute prohibition against.]—WALKER (T.), LTD. v. MARTINDALE, No. 48, *ante*.

Under fourteen years of age.]—See Education Act, 1918 (c. 39), s. 13.

Liability for education.]—See 1901 Act, ss. 68-72, & generally, EDUCATION, Vol. XIX., pp. 571, 572, Nos. 108-116.

See, now, Employment of Children Act, 1903 (c. 45).

Provisions as to hours & meal-times.]—See Sect. 2, sub-sect. 1, *post*.

be allotted to all for meal-times, but do not enact that all shall work during the same ten hours; so that, subject to the above limitations, working by relays is legal.

All children, young persons, & females must be taken to have commenced work when any one child, young person, or female commenced work.

In a ct. of law we have only to ascertain the meaning of the words used by the legislature & when that is ascertained, we have to carry it into effect, & we are not to inquire whether the enactments are dictated by sound policy or not; that question is exclusively for the consideration of Parliament (PARKE, B.).—RYDER v. MILLS (1850), 3 Exch. 853; 19 L. J. M. C. 82; 14 L. T. O. S. 445; 14 J. P. 145.

*Annotations:—*Mentd. *Re Gorham v. Exeter (Bp.)* (1850), 5 Exch. 630; *Chandos v. I. R. Comrs.* (1851), 6 Exch. 464.

183. — Working by shifts — How far permissible.]—RYDER v. MILLS, No. 182, *ante*.

184. — Working during meal-times—Of own accord—Liability of employer.]—PRIOR v. SLAITHWAITE SPINNING CO., No. 46, *ante*.

185. — — Despite precautions to prevent—Liability of employer.]—ROGERS v. BARLOW & SON, No. 47, *ante*.

186. — Finishing of bricks — By girls under sixteen years old.]—A girl under the age of sixteen was employed by resps. in carrying bricks already moulded & baked to dipping sheds, where the bricks were dipped in a preparing solution; such bricks were dried & stacked in such sheds & afterwards dipped in glaze & scraped or knifed & ultimately carried away to ovens, where they were baked to set the glaze:—*Held*: these latter processes constituted the finishing of bricks within Factory & Workshop Act, 1878 (c. 16), & resps. could not employ girls under the age of sixteen in such work.—SQUIRE v. STANLEY BROTHERS (1901), 84 L. T. 535; 65 J. P. 467; 17 T. L. R. 438; 10 Cox, C. C. 605, D. C.

187. — Working “manufacturing process”

SECT. 2.—HOURS, MEAL-TIMES AND HOLIDAYS IN FACTORIES AND WORKSHOPS.

SUB-SECT. 1.—GENERAL PROVISIONS.

See, now, 1901 Act, ss. 23-35, & Employment of Women, Young Persons & Children Act, 1920 (c. 65).

Employment of women—In flax scutch mills.]—See, now, Employment of Women Act, 1907 (c. 10).

182. Children, young persons or women—Time at which work commenced—How ascertained.]—It is no offence against the Factory Acts to employ a young person, or female, for ten hours in any one day, such ten hours ending at a period which is more than ten hours in addition to the hour & a half allowed for meal-times from the period another child or young person or female began to work.

Those Acts limit the periods between which young persons & women are to work, & the number of hours, & also require the same hour & a half to

that Act was made simply by proof of his age, the employment & the injury.—JONES v. MORTON CO., LTD. (1907), 14 O. L. R. 402; 9 O. W. R. 500.—CAN.

a. Child misrepresenting age—Duty of employer to satisfy himself.]—It is not enough to take the statement of a child as to his age; the employer must satisfy himself by reasonable means that the appet. for work is of the requisite age.—MCINTOSH v. FIRST-BROOK BOX CO. (1904), 24 C. L. T. 370; 10 O. L. R. 528; 6 O. W. R. 237.—CAN.

b. — —.]—CARTY v. NICOLL (1878), 6 R. (Ct. of Sess.) 194.—SCOT.

PART V. SECT. 2, SUB-SECT. 1.

c. Children, young persons or women—“Working week”—Meaning of.]—The word “week” in Factories & Shops Act, 1896 (No. 1445), s. 21, in cases where employees are engaged by the week, means from pay day to pay day—that is, a week of work—& does not mean the period from Sunday to Saturday.—BISHOP v. HOOPER, [1905] V. L. R. 220.—AUS.

PART V. SECT. 1.

181 i. Under 12 years of age—Absolute prohibition against.]—O'BRIEN v. SANFORD (1892), 22 O. R. 136.—CAN.

r. Under 14 years of age—Whether actionable.]—The employment of a child under fourteen years of age in a factory at work other than of the kinds specified in Factories Act, R. S. O. 1897, c. 256, s. 5, as proper for children, though it subjects the employer to a penalty, does not give rise to an action for damages, unless there be evidence to connect the violation of the Factories Act with the accident.—ROBERTS v. TAYLOR (1900), 31 O. R. 10.—CAN.

s. — —.]—MORRIS v. BOASE SPINNING CO., LTD. (1895), 22 R. (Ct. of Sess.) 336; 32 Sc. L. R. 243; 2 S. L. T. 483.—SCOT.

t. — How *prima facie* case made out.]—Pltf., a child under fourteen years of age, was injured by the fall of a goods elevator used by his employers in a building. By Ontario Factories Act, R. S. O. 1897, c. 256, s. 3, pltf.'s employment was wholly unlawful, & a *prima facie* case under

d. — Working voluntarily outside statutory hours—Contrary to instructions—Liability of occupier.]—*Held*: the occupier of a workshop had not committed an offence against Factory & Workshop Act, 1878, in respect of two women being found engaged in work in the premises after the statutory hour, they having remained of their own motive, & without the knowledge of the occupier or of his forewoman, & after being warned by the latter not to remain after the statutory hour.—ROBINSON v. MELVILLE (1890), 17 R. (Ct. of Sess.) 62. J.—SCOT.

e. — —.]—Two women, weavers in a linen factory, twenty minutes before the statutory hour for beginning work, in accordance with a practice known to the occupiers of the factory voluntarily dusted, & otherwise regulated their spinning-rooms for their own satisfaction & comfort. Adequate provision for the cleaning & regulation of the looms by other persons had been made by the occupiers of the factory:—*Held*: the women had not been employed before the statutory hour.—PATERSON v.

during prohibited hours—Machine in motion for cleaning purposes, 1901 Act, s. 24 (3), b.]—By above sub-sect. the period of employment of women in a textile factory on a Saturday must end at half-past eleven o'clock in the forenoon "as regards employment in any manufacturing process," & at noon as regards employment for any purpose.

In the resps.' cotton-spinning factory an inspector found at 11.50 a.m. on a Saturday two women engaged in cleaning the machines at which they were working, & which it was their duty to tend & clean. The machines had not been in motion from 11.30 a.m. till immediately before 11.50 a.m. & they were then in motion merely for the purpose of being cleaned, & not for the purpose of manufacturing. The machines could not be properly cleaned without setting them in motion for that purpose; & they performed the manufacturing process completely without the intervention of the women, except for the purpose of feeding, cleaning, & regulating. While the women were cleaning the machines, the machines were apparently working & performing the manufacturing process as if the women had not been cleaning them. Upon information against resps. for employing the women in a "manufacturing process" during the prohibited time:—*Held*: inasmuch as the machines were in motion merely for the purpose of being cleaned, & not for the purpose of manufacturing, the women were not employed in a "manufacturing process" within the meaning of the above sub-sect., & no offence thereunder had been committed.—*CRABTREE v. COMMERCIAL MILLS SPINNING CO., LTD.* (1910), 103 L. T. 879; 75 J. P. 6, D. C.

188. Notice specifying meal-times—Proof of contents by secondary evidence—Admissibility—No notice to produce original.]—On the prosecution of the occupier of a factory for allowing a young person employed in the factory to remain in a room in which a manufacturing process was being carried on during the time allowed for meals, contrary to 1901 Act, s. 33, secondary evidence is admissible to prove the contents of the notice specifying the times allowed in the factory for meals, which notice has under s. 32 to be affixed in the factory, although there has been no notice to produce the original notice.—*OWNER v. BEE HIVE SPINNING CO., LTD.*, [1914] 1 K. B. 105; 83 L. J. K. B. 282; 109 L. T. 800; 78 J. P. 15; 30 T. L. R. 21; 12 L. G. R. 42; 23 Cox, C. C. 626, D. C.

See, generally, EVIDENCE, Vol. XXII., pp. 214 et seq.

Observance of Sunday.]—See TIME.

DUKE (1904), 6 F. (Ct. of Sess.) 53, J.—SCOT.

f. "Work"—Meaning of—Ironing one's own shirt.]—"Work" during prohibited hours does not include such as ironing one's own shirt.—*INGHAM v. HIE LEE* (1912), 15 C. L. R. 267.—AUS.

g. Carting.]—A carter employed by a contracting carrier having delivered at a hotel in P. barrels of beer which he had carted from a brewery, placed on his lorry certain empty barrels & crates to be returned to the brewery & proceeded to his employer's stables in R. where he did not arrive until after 7.30 in the evening, his intention being to deliver the barrels & crates at the brewery the next day. He was prosecuted:—*Held*: the carter should have been convicted under Factories & Shops Act, 1907 (Vict.), s. 40, as amended by Factories & Shops Act,

1910 (Vict.), s. 38.—*PEMBERTON v. BANFIELD* (1912), 15 C. L. R. 323.—AUS.

h. —.]—The restriction of the hours of carting on Saturdays contained in Factories & Shops Act, 1915, s. 127, relates only to such carting as is done by way of carrying on business, & therefore does not apply to the case of a person carting his own goods for his own purposes, nor to the case of a volunteer doing the like work for him.—*GARNER v. WALLER*, [1920] V. L. R. 207.—AUS.

k. Making bread—Whether dough-making amounts to.]—On a charge of making bread within prohibited hours it was admitted that the person charged, an employer engaged in the trade or calling of a baker, was making dough at the hour alleged:—*Held*: the operation upon which debt. was employed was not within

SUB-SECT. 2.—EXCEPTIONS.

See 1901 Act, ss. 36–48, 58–60.

189. Saturday half-holiday—Substitution of another day by permission—Employment on substituted day—Form of summons.]—A half-holiday of equal length may under 30 & 31 Vict. c. 146, sched. 1, s. 9, by permission of the Secretary of State, be substituted on some other day of the week for the half-holiday required by the Act to be given on Saturday to children, young persons, & women employed in workshops coming within the Act. Permission having been given to substitute Wednesday for Saturday afternoon in a particular workshop, an information was preferred against the proprietor for employing a young person after two p.m. on Wednesday:—*Held*: such an information could not be sustained.—*CAMERON v. FOY* (1874), 30 L. T. 517; 38 J. P. 694, D. C.

190. Employment of Jews on Sunday—Provided workshop "not open for traffic."—The occupier of a workshop, wherein young persons & women of the Jewish religion were employed on Sunday, carried on there the business of making button-holes for tailors on garments delivered to him by them for that purpose.

The workshop was open to his customers on Sunday for the purpose of enabling them to send or fetch away garments in pursuance of contracts previously made, but not for the purpose of their giving fresh orders:—*Held*: the workshop was not thereby "open for traffic on Sunday" within Factory & Workshop Act, 1878 (c. 16), s. 51, so as to deprive the occupier of the exemption afforded by that sect.—*GOLDSTEIN v. VAUGHAN*, [1897] 1 Q. B. 549; 66 L. J. Q. B. 380; 76 L. T. 262; 61 J. P. 277; 45 W. R. 399; 13 T. L. R. 285; 18 Cox, C. C. 523, D. C.

SUB-SECT. 3.—OVERTIME.

See 1901 Act, ss. 49–53, sched. II.

191. Prohibition against—Extent of.]—By 1901 Act, s. 49, overtime employment of women is permitted on a limited number of days in the year & this permission is declared to apply to "the non-textile factories & workshops & parts thereof & warehouses specified in the second schedule to this Act." By sched. II., clause 4, factories & workshops in which overtime employment is allowed include "any part of a factory, whether textile or non-textile, or workshop which is a

the prohibition in Bread Act, 1901, s. 10 (1) (a) as amended by Early Closing Act, 1919.—*GREEN v. MAZE* (1921), 21 S. R. N. S. W. 538.—AUS.

l. Male worker in brewery—Hours of employment.]—A male worker, of whose employment an essential part is to get up steam for the machinery in a brewery preparatory to the work of the brewery, comes within Factories Act, 1901, s. 18 (2) if employed for a greater number of hours per week & day than proscribed by that sect., & performing other duties during the rest of his time.—*WARREN v. MCGAVIN* (1903), 23 N. Z. L. R. 295.—N.Z.

PART V. SECT. 2, SUB-SECT. 3.

m. Statutory provisions—To whom applicable.]—Factories Act, 1901, ss. 18–22, which limit the hours of working, & provide for payment of overtime after those hours, do not refer to

Sect. 2.—Hours, meal-times and holidays in factories and workshops: Sub-sects. 3 & 4. Sect. 3: Sub-sect. 1.]

warehouse not used for any manufacturing process or handicraft, & in which persons are solely employed in polishing, cleaning, wrapping, or packing up goods":—*Held*: the prohibition in sched. II., clause 4, against overtime work being carried on in a part of a factory used for a manufacturing process or handicraft, extended to any part of the factory in which a manufacturing process or handicraft was carried on during the ordinary working hours, & did not merely prevent the overtime work being carried on in a part of the factory which was at the same time being used for a manufacturing process or handicraft.—*SMITH v. SIBRAY, HALL & Co.*, [1903] 2 K. B. 707; 72 L. J. K. B. 822; 89 L. T. 358; 67 J. P. 390; 52 W. R. 218; 1 L. G. R. 871; 20 Cox, C. C. 542, 1 D. C.

SUB-SECT. 4.—NIGHT WORK.

See 1901 Act, ss. 54–56.

SECT. 3.—HOURS, ETC., IN SHOPS UNDER SHOP REGULATION ACTS.

SUB-SECT. 1.—IN GENERAL.

See, now, Shops Act, 1912 (c. 3); Shops Act, 1913 (c. 24); Shops (Early Closing) Act, 1920 (c. 58); Shops (Early Closing) Act (1920) Amendment Act, 1921 (c. 60), & Statutory Rules & Orders, 1912, No. 316.

192. What is a "shop"—Hotel—Licensed as inn for sale of liquor.]—(1) A building which is used solely as a hotel & restaurant for the accommodation of guests, & which has no bar or counter for the sale of intoxicating liquors & is not in the ordinary sense of the term a public-house, but which is licensed as an inn under 9 Geo. 4, c. 61, for the sale of intoxicating liquors by retail, is a "shop" within Shop Hours Act, 1892 (c. 62), s. 9.

(2) A page-boy in a hotel, who sleeps on the premises, & who is principally employed as a messenger, but partly also in assisting to dust the reception-rooms, is not within the exemption in sect. 10 in favour of "any person wholly employed as a domestic servant."—*SAVOY HOTEL Co. v. LONDON COUNTY COUNCIL*, [1900] 1 Q. B. 665; 69 L. J. Q. B. 274; 82 L. T. 56; 64 J. P. 262; 48 W. R. 351; 16 T. L. R. 148; 44 Sol. Jo. 212; 19 Cox, C. C. 437, D. C.

Annotations:—As to (1) *Consd. Gordon Hotels v. L. C. C.*, [1916] 2 K. B. 27. *Refd. Couron v. L. C. C.*, [1922] 2 Ch. 989.

persons who are the representatives of the master & who are included in the term "occupier" set out in s. 2.—*EDWARDS v. TIMARU MILLING Co., LTD.* (1907), 26 N. Z. L. R. 989.—N.Z.

PART V. SECT. 2, SUB-SECT. 4.

n. Lad under eighteen years—Duty of employer to ascertain correct age.]—A lad between seventeen & eighteen, while employed at night work in a factory, was injured by the belt of a machine, at which he was working, slipping off the drum & catching his arm. In an action of

damages by the lad against his employers, laid on breach of the Factory Acts, which forbid the employment of persons under eighteen at night work:—*Held*: the defenders had not used sufficient diligence to ascertain the pursuer's age before they employed him at night work, & were liable to pursuer in damages.—*GIBB v. CROMBIE* (1875), 2 R. (Ct. of Sess.) 886.—SCOT.

PART V. SECT. 3, SUB-SECT. 1.

o. What is a shop—Whether pawnbroker's place of business.]—*YOUNG v. HALL*, [1905] 8 R. Q. 161.—AUS.

193. ——— Part open to non-residents.]—The premises of a licensed hotel consisted, *inter alia*, of a dining-room & smoking-room, which were mainly, but not exclusively, used by the residents of the hotel, & of a grill-room, which was used as a restaurant both by residents & non-residents. In the kitchen food was prepared for consumption in both the residential & non-residential parts of the hotel without reference to the particular portion of the premises in which the food was to be consumed:—*Held*: (1) the grill-room was a shop within the Shops Act, 1912 (c. 3), & the kitchen formed part of the shop, & servants of the hotel who were employed entirely in the kitchen, either in the preparation of food or in the cleaning of the kitchen or the utensils, were shop assistants within the Act, but a kitchen clerk whose duty it was to order & check the supplies of provisions was not a shop assistant; (2) whether the residential part of the hotel was a shop or not, the waiters in that part of the hotel were not employed wholly or mainly in the serving of customers & were, therefore, not shop assistants.

The residential portion of an hotel is not a shop within the Shops Act, 1912 (c. 3) (*RIDLEY & BRAY, JJ.*).—*GORDON HOTELS, LTD. v. LONDON COUNTY COUNCIL*, *LONDON COUNTY COUNCIL v. GORDON HOTELS, LTD.*, [1916] 2 K. B. 27; 85 L. J. K. B. 1042; 114 L. T. 1126; 80 J. P. 266; 32 T. L. R. 423; 14 L. G. R. 617; 25 Cox, C. C. 402, D. C.

194. ——— Restaurant & kitchen together.]—Applt. kept a restaurant, & employed a kitchen-maid in the kitchen, which was connected with the restaurant & on the same level with it. She attended to the fires, washed the china & dishes, & prepared vegetables for cooking for the customers:—*Held*: there was evidence upon which the magistrate could find that the restaurant & the kitchen together formed one shop, & the kitchen maid was a shop assistant employed about the business of a shop within Shops Act, 1912 (c. 3), s. 1 (1), because employed therein in connection with the serving of customers within sect. 19 (1).—*MELLIISH v. LONDON COUNTY COUNCIL*, [1914] 3 K. B. 325; 83 L. J. K. B. 1165; 111 L. T. 539; 78 J. P. 441; 30 T. L. R. 527; 12 L. G. R. 1086; 24 Cox, C. C. 353, D. C.

Annotations:—*Consd. Prance v. L. C. C.*, [1915] 1 K. B. 688. *Folld. Gordon Hotels v. L. C. C.*, [1916] 2 K. B. 27.

195. ——— Temporary bookstall of board & trestles—On railway platform.]—(1) A firm of newsagents employed a boy at their bookstall at a railway station upon which stall the notice required by sect. 4 [of Shop Hours Act, 1892 (c. 62)] was duly exhibited. For a portion of the morning the boy was employed in delivering newspapers in a village about two miles distant, & in selling newspapers on the platform of the village station from a temporary structure put

p. ——— Coal merchant's branch office—Kept only for receiving orders.]—The word "Shop" in Shops Act, 1912, s. 19 (1), has an extended & artificial meaning that goes beyond the popular & recognised meaning of the word. A coal merchant's branch office, in which no coal is kept & only orders are dealt with, is a "shop."—*WALLACE v. DIXON*, [1917] 2 L. R. 236.—IR.

q. ——— Chemist's shop.]—A chemist's shop is one in which the business of a chemist is carried on exclusively, within Shops & Shop-Act, 1894, s. 3, as amended

up each morning by himself & consisting of a board lying on trestles; upon this structure no notice under sect. 4 was exhibited:—*Held*: the board & trestles was not a shop within sect. 4 of the Act, & the employment of the boy was at the bookstall of the principal station, where a notice was exhibited. (2) *Semble*: a stall composed of a board & trestles would be a shop within sect. 3 of the Act, which limits the hours of employment of young persons in or about shops.

(3) I think, apart from the particular case, that the word "shop" as used in sect. 4 applies to structures which are in the nature of permanent structures, & not to a mere temporary erection of a board & trestles such as existed here (LORD ALVERSTONE, C.J.).—SMITH (W. H.) & SON v. KYLE, [1902] 1 K. B. 286; 71 L. J. K. B. 16; 85 L. T. 428; 66 J. P. 101; 50 W. R. 319; 18 T. L. R. 32; 20 Cox, C. C. 54, D. C.

196. — Permanent bookstall in station.]—SMITH (W. H.) & SON v. KYLE, No. 195, *ante*.

197. — Not stall for gambling—Where no goods sold.]—DENNIS v. HUTCHINSON, TRAFFORD v. SAME, No. 209, *post*.

198. Employment "in or about a shop"—Work done out of doors—Delivery of newspapers.]—By the Shop Hours Act, 1892 (c. 62), s. 3, "No young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal-times, in any one week." A news-agent, occupying a shop for the purposes of his business, employed a boy whose work was done partly inside the shop, & partly away from the shop in fetching newspapers and delivering them to the customers:—*Held*: the whole employment was "in or about" the shop within the Act.

In this Act, the word "shop" seems to be used throughout with reference to the structure or place, as distinguished from the business carried on at that place. The question is whether, when employed in outdoor, the boy was employed "in or about a shop." We must consider what was the object of the Act & the mischief which it was intended to prevent. The object was to protect the health of young persons employed in shops, not to insure sanitary conditions but to protect the health of those employed for an undue length of time. If we adopt the narrow construction of the Act, we should limit its beneficial operation in all cases where the work was partly indoor & partly outdoor (LINDLEY, L.J.).—COLLMAN v. ROBERTS, [1896] 1 Q. B. 457; 65 L. J. M. C. 63; 71 L. T. 198; 60 J. P. 181; 41 W. R. 415; 12 T. L. R. 202; 18 Cox, C. C. 273, D. C.

199. — — — — —.]—SMITH (W. H.) & SON v. KYLE, No. 195, *ante*.

200. — — — — — Voluntary distribution of handbills—During weekly half-holiday.]—Three assistants, employed in one of the shops of L., of which applt. was manager, volunteered to

distribute handbills in the streets & at houses "in their spare time." Their offer was accepted & they were paid for this service. They in fact distributed the bills on the weekly half-holiday rendered obligatory by the Shops Act, 1912 (c. 3). The bills advertised "L.'s Margarine Overweight," & contained a statement that "We sell" this margarine at specified prices; but they contained no address of any particular shop or shops:—*Held*: the assistants were "employed about the business" of the shop in question within sect. 1 (1) of the Act, which prohibits such employment of the half-holiday, & the words "a shop" in the sub-sect. mean the shop in which the assistant in question is an assistant within the Act.—GEORGE v. JAMES, [1914] 1 K. B. 278; 83 L. J. K. B. 303; 110 L. T. 316; 78 J. P. 156; 30 T. L. R. 230; 12 L. G. R. 403; 24 Cox, C. C. 48, D. C.

Annotations:—Consd. L. C. C. v. Wettman, [1922] 1 K. B. 153. *Refd.* Melluish v. L. C. C. (1914), 12 L. G. R. 1086.

201. — Work done in branch shop—During weekly half-holiday.]—Resp. carried on the business of a retail confectioner at two shops, A. & B., situate in different parts of London. A shop assistant employed by him at shop A. was found to be working at shop B. on the afternoon of the day of the week fixed under the Act as her weekly half-holiday at shop A.:—*Held*: in employing her at shop B. resp. was employing her "about the business of" shop A., & was thereby committing a breach of Shops Act, 1912 (c. 3), s. 1 (1).

The words "employed about the business of" a shop are of wide application & mean "about the business carried on in the shop by the shop-keeper."—LONDON COUNTY COUNCIL v. WETTMAN, [1922] 1 K. B. 153; 91 L. J. K. B. 77; 126 L. T. 336; 86 J. P. 4; 38 T. L. R. 67; 66 Sol. Jo. (W. R.) 19; 19 L. G. R. 781; 27 Cox, C. C. 148, D. C.

202. Person "wholly employed as domestic servant"—Who is—Not messenger boy in hotel.]—SAVOY HOTEL CO. v. LONDON COUNTY COUNCIL, No. 192, *ante*.

203. "Shop assistant"—Who is—Kitchen servant in restaurant.]—MELLUISE v. LONDON COUNTY COUNCIL, No. 194, *ante*.

204. — — — — —.]—GORDON HOTELS, LTD. v. LONDON COUNTY COUNCIL, LONDON COUNTY COUNCIL v. GORDON HOTELS, LTD., No. 193, *ante*.

205. — — — — — Potman in public house—Facilitating service of customers.]—A person is employed "in connection with the serving of customers" if his services are rendered for the purpose of facilitating the serving of customers, although the services are not an essential part of the operation of serving.

A potman employed in a public-house by applt., a licensed victualler, was mainly employed in putting up tables for customers' dinners & taking

by Shops & Shop-assistants Act Amendment Act, 1895, s. 7, if only such goods are sold at it as are ordinarily sold at chemists' shops.—GATENBY v. SLATTERY (1897), 16 N. Z. L. R. 161.—N.Z.

r. — Hair-dressing department of retail store—Carried on for convenience of customers.]—THOMSON v. SOMERVILLE, [1917] S. C. (J.) 3; 1 S. L. T. 172.—SCOT.

s. "Shop assistant"—Who is—

Attendant in branch coal office.]—An attendant who takes orders for coal in a coal merchant's branch office, in which no coal is kept & only orders are dealt with, is a "shop assistant."—DIXON,

t. — — — — — Son assisting father—For his livelihood.]—A shopkeeper employed no paid assistant but was assisted by his son who lived with his father. There was no contract of employment & the son received no

remuneration, but the work done by him in the shop was for his livelihood:—*Held*: the son was an assistant within Shop Hours' Ordinance 14 of 1916, s. 8 (1).—R. v. GREGORIOS (1919), T. P. D. 13.—S. AF.

a. Sale by retail—Whether

b. "Evening"—What

Sect. 3.—Hours, etc., in shops under Shop Regulation Acts: Sub-sects. 1 & 2, A. & B.]

them down again, cleaning knives in so far as they were for subsequent use at the customers' tables, polishing pewter & copper measures used there-after for measuring or serving out drinks to customers, collecting glasses after they had been used by customers from various parts of the bar for cleaning by the barmen, cleaning & tidying the premises for use by customers at various times of the day. He did not have any half-holiday during the week. Applt. having been convicted by a magistrate upon an information charging him with unlawfully failing to comply with Shops Act, 1912 (c. 3), s. 1 (1):—*Held*: the conviction was right inasmuch as all the five duties were sufficiently proximate to the serving of customers to justify the magistrate in holding that they were discharged in connection with the serving of customers within the Act.—*PRANCE v. LONDON COUNTY COUNCIL*, [1915] 1 K. B. 688; 84 L. J. K. B. 623; 112 L. T. 820; 79 J. P. 242; 31 T. L. R. 128; 13 L. G. R. 382; *sub nom.* *FRANCE v. LONDON COUNTY COUNCIL*, 24 Cox, C. C. 684, D. C.

Annotation:—*Fold. Gordon Hotels v. L. C. C.*, [1916] 2 K. B. 27.

206. — Whether waiter in residential part of hotel—Not wholly employed in serving customers.]—*GORDON HOTELS, LTD. v. LONDON COUNTY COUNCIL*, *LONDON COUNTY COUNCIL v. GORDON HOTELS, LTD.*, No. 193, *ante*.

207. Notice specifying maximum time in week—During which young person may be employed—Penalty for non-exhibition.]—A young person was employed in a shop in which the notice required by Shop Hours Act, 1892 (c. 62), s. 4, was not exhibited:—*Held*: the fine imposed by sect. II could not be inflicted upon the employer.—*HAMMOND v. PULSFORD*, [1895] 1 Q. B. 223; 64 L. J. M. C. 63; 71 L. T. 767; 59 J. P. 533; 43 W. R. 236; 11 T. L. R. 117; 39 Sol. Jo. 181; 18 Cox, C. C. 58; 15 R. 95, D. C.

effect of War Legislation & Statute Law Amendment Act, 1918, s. 41 (3), which enacts that "for the purposes of the Shops & Offices Act, 1908, s. 25, 'Evening' shall be deemed to be the time of the day not earlier than five o'clock in the afternoon," is that for the purposes mentioned, between 5 p.m. & midnight are to be deemed "evening."—*ARNOLD v. MANNING & DAWSON, LTD.*, [1919] N. Z. L. R. 260.—N.Z.

PART V. SECT. 3, SUB-SECT. 2.—A.

c. Shop open after hours—"For show purposes."—Deft. had his shop open after the hour prohibited by regulation & goods in the shop were shown & employees were present. No sales of goods took place, & placards were exhibited announcing that the shop was open only for show purposes:—*Held*: the goods were exposed for sale within Factories & Shops Act, 1898 (No. 1597), s. 7 (c).—*TURNBULL v. COCKING* (1890), 25 V. L. R. 83.—AUS.

d. — Exempted business in same shop.]—Where fruit is sold in a shop, having only one entrance, in which pastry & confectionery are also sold the shop must be closed for all purposes at the hour prescribed by the regulation for the closing of fruit shops under Factories & Shops Act, 1915, s. 105 (1). It is not sufficient that the portion of the shop in which the fruit is sold is securely shut off by

a substantial partition at the hour prescribed, & that no fruit is sold there-after.—*HALL v. HOOKER*, [1921] V. L. R. 471.—AUS.

e. — Under Ordinance No. 12 of 1919, s. 8 (4), an eating house is exempted from the provisions of the Ordinance as to closing hours, but not if there is carried on therein any business outside the business of a restaurant not belonging to any other of the exempted classes.

D., the proprietor of a retail shop & of an eating house, which were conducted in adjoining rooms under one roof, was charged with neglecting to keep the shop closed, or otherwise with selling after closing hours, & was convicted. The sale took place in the eating-house, but the articles were not all of a nature usually sold in a restaurant. The retail shop was closed:—*Held*: the conviction was right.—*DESAI v. R.* (1920), 41 N. L. R. 228.—S. AF.

f. — Sale in living-room adjoining shop.]—The front door of a room used as a shop was closed to the public, but access to the room was possible from a living-room in the building. In a charge of contravening of Ord., No. 12, 1919, s. 5 (b), accused had sold articles to a person in the living-room after hours:—*Held*: the conviction should stand as the room was being used for the business of the shop, & being open for the admission

SUB-SECT. 2.—CLOSING HOURS.

A. In General.

208. "Retail business of jeweller"—Sale of jewellery by auction—After closing hour fixed by order—Shops Act, 1912, (c. 3), s. 9 (1).—By the Shops Act, 1912 (c. 3), a local authority may make an order fixing the closing hours for shops within their district & defining the shops & trades to which the order applies. By s. 19 (1) "the expression 'shop' includes any premises where any retail trade or business is carried on" & "the expression 'retail trade or business' includes," *inter alia*, "retail sales by auction." An order made under the Act fixed the closing hours for shops "in which the retail trade or business of a jeweller, gold or silversmith, ironmonger, hardware merchant, or tool dealer is carried on." Resp., who was an auctioneer, & who sold on his premises, being a shop, all kinds of articles, including articles of jewellery entrusted to him for sale by auction & pawnbrokers' pledges, sold by auction in the ordinary way, on certain days after the closing hours fixed by the order, articles of jewellery:—*Held*: resp. had not thereby carried on the retail business of a jeweller within the meaning of the order.—*LUCAS v. REUBENS*, [1921] 2 K. B. 482; 90 L. J. K. B. 860; 125 L. T. 313; 85 J. P. 166; 37 T. L. R. 618; 65 Sol. Jo. 492; 19 L. G. R. 470; 27 Cox, C. C. 1, D. C.

209. Stall for games of chance—"Premises for retail trade or business"—Shops Act, 1912 (c. 3), s. 19 (1).—Appls. had each a wooden booth or stall containing mechanical contrivances whereby games of mixed chance & skill were played by members of the public on payment of an entrance fee for prizes of chocolates, etc., provided by appls. No other business was carried on at these stalls:—*Held*: neither of the above stalls was a "shop" within above sub-sect. as being "premises where any retail trade or business is carried on," & consequently, appls. had not committed the offence of keeping a "shop" open after the closing hour prescribed by para. 1 (a) of Part I.

of the purchaser, was not closed in the sense of the Ordinance.—*PILLAY v. PIETERMARITZBURG* (CHIEF CONSTABLE) (1923), 44 N. L. R. 120.—S. AF.

g. Employment of hotel servant—After 11 p.m.]—It is not an offence under Early Closing Act, s. 9, to employ an hotel servant after 11 p.m.—*EX p. SHEARER* (1910), 10 S. R. N. S. W. 601; 27 N. S. W. W. N. 130.—AUS.

h. Scope of statute.]—*BATEMAN v. GREEN* (1912), 8 Tas. L. R. 43.—AUS.

k. "Carrying on trade or business"—Dealing with goods on particular occasion not sufficient.]—Under Factories & Shops Act, 1915, s. 105 (1), it must be shown that a trade or business of the kind specified in s. 99 of that Act is carried on, & it is not enough to show that the goods are dealt in on a particular occasion.

A., who occupied premises as a fruit & confectionary shop, was proved to have sold, on one occasion, a packet of cigarettes from the shop during the hours within which such a sale was lawful, & to have subsequently sold fruit therefrom during the hours within which it was lawful to sell fruit but unlawful to sell tobacco:—*Held*: the decision of justices that the trade or business of a tobacconist was not shown to have been carried on should

of the Sched. to the Shops (Early Closing) Act, 1920 (c. 60), as amended by subsequent Orders, which by para. 4 incorporates the above definition of "shop."—*DENNIS v. HUTCHINSON, TRAFFORD v. SAME*, [1922] 1 K. B. 693; 91 L. J. K. B. 584; 126 L. T. 669; 86 J. P. 85; 38 T. L. R. 263; 66 Sol. Jo. 316; 20 L. G. R. 199; 27 Cox, C. C. 202, D. C.

210. "Every day other than Saturday"—"Includes Sunday"—Sale of confectionery after hours on Sunday—Shops (Early Closing) Act, Amendment Act, 1921, Sched. Part I.]—Upon an information against the occupier of a confectionery shop for keeping his shop open between 8 & 9.30 p.m. on Sunday evening:—*Held*: the words "every day other than Saturday" in Part I. of the Schedule to the Act of 1920 included Sundays, while the words "weekdays other than Saturdays" in the amending Act of 1921 did not include Sundays, & therefore an offence had been committed contrary to the above provision of the Act of 1920.—*LONDON COUNTY COUNCIL v. GAINSBOROUGH*, [1923] 2 K. B. 301; 92 L. J. K. B. 597; 129 L. T. 633; 87 J. P. 102; 39 T. L. R. 422; 67 Sol. Jo. 595; 21 L. G. R. 312; 27 Cox, C. C. 503, D. C.

211. Customer in shop before closing hour—Failure to complete purchase in time—Shops (Early Closing) Act, 1920 (c. 58), sched. 1, Art. 2 (1).]—Where persons are invited to enter a shop before the appointed hour for closing & do so without any definite intention of making a purchase, as for example, when present at a retail sale by auction, & then remaining on after the closing hour & after the shop has been closed to new customers, are invited to make purchases, the shop-keeper contravenes the provisions of above Act, sched. 1, art. 1 (a) & such circumstances do not fall within the exception contained in above Act, sched. 1, art. 2 (1).—*SALFORD CATTLE MARKET*

not be disturbed.—*TIPPLE v. BONGIORNO*, [1921] V. L. R. 523.—AUS.

l. *Chemist's shop—Goods usually kept for sale.*]—In the absence of any bye-law specifically stating that any particular line or class of goods shall not be sold in any drug shop after the hour of closing prescribed by an early closing bye-law, there is no restriction as to the hours of sale of goods usually sold or kept for sale by pharmaceutical chemists, or chemists & druggists.—*STEVENS v. GORDON MITCHELL DRUG CO.*, [1917] 1 W. W. R. 938; 27 Man. L. R. 318; 32 D. L. R. 185.—CAN.

m. *Power of local authority to pass bye-laws.*]—The City Council of C. was empowered to make bye-laws for regulating the hours & for opening & closing retail stores. Under a bye-law passed for this purpose it was provided that no conviction should take place unless it was shown that business had actually been transacted during business hours:—*Held*: the bye-law was *ultra vires*.—*R. v. DOLL* (1907), 7 Ferr. L. R. 472; 6 W. L. R. 512.—CAN.

n. — *Interference by court with exercise of discretion.*]—Municipal bye-laws regulating the early closing of shops, though in operation they may affect unfairly some classes of shops, should not for that reason be declared invalid if the bye-laws are fully within the powers conferred by statute. If municipal council in passing a bye-law as acted strictly within the powers conferred upon it by the Legislature be reasonable, the bye-law is not unreasonable by the court.—*Re EARLY CLOS-*

SALEROOMS, LTD. v. OSBORNE (1923), 92 L. J. K. B. 1018; 129 L. T. 686; 87 J. P. 134; 21 L. G. R. 468; 27 Cox, C. C. 515, D. C.

B. On Weekly Half-Holiday.

See Shops Acts, 1912 (c. 3), 1913 (c. 24); Shops (Early Closing) Act, 1920 (c. 58); Shops (Early Closing) Act Amendment Act, 1921 (c. 60); & Statutory Rules & Orders, 1912, No. 316.

212. Power of local authority to make order—Fixing day for early closing—Shop Hours Act, 1904 (c. 31), s. 1.]—A local authority under above Act, made an order that every shop within its jurisdiction wherein the trade or business of a hairdresser or barber was carried on should, so far as such shop was used for carrying on such trade or business, be closed on Thursdays at 2 p.m. The order had been sent to the Home Office for confirmation. The A.-G. at the relation of a hairdresser carrying on business within the area, claimed an injunction to restrain the local authority from proceeding with the proposed order, on the ground that it was not within the scope of above sect., & was *ultra vires* because it dealt with one day of the week only, & did not fix the hours for closing on every day of the week, & that it was unreasonable in that it did not discriminate between high-class hairdressers & small barbers:—*Held*: above sect., which speaks of "the several days of the week," authorised the local authority to fix the hours for closing on the days of the week or any of them as it should think fit, & consequently, no action would lie.—*A.-G. v. BRIGHTON CORPN.* (1908), 77 L. J. Ch. 603; 99 L. T. 377; 72 J. P. 306; 24 T. L. R. 634; 6 L. G. R. 835, C. A.

213. — Exempting certain localities—Whether exercise enforceable by mandamus.]—In Apr. 1912, the occupiers of shops within a

hour specified in the requisition, there is no power to fix 5 p.m. as a closing hour, since that hour, at all events during those months when the sun does not set till later, is not in the evening.—*HOULDSWORTH v. LIGHTFOOT*, [1918] N. Z. L. R. 941.—N.Z.

o. — — —.]—*DE PRATO v. PARTICK MAGISTRATES*, [1907] S. C. (H. L.) 5; 44 Sc. L. R. 366; 14 S. L. T. 874.—SCOT.

p. "Closed" — *Meaning of.*]—Shops Regulation Act, R. S. M. 1913, c. 180, s. 2 (13), provides that "The expression 'closed' means not open for the serving of any customer." On a prosecution for a violation of a bye-law passed in pursuance of said Act & requiring shops to be closed & to be kept closed between certain hours, if the magistrate finds that there was no intention on the part of the shop-keeper of serving any customer, the fact that the door was unlocked, the lights turned on, & that persons were in the shop is not sufficient to establish the offence.—*R. v. LEE* (1921), 66 D. L. R. 492; 36 Can. Crim. Cas. 189; 31 Man. L. R. 375; [1922] 1 W. W. R. 126.—CAN.

q. — — —.]—The word "closed" in Shop Hours Act (36 of 1905), s. 4, means that the doors of the shop must be actually shut so as to prevent persons entering for the purpose of buying.—*ISMAIL AHMED v. DURBAN BOROUGH POLICE INSPECTOR* (1918), 39 N. L. R. 119.—S. AF.

r. *Closing shops by requisition—"Evening"*—Power to fix particular hour.]—Under Shops & Offices Act, 1908, s. 25, which provides for the closing of shops by requisition "in the evening of every working day at an

s. *Right to employ assistants after closing hour—On special days—Whether shop may be kept open.*]—In conferring upon the occupier of a shop the right to employ assistants till 11 p.m. on Christmas Eve & New Year's Eve, Shops & Offices Act, 1908, s. 5 does not authorise the keeping open of the shop till the same hour.—*ARNOLD v. MANNING & DAWSON, LTD.*, [1919] N. Z. L. R. 260.—N.Z.

t. *Exemption — "Refreshments" — "Sweets" — "Strawberry water-ice."*]—Under the Early Closing of Shops Order of Apr. 26, 1917, as amended by the Order of June 28, 1918, an exception is made in favour of the sale of "refreshments for consumption on the premises" it being provided however, that "refreshments shall not be deemed to include sweets, chocolate, or other sugar confectionery or ice-cream":—*Held*: "strawberry water-ice" fell under the category of "sweets."—*JACOVELLI v. ARCHIBALD*, [1918] S. C. (J.) 13.—SCOT.

PART V. SECT. 3, SUB-SECT. 2.—B.

a. *Power of local authority to make order—Fixing day for early closing.*]—There is no power under Factories & Shops Acts to make a regulation prescribing & enforcing

Sect. 3.—Hours, etc., in shops under Shop Regulation Acts: Sub-sects. 1 & 2, A. & B.]

them down again, cleaning knives in so far as they were for subsequent use at the customers' tables, polishing pewter & copper measures used there-after for measuring or serving out drinks to customers, collecting glasses after they had been used by customers from various parts of the bar for cleaning by the barmen, cleaning & tidying the premises for use by customers at various times of the day. He did not have any half-holiday during the week. Applt. having been convicted by a magistrate upon an information charging him with unlawfully failing to comply with Shops Act, 1912 (c. 3), s. 1 (1):—*Held*: the conviction was right inasmuch as all the five duties were sufficiently proximate to the serving of customers to justify the magistrate in holding that they were discharged in connection with the serving of customers within the Act.—*FRANCE v. LONDON COUNTY COUNCIL*, [1915] 1 K. B. 688; 84 L. J. K. B. 623; 112 L. T. 820; 79 J. P. 242; 31 T. L. R. 128; 13 L. G. R. 382; *sub nom.* *FRANCE v. LONDON COUNTY COUNCIL*, 24 Cox, C. C. 684, D. C.

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e. — — —.]—Under Ordinance No. 12 of 1919, s. 8 (4), an eating house is exempted from the provisions of the Ordinance as to closing hours, but not if there is carried on therein any business outside the business of a restaurant not belonging to any other of the exempted classes.

D., the proprietor of a retail shop & of an eating house, which were conducted in adjoining rooms under one roof, was charged with neglecting to keep the shop closed, or otherwise with selling after closing hours, & was convicted. The sale took place in the eating-house, but the articles were not all of a nature usually sold in a restaurant. The retail shop was closed:—*Held*: the conviction was right.—*DESAI v. R.* (1920), 41 N. L. R. 228.—S. AF.

f. — Sale in living-room adjoining shop.]—The front door of a room used as a shop was closed to the public, but access to the room was possible from a living-room in the building. In a charge of contravening of Ord., No. 12, 1919, s. 5 (b), accused had sold articles to a person in the living-room after hours:—*Held*: the conviction should stand as the room was being used for the business of the shop, & being open for the admission

SUB-SECT. 2.—CLOSING HOURS.

A. In General.

208. "Retail business of jeweller"—Sale of jewellery by auction—After closing hour fixed by order—*Shops Act, 1912, (c. 3), s. 9 (1).*—By the Shops Act, 1912 (c. 3), a local authority may make an order fixing the closing hours for shops within their district & defining the shops & trades to which the order applies. By s. 19 (1) "the expression 'shop' includes any premises where any retail trade or business is carried on" & "the expression 'retail trade or business' includes," *inter alia*, "retail sales by auction." An order made under the Act fixed the closing hour for shops "in which the retail trade or business of a jeweller, gold or silversmith, ironmonger, hardware merchant, or tool dealer is carried on." Resp., who was an auctioneer, & who sold on his premises, being a shop, all kinds of articles including articles of jewellery entrusted to him for sale by auction & pawnbrokers' pledges, sold by auction in the ordinary way, on certain days after the closing hours fixed by the order, articles of jewellery:—*Held*: resp. had not thereby carried on the retail business of a jeweller within the meaning of the order.—*LUCAS v. REUBENS*, [1922] 2 K. B. 482; 90 L. J. K. B. 860; 125 L. T. 313; 85 J. P. 166; 37 T. L. R. 618; 65 Sol. Jo. 492; 19 L. G. R. 470; 27 Cox, C. C. 1, D. C.

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of the purchaser, was not closed in the sense of the Ordinance.—*PILLAY PIETERMARITZBURG (CHIEF CO STABLE)* (1923), 44 N. L. R. 120. S. AF.

g. Employment of hotel servant After 11 p.m.]—It is not an offence under Early Closing Act, s. 9, to employ an hotel servant after 11 p.m.—*ET SHEARER* (1910), 10 S. R. N. S. 601; 27 N. S. W. W. N. 130.—AUS

h. Scope of statute.]—*BATEMAN GREEN* (1912), 8 Tas. L. R. 43. AUS.

k. "Carrying on trade or business"—Dealing with goods on particular occasion not sufficient.]—Under Factories & Shops Act, 1915, s. 105 (1) it must be shown that a trade business of the kind specified in s. 105 of that Act is carried on, & it is not enough to show that the goods dealt in on a particular occasion.

A., who occupied premises as fruit & confectionary shop, was proved to have sold, on one occasion, packet of cigarettes from the stall during the hours within which such sale was lawful, & to have subsequently sold fruit therefrom during the hours within which it was lawful to sell fruit but unlawful to sell tobacco:—*Held*: the decision of justices that the trade business of a tobacconist was not shown to have been carried on was

of the Sched. to the Shops (Early Closing) Act, 1920 (c. 60), as amended by subsequent Orders, which by para. 4 incorporates the above definition of "shop."—*DENNIS v. HUTCHINSON, TRAFFORD v. SAME*, [1922] 1 K. B. 693; 91 L. J. K. B. 584; 126 L. T. 669; 86 J. P. 85; 38 T. L. R. 263; 66 Sol. Jo. 316; 20 L. G. R. 199; 27 Cox, C. C. 202, D. C.

210. "Every day other than Saturday"—"Includes Sunday"—Sale of confectionery after hours on Sunday—Shops (Early Closing) Act, Amendment Act, 1921, Sched. Part I.]—Upon an information against the occupier of a confectionery shop for keeping his shop open between 8 & 9.30 p.m. on Sunday evening:—*Held*: the words "every day other than Saturday" in Part I. of the Schedule to the Act of 1920 included Sundays, while the words "weekdays other than Saturdays" in the amending Act of 1921 did not include Sundays, & therefore an offence had been committed contrary to the above provision of the Act of 1920.—*LONDON COUNTY COUNCIL v. GAINSBOROUGH*, [1923] 2 K. B. 301; 92 L. J. K. B. 597; 129 L. T. 633; 87 J. P. 102; 39 T. L. R. 422; 67 Sol. Jo. 595; 21 L. G. R. 312; 27 Cox, C. C. 503, D. C.

211. Customer in shop before closing hour—Failure to complete purchase in time—Shops (Early Closing) Act, 1920 (c. 58), sched. 1, Art. 2 (1).]—Where persons are invited to enter a shop before the appointed hour for closing & do so without any definite intention of making a purchase, as for example, when present at a retail sale by auction, & then remaining on after the closing hour & after the shop has been closed to new customers, are invited to make purchases, the shop-keeper contravenes the provisions of above Act, sched. 1, art. 1 (a) & such circumstances do not fall within the exception contained in above Act, sched. 1, art. 2 (1).—*SALFORD CATTLE MARKET*

not be disturbed.—*TIPPLE v. BONGIORNO*, [1921] V. L. R. 523.—AUS.

l. *Chemist's shop—Goods usually kept for sale.*]—In the absence of any bye-law specifically stating that any particular line or class of goods shall not be sold in any drug shop after the hour of closing prescribed by an early closing bye-law, there is no restriction as to the hours of sale of goods usually sold or kept for sale by pharmaceutical chemists, or chemists & druggists.—*STEVENS v. GORDON MITCHELL DRUG CO.*, [1917] 1 W. W. R. 938; 27 Man. L. R. 318; 32 D. L. R. 185.—CAN.

m. *Power of local authority to pass bye-laws.*]—The City Council of C. was empowered to make bye-laws for regulating the hours & for opening & closing retail stores. Under a bye-law passed for this purpose it was provided that no conviction should take place unless it was shown that business had actually been transacted during business hours:—*Held*: the bye-law was *ultra vires*.—*R. v. DOLL* (1907), 7 Terr. L. R. 472; 6 W. L. R. 512.—CAN.

n. — *Interference by court with exercise of discretion.*]—Municipal bye-laws regulating the early closing of shops, though in operation they may affect unfairly some classes of shops, should not for that reason be declared invalid if the bye-laws are fully within the powers conferred by statute. If a municipal council in passing a bye-law has acted strictly within the powers conferred upon it by the Legislature the reasonableness of the bye-law is not examinable by the court.—*Re EARLY CLOS-*

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ING BYE-LAW, *Re PERLEY* (1920), 2 W. W. R. 524; 52 D. L. R. 363; 30 Man. L. R. 444.—CAN.

PARTICK MAGISTRATES, [1907] S. C. (H. L.) 5; 44 Sc. L. R. 366; 14 S. L. T. 874.—SCOT.

p. "Closed"—*Meaning of.*]—Shops Regulation Act, R. S. M. 1913, c. 180, s. 2 (13), provides that "The expression 'closed' means not open for the serving of any customer." On a prosecution for a violation of a bye-law passed in pursuance of said Act & requiring shops to be closed & to be kept closed between certain hours, if the magistrate finds that there was no intention on the part of the shop-keeper of serving any customer, the fact that the door was unlocked, the lights turned on, & that persons were in the shop is not sufficient to establish the offence.—*R. v. LEE* (1921), 66 D. L. R. 492; 36 Can. Crim. Cas. 189; 31 Man. L. R. 375; [1922] 1 W. W. R. 126.—CAN.

q. — — —.]—The word "closed" in Shop Hours Act (36 of 1905), s. 4, means that the doors of the shop must be actually shut so as to prevent persons entering for the purpose of buying.—*ISMAIL AHMED v. DURBAN BOROUGH POLICE INSPECTOR* (1918), 39 N. L. R. 119.—S. AF.

r. *Closing shops by requisition—Evening.*]—Power to fix particular hour.]—Under Shops & Offices Act, 1908, s. 25, which provides for the closing of shops by requisition "in the evening of every working day at an

SALEROOMS, LTD. *v. OSBORNE* (1923), 92 L. J. K. B. 1018; 129 L. T. 686; 87 J. P. 134; 21 L. G. R. 468; 27 Cox, C. C. 515, D. C.

B. On Weekly Half-Holiday.

See Shops Acts, 1912 (c. 3), 1913 (c. 24); Shops (Early Closing) Act, 1920 (c. 58); Shops (Early Closing) Act Amendment Act, 1921 (c. 60); & Statutory Rules & Orders, 1912, No. 316.

212. Power of local authority to make order—Fixing day for early closing—Shop Hours Act, 1904 (c. 31), s. 1.]—A local authority under above Act, made an order that every shop within its jurisdiction wherein the trade or business of a hairdresser or barber was carried on should, so far as such shop was used for carrying on such trade or business, be closed on Thursdays at 2 p.m. The order had been sent to the Home Office for confirmation. The A.-G. at the relation of a hairdresser carrying on business within the area, claimed an injunction to restrain the local authority from proceeding with the proposed order, on the ground that it was not within the scope of above sect., & was *ultra vires* because it dealt with one day of the week only, & did not fix the hours for closing on every day of the week, & that it was unreasonable in that it did not discriminate between high-class hairdressers & small barbers:—*Held*: above sect., which speaks of "the several days of the week," authorised the local authority to fix the hours for closing on the days of the week or any of them as it should think fit, & consequently, no action would lie.—*A.-G. v. BRIGHTON CORPN.* (1908), 77 L. J. Ch. 603; 90 L. T. 377; 72 J. P. 306; 24 T. L. R. 634; 6 L. G. R. 835, C. A.

213. — Exempting certain localities—Whether exercise enforceable by mandamus.]—In Apr. 1912, the occupiers of shops within a

hour specified in the requisition, there is no power to fix 5 p.m. as a closing hour, since that hour, at all events during those months when the sun does not set till later, is not in the evening.—*HOULDSWORTH v. LIGHTFOOT*, [1918] N. Z. L. R. 941.—N.Z.

s. *Right to employ assistants after closing hour—On special days—Whether shop may be kept open.*]—In conferring upon the occupier of a shop the right to employ assistants till 11 p.m. on Christmas Eve & New Year's Eve, Shops & Offices Act, 1908, s. 5 does not authorise the keeping open of the shop till the same hour.—*ARNOLD v. MANNING & DAWSON, LTD.*, [1919] N. Z. L. R. 260.—N.Z.

t. *Exemption — "Refreshments" — "Sweets" — "Strawberry water-ice."*]—Under the Early Closing of Shops Order of Apr. 26, 1917, as amended by the Order of June 28, 1918, an exception is made in favour of the sale of "refreshments for consumption on the premises" it being provided however, that "refreshments shall not be deemed to include sweets, chocolate, or other sugar confectionery or ice-cream":—*Held*: "strawberry water-ice" fell under the category of "sweets."—*JACOVELLI v. ARCHIBALD*, [1918] S. C. (J.) 13.—SCOT.

PART V. SECT. 3, SUB-SECT. 2.—B.

a. *Power of local authority to make order—Fixing day for early closing.*]—There is no power under Factories & Shops Acts to make a regulation prescribing & enforcing

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Sect. 3.—Hours, etc., in shops under Shop Regulation Acts: Sub-sect. 2, R.]

certain area petitioned the local authority under Shops Act, 1912 (c. 3), s. 4 (4), to exempt that area from the operation of the Act; & at a meeting on June 5 the council by resolution accepted the area for the purposes of that enactment. Voting papers were issued accordingly, & a majority of the shopkeepers voted in favour of the exemption. On July 3 the local authority rescinded their resolution of June 5 on the ground that the area in question was unreasonably small.

An application was therefore made by one of the shopkeepers in the area for a *mandamus* requiring the local authority to make the exemption order under sect. 4 (4), on the ground that as the area had been accepted by the council as sufficiently large, & a vote had been taken of the occupiers of shops of all classes within it, which disclosed a majority in favour of the exemption, the council could not thereafter hold the area to be unreasonably small:—*Held*: after the resolution of June 5 was rescinded there was either no duty on the council to act upon it, or if there were it was a duty within the discretion of the council & not one which, in the circumstances, the ct. would enforce by *mandamus*.—*R. v. MANCHESTER CITY COUNCIL, Ex p. BATTY* (1912), 107 L. T. 617; 77 J. P. 43; 29 T. L. R. 28; 10 L. G. R. 1081, D. C.

214. Application of Acts to companies—As occupiers of shops.]—There is nothing in the provisions of the Shops Act, 1912 (c. 3), to exclude an incorporated co. which occupies a shop from the obligation imposed by s. 4 of that Act upon occupiers of shops to close their shops on the afternoon of one day in the week.

The provisions of the Summary Jurisdiction Acts as to summoning offenders before a ct. of summary jurisdiction to answer an information for a penalty apply to corpns. as well as to natural persons.—*EVANS & CO., LTD. v. LONDON COUNTY COUNCIL*, [1914] 3 K. B. 315; 83 L. J. K. B. 1264; 111 L. T. 288; 78 J. P. 345; 30 T. L. R. 509; 12 L. G. R. 1079; 24 Cox, C. C. 290, D. C.

215. Disobedience of shop assistant—To instructions not to work during half-holiday—Personal liability of assistant.]—The owners of a bookstall, who were alleged to be the occupiers of a shop within Shops Act, 1912 (c. 3), had given notice to the clerk in charge of the bookstall requiring him to take his weekly half-holiday & had, so far as they were able, insisted upon his taking it. They had in pursuance of sect. 1, sub-sect. 2, of the Act fixed & specified by notice in the bookstall in the prescribed form a certain day of the week on which the clerk was not employed after half-past 1 o'clock in the afternoon. It made no pecuniary difference to him whether he took the weekly half-holiday or not. In a certain week in disobedience to his orders he took no weekly half-holiday and persisted in working in the bookstall after half-past 1 on the day specified.

the observance of a weekly half-holiday by the keepers of shops of the classes mentioned in Factories & Shops Act, 1890 (No. 1091), Sched. 4.—*Re HOOKER*, [1905] V. L. R. 680.—AUS.

b. ——— *Whether applicable to railway bookstall.]*—*Held*: an order of a local authority, made under Shops Act, 1912, s. 4 (6), extending sub-sect. 1 to "the sale of tobacco

& smoker's requisites" did not apply to a railway bookstall at which a substantial part of the business consisted in the sale of those articles.—*BYER v. MENZIES (JOHN) & Co.*, [1920] S. C. (J.) 7.—SCOT.

c. ——— *Notice must conform to statute.]*—Ordinance 5 of 1906, s. 3 (a), as amended by Ordinance 11 of 1920, required the B. town council to select a day on which all shops should

On an information laid against the alleged occupiers:—*Held*: assuming the bookstall to be a shop, that an offence had been committed under sect. 1, sub-sect. 1, of the Act, & the proper course for the occupiers was to lay an information against the clerk & bring him before the Court under sect. 14, sub-sect. 3, of the Act.—*WARD v. SMITH (W. H.) & SON*, [1913] 3 K. B. 154; 82 L. J. K. B. 941; 109 L. T. 439; 77 J. P. 370; 29 T. L. R. 536; 11 L. G. R. 741; 23 Cox, C. C. 562, D. C.

Annotations:—*Appld. George v. James* (1913), 78 J. P. 156. *Reid. Molluish v. L. C. C.* (1914), 12 L. G. R. 1086; L. C. C. v. Wettman, [1922] 1 K. B. 153.

216. Employment outside shop—Distribution of handbills connected with business—In which shop not specifically named.]—*GEORGE v. JAMES*, No. 200, *ante*.

217. Employment at branch shop—During half-holiday at usual place of employment.]—*LONDON COUNTY COUNCIL v. WETTMAN*, No. 201, *ante*.

218. Commodity retailed by several classes of shops—Sale by one during half-holiday of other—Whether offence committed.]—Where a commodity is sold by retail in the ordinary course of the business of more than one class of traders, & the weekly half-holiday under the Shops Act, 1912 (c. 3), is fixed by the local authority for the different classes respectively on different days of the week, a trader who sells the commodity in the ordinary course of his own business is not required to close his shop for the serving of customers with it on the half-holiday fixed for any of the other classes of traders.—*SCHUCK v. BANKS*, [1914] 2 K. B. 491; 83 L. J. K. B. 1168; 111 L. T. 44; 78 J. P. 229; 30 T. L. R. 378; 12 L. G. R. 512; 24 Cox, C. C. 187, D. C.

219. ——— ——— ———.]—Under Shops Act, 1912 (c. 3), s. 4, a local authority made an order fixing the weekly half-holiday for all shops in which the retail trade or business of a pork butcher is carried on, & extending the provisions of s. 4 to such parts of the retail trade or business of pork butchers as were exempted under s. 4 (6) & the second schedule to the Act.

Resps. who were confectioners & refreshment-room proprietors, as incidental to their business made sausages of pork, bread, & other materials & sold them in their shop for consumption both on & off their premises, & they sold such sausages in their shop at a time when pork butchers were required to have their shops closed under the weekly half-holiday. Pork sausages are made & sold by confectioners & others, as well as by pork butchers:—*Held*: resps. by selling the pork sausages as incidental to their business did not thereby become "pork butchers" & therefore sale of such sausages on the pork butchers' weekly half-holiday was not an infringement of the order.—*MARGERISON v. WILSON* (1914), 112 L. T. 76; 79 J. P. 38; 12 L. G. R. 1098, D. C.

220. Liberty to close on day other than that

be closed not later than 1.30 p.m. for the remainder of the day. A notice purporting to have been published under this sect. required all shops within the municipality to be closed at 1 p.m. on the day selected:—*Held*: *ultra vires*.—*R. v. GIN*, [1923] O. P. D. 137.—S. AF.

d. *Half-holiday—Duty of employer to intimate to employees.]*—It is the duty of the occupier of a shop to

fixed—How far a defence—Retail trade in private house—Only during half-holiday period for locality.]

—Resp. sold groceries on Wednesday afternoon after 1 p.m. in her house, which on all the other days of the week was used solely as an ordinary dwelling house. Under an order made by the local authority all shops to which the order applied were obliged to close for serving customers on Wednesday in each week from 1 p.m., but the order contained a proviso that the occupier of a shop might elect to close his shop for the weekly half-holiday on a Saturday instead of Wednesday. No notice under the Shops Act, 1912 (c. 3), was affixed to resp.'s house:—*Held*: resp. had committed the offence under Shops Act, 1912 (c. 3), s. 9 (1), of carrying on a retail trade in a place not a shop at a time when it would be unlawful to keep a shop open for the purposes of retail trade, & the fact that the occupier of a shop could elect to close his shop on a Saturday instead of a Wednesday afforded no answer to the charge.—*COWDEN v. McEVOY*, [1914] 3 K. B. 108; 83 L. J. K. B. 1249; 111 L. T. 549; 78 J. P. 336; 12 L. G. R. 1216; 24 Cox, C. C. 377, D. C.

221. ——— Trading during usual half-holiday—No evidence of intention to change.]

Resp., who was a shopkeeper, & had selected Wednesday as his early-closing day, & had a notice to that effect fixed in his shop, kept his shop open on a certain Wednesday after 1 p.m., the notice being still affixed in the shop upon that day. In the following week he did not close his shop on any day other than Wednesday. On an information against resp. for keeping his shop open after 1 p.m. on the Wednesday in question, he contended that though he might have been convicted for not closing on any day of that week, yet that as he was entitled to change his usual closing day he had not committed the offence charged:—*Held*: as the resp. had not taken any steps to change his usual closing day, & still maintained in his shop the notice that Wednesday was his early closing day, he was liable to be convicted.—*OWEN v. PARRY* (1914), 79 J. P. 64; 12 L. G. R. 1228, D. C.

222. Use of automatic machine—When shop closed—Not "personal service" of customer.]

Resp., who carried on the retail trade or business of a dairyman, locked his shop on the weekly half-holiday so that no would-be customer could obtain access to the interior, but on the same afternoon he had an automatic machine affixed to the door of the shop, & a customer, by putting money in the slot of the machine, could obtain a supply of milk. The reservoir of the automatic machine containing the milk was inside the shop:—*Held*: resp. had not by the use of the automatic machine on the weekly half-holiday contravened the Shops Act, 1912 (c. 3), s. 4 (1), inasmuch as the sub-sect. by providing that "every shop shall . . . be closed for the serving of customers" on the weekly half-holiday, means that the shop shall be closed for the personal serving of customers; (2) resp. had not contravened s. 9 of the

Act, which prohibits trading elsewhere than in shops on the weekly half-holiday, inasmuch as the automatic machine placed where it was, was part of his shop.

Semble: sect. 9 is aimed at the personal carrying on in a place not a shop of retail trade or business; it does not apply to trade or business carried on by means of an automatic machine (*LUSH, J.*).—*WILLESDEN URBAN DISTRICT COUNCIL v. MORGAN*, [1915] 1 K. B. 349; 84 L. J. K. B. 373; 112 L. T. 423; 79 J. P. 166; 31 T. L. R. 93; 59 Sol. Jo. 148; 13 L. G. R. 390; 24 Cox, C. C. 546, D. C.

223. Exemption—Business involving "perishable article"—Butter.]—Resps. carried on the business of dairymen, & kept a shop in which they sold milk, cream, & butter, & in addition honey in pots. On the day fixed for the weekly half-holiday resps.' shop was open after 1 o'clock & the manager sold to a certain appct. some butter & a pot of run honey.

On an information charging resps. with an offence under Shops Act, 1912 (c. 3), s. 4, a ct. of summary jurisdiction held that butter was an article of a perishable nature & that run honey was confectionery within sched. 2 & no offence had been committed.

On a case stated:—*Held*: (1) butter was an article of a perishable nature within sched. 2; (2) there being no evidence upon which run honey could be held to be confectionery within sched. 2, the sale of run honey was not a trade or business exempted from the operation of s. 4 & an offence had been committed.—*LONDON COUNTY COUNCIL v. WELFORD'S SURREY DAIRIES CO., LTD.*, [1913] 2 K. B. 529; 82 L. J. K. B. 669; 108 L. T. 998; 77 J. P. 206; 29 T. L. R. 438; 11 L. G. R. 831; 23 Cox, C. C. 428, D. C.

224. ——— Motor, cycle & aircraft supply business.]—The exemption granted in the Shops Act, 1912 (c. 3), sched. 2, by which a shop is not bound by the provisions of the Act itself as to a weekly half-holiday, in so far as the trade or business carried on is concerned with "the sale of motor, cycle, & aircraft supplies and accessories to travellers," only extends to the sale of supplies & accessories for motors, cycles, & aircraft, & does not authorise the sale to travellers of any supplies or accessories whatever which are unconnected with motors, cycles, and aircraft.—*WILLIAMS v. GOSDEN*, [1914] 1 K. B. 35; 83 L. J. K. B. 77; 109 L. T. 870; 77 J. P. 464; 30 T. L. R. 4; 58 Sol. Jo. 49; 11 L. G. R. 1174; 23 Cox, C. C. 655, D. C.

225. ——— Confectionery—Whether run honey included under.]—*LONDON COUNTY COUNCIL v. WELFORD'S SURREY DAIRIES CO., LTD.*, No. 223, ante.

226. ——— Sweets & chocolates.]—Sweets & chocolates are "confectionery" within Shops Act, 1912 (c. 3), sched. 2, & shops where they are sold are *prima facie* not included within the provisions of the Act, as to the weekly half-holiday.

intimate to his employees on what day of the week they are to take a half-holiday.—*MARTIN v. McCANN* (1897), 22 V. L. R. 553.—AUS.

Meaning of term.]—A "half-holiday" means the remainder of the day from the commencement of such half-holiday.—*BRADSHAW v. REWER* (1911), 14 W. A. L. R. 6.—

f. ——— "Bank holiday"—"Week day."]—During the week ending Dec. 21, 1912, T. B. & Co. gave their assistants no half-holiday: during the week ending Dec. 28, the only holidays given were Christmas Day & St. Stephen's Day. T. B. & Co. were convicted of an offence under Shops Act, 1912, s. 1 (1):—*Held*: Christmas Day was a week day & a bank holiday for the purposes

of the Act. The word "holiday" must be read in the singular only. No offence was committed.—*TODD, BURNS & CO., LTD. v. DUBLIN CORPN.* (1913), 47 I. L. T. 157.—IR.

g. Exemption—How excluded.]—Shops & Offices Act, 1908, s. 18 (a) (1.), which exempts "Any shop wherein is exclusively carried on any one or more of the businesses" therein specified from the general obligation to close

Sect. 3.—Hours, etc., in shops under Shop Regulation Acts: Sub-sect. 2, B. Sects. 4 & 5: Sub-sects. 1 & 2, A.]

But, where, under the provisions of sect. 4, sub-sect. B of the Act, a local authority made an order extending the provisions of the Act, to "the sale by retail of . . . confectionery (including sweets & chocolates)":—*Held*: the order included shops in which sweets & chocolates only are sold, & not those only in which they are sold in addition to pastry confectionery.—*GEE v. DAVIES* (1916), 85 L. J. K. B. 1431; 114 L. T. 1132; 80 J. P. 285; 32 T. L. R. 446; 14 L. G. R. 694; 25 Cox, C. C. 415, D. C.

227. Removal of exemption by local authority—Sale of "confectionery (including sweets & chocolates)"—Shop selling sweets & chocolates only.]—GEE v. DAVIES, No. 226, ante.

SECT. 4.—MEMBERSHIP OF SHOP CLUBS AND CONTRIBUTIONS TO THRIFT FUNDS.

See Shop Clubs Act, 1902 (c. 21).

228. Payments under rules of club—Not certified by registrar—How far recoverable.]—BALCHIN v. EBURY (LORD) (1903), 20 T. L. R. 60; 48 Sol. Jo. 83.

SECT. 5.—WAGES.

SUB-SECT. 1.—PARTICULARS TO BE FURNISHED TO PIECE-WORKERS.

See 1901 Act, ss. 116, 117, & Checkweighing in Various Industries Act, 1919 (c. 51).

229. Error on card as to rate of payment—Conviction of employer—Notwithstanding error discoverable by worker.]—B., a woollen weaver by the piece, employed by N., had a card given to her with particulars as to rate of payment. The card was incorrect, though B. might have discovered the error by counting, or by applying to the manager of the machine. The justices convicted N. under Factory & Workshop Act, 1891 (c. 75), s. 24:—*Held*: it being a question of fact, the ct. could not interfere with the conviction.—NUSSEY v. BIRTWHISTLE (1894), 58 J. P. 735, D. C.

230. Power of Secretary of State—To extend 1901 Act, s. 116, to men's workshops—1901 Act, s. 157.]—By reason of 1901 Act, s. 157, which enacts that sect. 116 of the Act shall not apply to men's workshops, a Secretary of State has no power under sect. 116, sub-sect. 5, to apply the provisions of the sect. to out-workers employed in connection with a men's workshop; & in such a case an employer, who carries on business as a tailor, is under no obligation to furnish to a person who is an out-worker a written or printed state-

ment of the particulars of the rate of his wages applicable to the work to be done by him.—*SEAL v. ALEXANDER*, [1912] 1 K. B. 469; 81 L. J. K. B. 628; 106 L. T. 121; 76 J. P. 156; 28 T. L. R. 196; 22 Cox, C. C. 697, D. C.

SUB-SECT. 2.—TRUCK.

A. Persons to Whom Truck Acts Apply.

See Truck Act, 1831 (c. 37).

231. Who is "artificer, workman or labourer"—Personal performance of labour—How far material.]—A person who takes a contract to execute a certain cutting on a railway, at a certain sum per cubic yard, & employs several men under him to assist in doing the work, is not a workman or labourer within the true meaning of Truck Act, 1831 (c. 37), although he does a portion of the work himself.—*RILEY v. WARDEN* (1848), 2 Exch. 59; 18 L. J. Ex. 120; 10 L. T. O. S. 420; 12 J. P. 614; 154 E. R. 405.

Annotations:—*Distd.* *Floyd v. Weaver* (1852), 19 L. T. O. S. 58. *Apld.* *Sharman v. Sanders* (1853), 13 C. B. 166; *Ingram v. Barnes* (1857), 7 E. & B. 115; *Sleeman v. Barrett* (1864), 2 H. & C. 934. *Refd.* *Bowers v. Lovekin* (1856), 6 E. & B. 584; *Lawrence v. Todd* (1863), 14 C. B. N. S. 554; *Squire v. Midland Lace Co.*, [1905] 2 K. B. 448. *Mentd.* *Homer v. Taunton* (1860), 5 H. & N. 661.

232. ———.]—If a collier be employed to get coal from a mine, & is to be paid at a certain rate per ton, on the coals got by him, & has liberty to employ other men to assist him, he is an artificer within the meaning of the Truck Act, 1831, c. 37, & his wages must be paid in money, not in goods, if by the contract he is bound to give his personal labour in the performance of the work.—*WEAVER v. FLOYD* (1852), Cox, M. & H. 599; 21 L. J. Q. B. 151; *sub nom.* *FLOYD v. WEAVER*, 19 L. T. O. S. 58; 16 J. P. 278; 16 Jur. 289.

Annotations:—*Apld.* *Bowers v. Lovekin* (1856), 6 E. & B. 584. *Consd.* *Ingram v. Barnes* (1857), 7 E. & B. 115. *Refd.* *Sharman v. Union Iron Works Co.* (1852), 3 Car. & Kir. 298.

233. ———.]—One who contracts to do work upon a large scale, employing labourers under him, is not an "artificer, workman, or labourer," within the meaning of the Truck Act, 1831 (c. 37), though he superintends the work, & from time to time labours personally therein.—*SHARMAN v. SANDERS* (1853), 13 C. B. 166; 22 L. J. C. P. 86; 20 L. T. O. S. 247; 17 Jur. 765; 1 W. R. 152; 138 E. R. 1161.

Annotations:—*Apld.* *Ingram v. Barnes* (1857), 7 E. & B. 115; *Sleeman v. Barrett* (1864), 2 H. & C. 934. *Refd.* *Bowers v. Lovekin* (1856), 6 E. & B. 584.

234. ———.]—(1) By an agreement with a mine owner, two persons engaged as "butty colliers." It was found, as a fact, that butty colliers get the produce of the mine at so much a yard, that they employ others under them to increase the quantity; but that they must work personally, & are treated as workmen:—*Held*: on this finding, butty colliers were artificers within

on the statutory closing day which is imposed by s. 11, does not mean that a shopkeeper who carries on any such business is exempt unless he also carries on some business which is not covered by the exemption. The exemption may be excluded by proof, not of purely casual & trifling transactions in non-exempted business, but of something like systematic trading,

though such dealings may not amount in any case to the carrying on of a particular business.—*WONG LOWE v. GEORGESON*, [1919] N. Z. L. R. 830.—N.Z.

PART V. SECT. 5, SUB-SECT. 2.—A.

b. Who is "artificer, workman or labourer"—Under Employers & Work-

men Act, 1875, c. 90, s. 10.]—A hall dresser is not a "workman" engaged in manual labour" within *Employers & Workmen Act*, 1875, s. 10.—*R. LOUTH JJ.*, [1900] 2 I. R. 714.—IR.

1. ——— Tram conductor.]—WILSON v. GLASGOW TRAMWAYS CO. (1878), 5 B. & S. 981.—SCOT.

the Truck Act, 1831 (c. 37); the distinction between contractors & artificers depending on the fact whether by the engagement they were labourers; (2) deductions made from their wages in respect of articles supplied to them by their employers to enable them to proceed with their work were invalid as payments under the statute.—*BOWERS v. LOVEKIN* (1856), 6 E. & B. 584; 25 L. J. Q. B. 371; 27 L. T. O. S. 168; 2 Jur. N. S. 1187; 4 W. R. 600; 119 E. R. 982.

Annotations:—*As to* (1) *Apld.* *Lawrence v. Todd* (1863), 14 C. B. N. S. 554. *Consd.* *Sleeman v. Barrett* (1864), 2 H. & C. 934. *Refd.* *Ingram v. Barnes* (1857), 7 E. & B. 115. *As to* (2) *Refd.* *Archer v. James* (1862), 2 B. & S. 67.

235. — — — — —.]—Pltf., an illiterate labouring man, attached his mark to a written contract with deft., by which he engaged to make as many bricks as deft. required in deft.'s brickfield, finding all labour, deft. finding the materials. Payment to be 10s. 6d. per thousand for the bricks when complete. Pltf., assisted by others, made bricks, having worked at them personally; in payment he accepted tickets for goods. Afterwards he sued for the full price, contended that he was an artificer within the Truck Act, 1831 (c. 37), & consequently, the payment by tickets was void:—*Held*: pltf., not being bound by his contract to do any part of the work personally, was not an artificer within the Truck Act. *Qu.*: whether, if pltf. had been bound to labour personally, but was at liberty to hire labourers to assist him, he would have been within the Act.—*INGRAM v. BARNES* (1857), 7 E. & B. 115; 26 L. J. Q. B. 319; 29 L. T. O. S. 297; 21 J. P. 822; 3 Jur. N. S. 861; 5 W. R. 726; 119 E. R. 1190, Ex. Ch.

Annotations:—*Apld.* *Sleeman v. Barrett* (1864), 2 H. & C. 934; *Pillar v. Llynvi Coal & Iron Co.* (1869), 38 L. J. C. P. 294; *Squire v. Midland Lace Co.*, [1905] 2 K. B. 448. *Mentd.* *Homer v. Taunton* (1860), 5 H. & N. 661.

236. — — — — —.]—Butty colliers working in partnership under a verbal contract with a colliery owner, by the day, by the ton, or by the yard, according to the nature of the work & though not allowed to underlet the work, employing others to assist them, for whose wages they were responsible are not "artificers" receiving "wages" within Truck Act, 1831 (c. 37).

The case is within the Truck Act or not according as the contract is for mere labour or for the result of labour (*POLLOCK, C.B.*).—*SLEEMAN v. BARRETT, ETC. (EXECUTORS OF BENNETT)* (1864), 2 H. & C. 934; 3 New Rep. 484; 33 L. J. Ex. 153; 9 L. T. 834; 28 J. P. 232; 10 Jur. N. S. 476; 12 W. R. 411.

237. — — — — —.]—Resps., a firm of lace-makers, whose premises were a factory within 1901 Act, were in the habit in common with other lacemakers of handing finished lace after its removal from the machines to women called "clippers" for the purpose of having superfluous threads & material removed. The clippers, who were not employed exclusively by any one firm, undertook to get lace clipped & applied to the manufacturers for lace, which they took home with them for that purpose. The lacemakers had no control over the clippers, who might & often did employ others to assist them in the work; the clippers might execute the work themselves or give it to others to execute, or might return it unexecuted. The clippers were responsible in case of the non-return of the lace, & were paid at the end of each week according to the work done;

they were required to pay for damage done to the lace in clipping.

Lace was handed by resps. to two clippers; one was an outsider who had never worked in resps.' factory, & did the clipping at home herself; the other was employed daily in the factory, & after it was closed at night she occasionally took the work home to do, & was assisted by her daughter. The lace handed to the two clippers having been damaged, a sum of sixpence was in each case deducted from the amount due to them at the end of the week, the conditions of Truck Act, 1896 (c. 44), s. 2, as to the making of deductions in respect of damaged goods were not complied with, & the deductions were illegally made if the clippers were workwomen within the Act:—*Held*: as the clippers were not bound by the terms of their contracts to execute the work or any part of it themselves, they were not workwomen within the Employers & Workmen Act, 1875 (c. 90), s. 10, & were not entitled to the protection of Truck Act, 1896 (c. 44), s. 2.—*SQUIRE v. MIDLAND LACE CO.*, [1905] 2 K. B. 448; 74 L. J. K. B. 614; 93 L. T. 29; 69 J. P. 257; 53 W. R. 653; 21 T. L. R. 466; 49 Sol. Jo. 430, D. C.

238. — — — — —.]—*Person loading boat—Connected with ironworks.*—A person employed in loading boats with iron at a private canal, close to ironworks, is an artificer in making iron within Truck Act, 1831 (c. 37).—*MILLARD v. KELLY* (1858), 32 L. T. O. S. 123; 7 W. R. 12; 22 J. P. Jo. 736.

239. — — — — —.]—*Framework knitter.*—A framework knitter is an artificer within Truck Act, 1831 (c. 37).—*MOORHOUSE v. LEE* (1864), 4 F. & F. 354.

240. — — — — —.]—*Under Employers & Workmen Act, 1875 (c. 90), s. 10—Truck Act, 1887 (c. 46), s. 2.*—Pltf. was in the employment of a railway co. as guard of a goods train. His main duty was to guard & conduct the train & to marshal the trucks; but it was also part of his duty at times to assist in coupling & uncoupling the trucks & in unloading them:—*Held*: he was not a "workman" as defined by Employers & Workmen Act, 1875 (c. 90), s. 10, & was not therefore a person to whom Truck Acts, 1831 (c. 37) & 1887 (c. 46) applied.—*HUNT v. GREAT NORTHERN RY. CO.*, [1891] 1 Q. B. 601; 60 L. J. Q. B. 216; 64 L. T. 418; 55 J. P. 470, D. C.

Annotations:—*Refd.* *Bound v. Lawrence* (1891), 60 L. J. M. C. 137; *Whelan v. Great Northern Steam Fishing Co.* (1909), 100 L. T. 913.

241. — — — — —.]—*Potter's printer.*—*Held*: a potter's printer, under a contract with his employers to do work in which he was assisted by "transferrers" whom he himself engaged & paid, was a "workman" within Employers & Workmen Act, 1875 (c. 90), s. 10, & liable in proceedings before a magistrate to pay damages for a breach of his contract with his employers, caused by his transferrers' refusal to work, although he was ready & willing to do it.—*GRAINGER v. AYNLEY, BROMLEY v. TAMS* (1880), 6 Q. B. D. 182; 50 L. J. M. C. 48; 43 L. T. 608; 45 J. P. 142; 29 W. R. 242.

Annotation:—*Refd.* *Morgan v. London General Omnibus Co.* (1884), 48 J. P. 503.

242. — — — — —.]—*Omnibus conductor.*—An omnibus conductor engaged at daily wages paid daily, is not a person to whom the Employers & Workmen Act, 1875 (c. 90) applies, & therefore is not entitled to the benefit of the Employers' Liability Act, 1880 (c. 42).—*MORGAN v. LONDON GENERAL OMNIBUS CO.* (1884), 13 Q. B. D. 832;

Sect. 5.—Wages: Sub-sect. 2, A. & B. (a).]

53 L. J. Q. B. 352; 51 L. T. 213; 48 J. P. 503; 32 W. R. 759, C. A.

Annotations:—Folld. Cook v. North Metropolitan Tram. Co. (1887), 18 Q. B. D. 683. *Distd.* Maynard v. Peter Robinson (1903), 19 T. L. R. 492. *Apld.* Rushbrook v. Grimsby Palace Theatre Co. (1908), 99 L. T. 18. *Refd.* Jackson v. Hill (1884), 13 Q. B. D. 618; Hunt v. G. N. Ry., [1891] 1 Q. B. 601; Lamb v. G. N. Ry. (1891), 65 L. T. 225; Round v. Lawrence, [1892] 1 Q. B. 226; Hoare v. Green (1907), 76 L. J. K. B. 730; Smith v. Associated Omnibus Co., [1907] 1 K. B. 916; Whelan v. Great Northern Steam Fishing Co. (1909), 100 L. T. 913. *Mentd.* Kirkdale Burial Board v. Liverpool Corp., [1904] 1 Ch. 829; Re National Insurance Act, 1911, Re Dairymen's Foremen, Re Tailors' Cutters (1912), 107 L. T. 342.

243. ——— Stage manager.]—A stage manager, part of whose duty it is to shift furniture & scenes, is a workman within Employers' Liability Act, 1880 (c. 42), s. 8.—RUSHBROOK v. GRIMSBY PALACE THEATRE & BUFFET, LTD. (1909), 100 L. T. 253; 25 T. L. R. 258, C. A.

244. ——— Inventor.]—By an agreement in writing between H. & Co., manufacturers, & J., reciting that J. having a knowledge of mechanics, & H. & Co. requiring the services of a person having such knowledge, to assist the firm as a practical working mechanic in developing ideas they, the firm, might wish to carry out, & to himself originate & carry out ideas & inventions suitable to the business of such firm if such inventions were approved by them, it was mutually agreed that J. should be employed by the firm "for the purpose above specified":—*Held*: J. was not "a mechanic or workman" within the Employers & Workmen Act, 1875 (c. 90).—JACKSON v. HILL (1884), 13 Q. B. D. 618; 49 J. P. 118, D. C.

Annotation:—Consd. Bagnall v. Levinstein, [1907] 1 K. B. 531.

245. ——— Tramcar driver.]—The driver of a tramcar is not a person to whom the Employers & Workmen Act, 1875 (c. 80), applies, & therefore is not entitled to the benefit of the Employers' Liability Act, 1880 (c. 42).—COOK v. NORTH METROPOLITAN TRAMWAYS CO. (1887), 18 Q. B. D. 683; 56 L. J. Q. B. 309; 56 L. T. 448; 57 L. T. 476; 51 J. P. 630; 35 W. R. 577; 3 T. L. R. 523, D. C.

Annotations:—Distd. Smith v. Associated Omnibus Co., [1907] 1 K. B. 916. *Refd.* Bound v. Lawrence (1891), 64 L. T. 470; Hunt v. G. N. Ry., [1891] 1 Q. B. 601; Rushbrook v. Grimsby Palace Theatre Co. (1908), 99 L. T. 18; Whelan v. Great Northern Steam Fishing Co. (1909), 100 L. T. 913; Re Lithographic Artists; Re Engravers (1913), 108 L. T. 894.

246. ——— Omnibus driver.]—The driver of a motor-omnibus who has, when out with the omnibus, to do such necessary repairs to it as he is able to do, is a person "otherwise engaged in manual labour" within Employers & Workmen Act, 1875 (c. 90), s. 10, & is, therefore, entitled to the benefit of the Employers' Liability Act, 1880 (c. 42).—SMITH v. ASSOCIATED OMNIBUS CO., [1907] 1 K. B. 916; 76 L. J. K. B. 574; 96 L. T. 675; 71 J. P. 239; 23 T. L. R. 381, D. C.

Annotations:—Refd. Hoare v. Green, [1907] 2 K. B. 315; Rushbrook v. Grimsby Palace Theatre Co. (1908), 99 L. T. 18.

247. ——— Grocer's assistant—Duties not confined to selling.]—The test of whether an employee is engaged in manual labour, within the meaning of the Employers & Workmen Act, 1875 (c. 90), is whether such labour is his real & substantial employment, or whether it is incidental & accessory to such employment.

Appltd., a grocer's assistant, whose duty it was

to serve customers in a shop, had also other duties involving manual labour, such as making up parcels for customers, carrying parcels from the shop to the cart at the door, & bringing up goods from the cellar to the shop:—*Held*: such occupations were incidental to his real & substantial employment as a salesman, & he was not engaged in manual labour within the meaning of the Employers & Workmen Act, 1875 (c. 90).—BOUND v. LAWRENCE, [1892] 1 Q. B. 226; 61 L. J. M. C. 21; 65 L. T. 844; 56 J. P. 118; 40 W. R. 1; 8 T. L. R. 1; 36 Sol. Jo. 11, C. A.

Annotations:—Apld. McDonald v. Brown (1918), 87 L. J. K. B. 1119. *Refd.* Pearce v. Lansdowne (1893), 62 L. J. Q. B. 441; Hoare v. Green, [1907] 2 K. B. 315; Rushbrook v. Grimsby Palace Theatre Co. (1908), 99 L. T. 18; Jacques v. Steam Tug Alexandria (Owners) (1920), 90 L. J. K. B. 473. *Mentd.* Re Dairymen's Foremen, Re Tailors' Cutters (1912), 107 L. T. 342.

248. ——— Potman in public house.]—Where the duties of a potman in a public-house, although manual, are substantially of a menial or domestic nature, he is not a workman within the Employers' Liability Act.—PEARCE v. LANSDOWNE (1893), 62 L. J. Q. B. 441; 69 L. T. 316; 57 J. P. 760, D. C.

Annotations:—Mentd. L. C. C. v. Parry (1915), 79 J. P. 312; Re Unemployment Insurance Act, Re Junior Carlton Club's Appln., [1922] 1 K. B. 166.

249. ——— Independent contractor.]—By the special rules of a colliery made under Coal Mines Regulation Act, 1887 (c. 58), s. 51, the manager of the mine was made responsible for the control, management, & direction of the mine, & was to appoint such competent persons as might be necessary for carrying out the provisions of the Act, & all persons employed in or about the mine were to obey his directions; & the chargeman in each shift was to have charge of the sinking operations.

E. entered into a contract with the owners of the colliery to sink a shaft in their coal mine. By the contract E., who was therein called the contractor, was to provide such sinkers, etc., as might be necessary for the execution of the work, & was to be paid a certain sum per fathom sunk. E. employed & paid the sinkers, he himself acting as "chargeman" in charge of the sinking operations. One of the sinkers, while engaged upon the work, was killed by a block of wood falling upon him, & his administratrix brought an action against the colliery owners under the Employers' Liability Act, 1880 (c. 42), to recover damages for his death:—*Held*: (1) E. was an independent contractor; (2) deceased was not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the Employers & Workmen Act, 1875 (c. 90), s. 10; & the Employers' Liability Act, 1880 (c. 42), did not apply; (3) the control given by the Coal Mines Regulation Act, 1887 (c. 58), by the special rules of the mine, to the manager over all persons in the mine, did not make E. & the sinkers employed by him "workmen" in the employment of the colliery owners within Employers & Workmen Act, 1875 (c. 90), s. 10.—MARROW v. FLIMBY & BROUGHTON MOOR COAL & FIRE BRICK CO., [1898] 2 Q. B. 588; 67 L. J. Q. B. 976; 79 L. T. 397; 14 T. L. R. 583, C. A.

Annotations:—Folld. Fitzpatrick v. Evans, [1902] 1 K. B. 505. *Refd.* Richards v. Wrexham & Acton Collieries, Davies v. Same, [1914] 2 K. B. 497. *Mentd.* Hill v. Beckett, [1915] 1 K. B. 578.

250. ——— Woman manipulating sewing machine.]—A woman employed to work a treadle

sewing-machine & to iron the seams of dresses is a "workman" within the definition of Employers and Workmen Act, 1875 (c. 90), s. 10, & therefore within the definition of Employers' Liability Act, 1880 (c. 42), s. 8.—*MAYNARD v. PETER ROBINSON, LTD.* (1903), 89 L. T. 136; 10 T. L. R. 492; 67 J. P. Jo. 244.

251. "Servant in husbandry" — Under 4 Geo. 4 (c. 34)—*Waggoner*.]—*LILLEY v. ELWIN* (1848), 11 Q. B. 742; 17 L. J. Q. B. 132; 11 L. T. O. S. 151; 12 J. P. 343; 12 Jur. 623; 116 E. R. 652.

Annotations:—*Mentd. Nicoll v. Greaves* (1864), 17 C. B. N. S. 27; *Moriarty v. Regent's Garage Co.*, [1921] 1 K. B. 423.

252. ——— *Farm bailiff*.]—*DAVIES v. BERWICK (LORD)* (1861), 3 E. & E. 549; 30 L. J. M. C. 84; 3 L. T. 697; 25 J. P. 293; 7 Jur. N. S. 410; 9 W. R. 334; 121 E. R. 548.

See, now, Conspiracy & Protection of Property Act, 1875 (c. 86), s. 17.

B. Transactions to Which Truck Acts Apply.

(a) In General.

See Truck Act, 1831 (c. 37); Truck Act, 1887 (c. 46); Truck Act, 1896 (c. 44).

Deductions other than for supply of goods.]—*See* Nos. 261, 263-265, 269, 272-275, 276-279, *post*.

253. **Supply of goods—On credit—Debt paid out of wages—In discretion of worker.**]—In an action for wages, it appeared that one of defts. also kept a grocer's shop, at which pltf. & other workmen in defts.' employ were in the habit of getting goods on credit; the wages were paid once a week, when the workmen got a ticket from the shop, showing how much they owed for grocery, & took it to the person who paid the wages; he asked them how much of it they would pay, & gave them the difference between that & their wages:—*Held*: this was evidence of payment, & the transaction was perfectly legal, notwithstanding Truck Act, 1831 (c. 37).—*LANE v. PRATT* (1843), 1 L. T. O. S. 623.

254. ——— **Liquor up to fixed quantity.**]—*Resp.*, who carried on the business of a licensed victualler & also of a brickmaker, supplied workmen employed at his brickfield with intoxicating liquors to the amount of 3s. 10d. on credit, entries being made in *resp.*'s books as the liquors were supplied. In the evening of the same day, when the workmen were in his public-house, the employer handed across the bar to one of them on behalf of the others 4s. which was immediately given back, 2d. being returned by the employer as change & the entries were then crossed off. On the next day the wages then due to the workmen were paid by the employer in coin, the 4s. above mentioned being deducted from the sum so paid:—*Held*: the employer had committed an offence against the Truck Acts, 1831 (c. 37), & 1887 (c. 46).—*GOULD v. HAYNES* (1889), 59 L. J. M. C. 9; 61 L. T. 732; 54 J. P. 405; 16 Cox, C. C. 732, D. C.

255. ——— **Articles necessary for trade.**]—*BOWERS v. LOVEKIN*, No. 234, *ante*.

256. ——— **By written order on shop—For**

amount of wages.]—*ATHERSMITH v. DRURY*, No. 280, *post*.

257. ——— **At option of workmen.**]—(1) If an artificer, engaged in an employment which comes within Truck Act, 1831 (c. 37), receive of his own accord goods at a shop kept by his employer, & a corresponding amount be deducted by his employer from his wages at their next settling, this is a payment of wages in goods within the meaning of s. 3, & subjects the employer to the penalties of s. 9.

(2) If payment of wages has been made in goods, no subsequent payment of the wages in cash can purge the offence so committed; the provisions of the Act which declare the payment void, & also illegal & punishable, being cumulative.—*WILSON v. COOKSON, FISHER v. JONES* (1863), 13 C. B. N. S. 496; 32 L. J. M. C. 177; 8 L. T. 53; 27 J. P. 215; 9 Jur. N. S. 177; 11 W. R. 426; 143 E. R. 197.

Annotation:—*Reid. Kemp v. Lewis*, [1914] 3 K. B. 543.

258. ——— **Cloth damaged by bad workmanship.**]—An artificer in a trade within the Truck Act, 1831 (c. 37), having, through negligent workmanship, damaged a piece of cloth, his employer delivered to him the damaged cloth instead of such wages earned as were equivalent to the value which, according to the assessment of the employer, the cloth would have had if undamaged:—*Held*: the employer had paid wages otherwise than in current coin, & was therefore liable to a penalty under sect. 9 of the Act.—*SMITH v. WALTON* (1877), 3 C. P. D. 109; 47 L. J. M. C. 45; 37 L. T. 437; 42 J. P. 280.

Annotation:—*Reid. Williams v. North's Navigation Collieries* (1889), Ltd., [1906] A. C. 136.

259. ——— **By oral arrangement—Supplementary to written agreement.**]—A workman was engaged under an agreement in writing at a fixed rate of wages per week. There was also a verbal arrangement entered into at the same time under which, as the justices found, the workman was to be supplied with a certain quantity of cider each day in part payment of wages. On an information for an offence under the Truck Act, 1831 (c. 37):—*Held*: the justices were entitled to receive evidence of the oral arrangement, & to find that an offence had been committed.—*JONES v. WASLEY* (1902), 18 T. L. R. 418; 46 Sol. Jo. 339.

260. ——— **Food & drink only.**]—*Appct.*, a quarryman, was accustomed occasionally during hay harvest to assist a farmer in the evening in getting in his crops. He did not receive any money payment for his services, but the farmer gave him beer & sometimes a supper when the work was over. While thus engaged in carrying hay he fell from the top of a load & was injured, & thereby incapacitated for work. In an arbn. under the Workmen's Comp. Act, 1906 (c. 58), the county ct. judge awarded him compensation:—*Held*: there was no contract of service express or implied between the parties. If there were such a contract it would have been illegal under the Truck Acts, & could not constitute a "contract of service" within the Workmen's Comp. Act, 1906 (c. 58), s. 13. *Appct.* was not, therefore, entitled to compensation.—*KEMP v. LEWIS*, [1914] 3 K. B. 543; 83 L. J. K. B. 1535; 111 L. T. 699; 7 B. W. C. C. 422, C. A.

Annotations:—*Appld. Pountney v. Turton* (1917), 31 T. L. R. 103. *Reid. Newson v. Burstall* (1915), 84 L. J. K. B. 535.

PART V. SECT. 5, SUB-SECT. 2.—B. (a).

for payment not in coin—Shares in company—Whether legal.]—*GLASGOW v. INDEPENDENT PRINTING CO.*, 278.—*IR.*

Sect. 5.—Wages: Sub-sect. 2, B. (a) & (b).]

261. Payment in coin — To person authorised by workman—In discharge of his obligation.]—A payment made by an employer, at the instance of a person employed, to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is within Truck Act, 1831 (c. 37), ss. 3, 4, a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands.

Appct. entered the service of resp. & signed an agreement to conform to all the rules & regulations of resp.'s works. One of the regulations was that all employees were to become members of the sick & accident club. In accordance with the rules of this club weekly payments were made to the club treasurer, & from the fund thus established relief was given to the members in case of sickness or accident. Appct. received each week a ticket showing the gross amount of wages due to her & the weekly deduction on account of the payment to the club, the balance alone being paid to her. She never required & never received any relief from the fund. After leaving her employment appct. brought under Truck Act, 1831 (c. 37), s. 4, an action against resp. to recover the amount of the weekly payments to the club thus deducted from her wages:—*Held*: within Truck Act, 1831 (c. 37), s. 4, the entire amount of the wages payable to appct. had been actually paid to her in the current coin of the realm, & she was not entitled to recover from resp. the amount of the deduction, also even assuming but without deciding that there was in this case a contract which was made illegal, null & void by Truck Act, 1831 (c. 37), s. 2, resp. by making the weekly payments to the club with the assent of appct. had discharged his obligations to her.—*HEWLETT v. ALLEN*, [1894] A. C. 383; 63 L. J. Q. B. 608; 71 L. T. 94; 58 J. P. 700; 42 W. R. 670; 10 T. L. R. 464; 38 Sol. Jo. 455; 6 R. 175, H. L.

Annotations:—*Reld*. Phillips v. London School Board, Cockerton v. London School Board, [1898] 2 Q. B. 447; Williams v. North's Navigation Collieries (1889), Ltd., [1906] A. C. 136.

262. — Subsequent repayment in part—As contribution to employer's insurance liability.]—A master, when paying his workmen their wages, handed to each a slip of paper on which was written a sum of money equal to 2d. in the pound on the amount of the wages. The workmen thereupon handed this sum to the master. This sum was to provide for insurance premiums paid by master to cover his own liability under the Workmen's Comp. Act, 1897 (c. 37). The amount so paid by the workmen exceeded the premiums paid by the master:—*Held*: the master had not made a payment of wages otherwise than in current coin of the realm contrary to Truck Act, 1831 (c. 37), s. 3.—*OWNER v. HOOPER* (1903), 80 L. T. 130; 67 J. P. 406; 19 T. L. R. 601; 47 Sol. Jo. 655; 20 Cox, C. C. 518, D. C.

(b) Deductions from Wages.

See Truck Act, 1831 (c. 37), ss. 23, 24; Truck Act, 1896 (c. 44).

263. What deductions permissible — Deductions authorised by Acts only.]—The Truck Act, 1831 (c. 37), does not allow an employer when paying wages to a workman to make any deductions except those expressly sanctioned by the Act. Therefore he cannot deduct money which a ct. of summary jurisdiction has ordered the workman to pay to the employer in respect of breaches of contract to work.

By sects. 23 & 24 [of the above Act] certain deductions are permitted to be made, or, to use the language of the marginal note "particular exceptions to the generality of the law" are made under strictly defined conditions, & no other deductions or particular exceptions are authorised (*LORD DAVEY*).—*WILLIAMS v. NORTH'S NAVIGATION COLLIERIES* (1889), LTD., [1906] A. C. 136; 75 L. J. K. B. 334; 94 L. T. 417; 70 J. P. 217; 54 W. R. 485; 22 T. L. R. 372; 50 Sol. Jo. 313, H. L.; *reversg.*, [1904] 2 K. B. 44, C. A.

Annotations:—*Reld*. Parkin v. South Hetton Coal Co. (1907), 98 L. T. 162; Keates v. Lewis Merthyr Consolidated Collieries, [1910] 2 K. B. 445. *Mentd.* North Eastern Marine Engineering Co. v. Leeds Forge Co., [1906] 1 Ch. 324; Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536.

264. — Onus of proof on employer.]—Truck Act, 1831 (c. 37), prohibits in certain trades the payment of wages in goods, & contained stringent provisions for enforcing their payment in money. By sect. 23 nothing in the Act contained shall prevent any employer from supplying or contracting to supply to any artificer any medicine or medical attendance, or any materials, tools or implements, etc., nor from demising to him any tenement, nor from making or contracting to make any stoppage or deduction from his wages for or in respect of any such rent, or of any such medicine or medical attendance. Provided that such stoppage or deduction shall not be made unless the contract for it shall be in writing, etc.:—*Held*: (1) the contract for deductions from the wages need only point out the class of things in respect of which the deductions shall be made, & need not specify the amount in respect of each head of deduction; (2) the contract for supplying materials, tools, or implements must be for a sale of them out & out, & not a hiring of them, on which money is advanced as a mere security against breakage; (3) *Semble*: the onus lies on the mine owner when challenged on the point to show that the deduction was one which he was entitled to make.—*CUTTS v. WARD* (1867), L. R. 2 Q. B. 357; 8 B. & S. 277; 36 L. J. Q. B. 161; 15 L. T. 614; 31 J. P. 709; 15 W. R. 445.

Annotation:—*Generally*, *Reld*. Hewlett v. Allen, [1892] 2 Q. B. 662.

265. Deductions authorised by Acts — Necessity for written agreement.]—Truck Act, 1831 (c. 37), s. 23, provides that an employer may make a stoppage or deduction from the wages of any artificer in respect of medicine or medical attendance, or of fuel, materials, tools, implements, hay, corn, or provender—"Provided always, that such stoppage or deduction shall not exceed the real & true value of such fuel, materials, tolls, implements, hay, corn, or provender, & shall not be in any case made from the wages of such artificer unless the agreement or contract for such stoppage

PART V. SECT. 5, SUB-SECT. 2.—
B. (b).

1. Deductions in respect of fines—Non-payment of bonus—Whether a fine.—*DEANE v. WILSON*, [1906] 2

I. R. 405.—*IR.*

m. Deductions authorised by
—Deductions for rent—Made by
—Employer as factor for landlord.)
M'LUCAS v. CAMPBELL (1892), 30

Sc. L. R. 226.—*SCOT.*

n. — — — — — Not damages for
illegal occupation.]—*SUMNER & IRON*
(X), LTD. v. THOMSON, [1913] 8. C. (J.)
34.—*SCOT.*

or deduction shall be in writing, & signed by such artificer"; & sect. 24 provides, "that nothing in the Act shall extend to prevent" any employer "from deducting, or contracting to deduct, any sum or sums of money from the wages of such artificer for the education of any child or children of such artificer, & unless the agreement or contract for such deduction shall be in writing & signed by such artificer." An employer stopped part of the wages of an artificer as a contribution to funds established by him to provide medicines & medical attendance for the artificers employed by him, & schools for their children, without any written agreement with the artificer:—*Held*: the artificer was entitled to recover the whole of the deduction:—*PILLAR v. LLYNVI COAL & IRON CO., LTD.* (1869), L. R. 4 C. P. 752; 38 L. J. C. P. 291; 20 L. T. 923; 17 W. R. 1123.

Annotations:—*Ridd. Lamb v. G. N. Ry.*, [1891] 2 Q. B. 281; *Hewlett v. Allen* (1892), 11 L. J. Q. B. 9; *Squire v. Midland Lace Co.*, [1905] 2 K. B. 448; *Williams v. North's Navigation Collieries* (1889), Ltd., [1906] A. C. 136.

236. — Requirements as to form.]—*CUTTS v. WARD*, No. 261, *ante*.

267. — In respect of medical facilities—Amounts deducted not paid over to doctor—Right of workmen to recover.]—By an arrangement between employers & their workmen certain deductions were made from the workmen's wages, which were paid monthly, for a "doctor's fund" which was established for the purpose of paying a doctor, who attended the workmen & their families & supplied them with medicines in case of illness. The sums thus deducted were handed over by the employers to the doctor from time to time. There was no contract in writing between the employers & the workmen authorising the employers to make the deductions, nor was there any evidence that the doctor had accepted the liability of the employers. The employers filed a liquidation petition, & at this time there stood to the credit of the "doctor's fund" in their books a sum of £140 which had arisen from deductions thus made from the workmen's wages, & had not yet been paid over to the doctor:—*Held*: there had been no valid payment within the Truck Act, 1831 (c. 37), of the £140 to the workmen, & they were entitled to be paid the £140 in full out of the employers' estate as unpaid wages. *Qu.*: whether if the £140 had been, in pursuance of the arrangement, actually paid over by the employers to the doctor, in discharge of a debt for which the workmen were liable, or if the doctor had accepted the liability of the employers, the Truck Act, 1831 (c. 37), would, notwithstanding the absence of a contract in writing signed by the workmen, have applied.

All that appears is that the workmen were desirous that what was in substance due from them to the doctor should be paid through the machinery of a retainer out of their wages, the amount thus retained being paid over by the employers. The employers have retained the amount out of the wages but they have never paid it over, & there is no evidence to satisfy me that anything equivalent to payment to the workmen has taken place (*LORD SELBOURNE, C.*).—*Re MORRIS, Ex p. COOPER* (1884), 26 Ch. D. 693, C. A.

Annotations:—*Folld. Hewlett v. Allen*, [1894] A. C. 383. *Ridd. Lamb v. G. N. Ry.*, [1891] 2 Q. B. 281; *Williams v. North's Navigation Collieries* (1889), Ltd., [1906] A. C. 136.

268. — Amounts deducted paid into medical fund.]—*HEWLETT v. ALLEN*, No. 261, *ante*.

269. — Truck Amendment Act, 1887 (c. 46), s. 6—Effect on Truck Act, 1831, s. 23.]—*Pltf.*, a railway porter, on entering the service of *defts.* signed an agreement, one of the conditions of which was that certain deductions should be made weekly from his pay as his contribution to a sick & funeral allowance fund; the fund was for the benefit of *defts.* servants, & was managed on their behalf by *defts.* Deductions were made weekly from *pltf.*'s wages until he left *defts.* service, when he brought an action to recover the amount of the deductions as having been made in contravention of the provisions of the Truck Acts. During the period in respect of which *pltf.* sued, a larger sum had been paid out of the fund in medical attendance for *pltf.* & his wife than the total amount of his contributions which he sought to recover:—*Held*: Truck Amendment Act, 1887 (c. 46), s. 6, did not apply to written contracts excepted by Truck Amendment Act, 1831 (c. 37), s. 23, from the operation of that Act; the deductions were therefore legally made, & *pltf.* was not entitled to recover.—*LAMB v. GREAT NORTHERN RY. CO.*, [1891] 2 Q. B. 281; 60 L. J. Q. B. 489; 65 L. T. 225; 56 J. P. 22; 39 W. R. 475; 7 T. L. R. 415, D. C.

Annotations:—*Distd. Hewlett v. Allen*, [1892] 2 Q. B. 662. *Ridd. Williams v. North's Navigation Collieries* (1889), Ltd., [1906] A. C. 136. *Distd. Phillips v. London School Board*, Cockerton v. London School Board, [1898] 2 Q. B. 447.

270. — Supply of tools of trade—Must be out & out sale.]—*CUTTS v. WARD*, No. 261, *ante*.

271. Deductions in respect of fines—For absence from work.]—*WILLIS v. THORP*, No. 279,

272. — For damaging goods.]—The deduction from their wages of fines incurred by artificers [for damaging goods] is not a "payment otherwise than in the current coin of the realm" so as to make the employer guilty of an offence under Truck Act, 1831 (c. 37), s. 9.—*REDGRAVE v. KELLY* (1889), 54 J. P. 70; 37 W. R. 543; 5 T. L. R. 477.

See, now, Truck Act, 1896 (c. 44), ss. 1, 2.

273. — For failure to enter child in factory register.]—*B.* was engaged as overlooker in a factory, & by the rules, forfeited 20s. if he engaged a child before such child's name was entered in the register. *C.* the owner of the factory, had another factory near in which a child had been duly entered in the register, & on being after an interval engaged in the first factory, the child's name was not entered by *B.* The employers deducted 20s. from the wages of *B.*, & for this he sued *C.* under Employers & Workmen Act (c. 93):—*Held*: there was nothing in the Truck Act to prevent the deduction, as the forfeiture was not a penalty, but liquidated damages.—*BEETHAM v. CREWDSON* (1890), 55 J. P. 55; 6 T. L. R. 379, D. C.

274. — For breach of rules as to behaviour—Sufficient specification of rule in contract—Truck Act, 1896 (c. 44), s. 1 (1), c.]—A rule posted in a factory workroom that all workers shall observe "good order & decorum" is sufficiently specific to cover the case of female workers dancing during their dinner hour in a workroom in which they are privileged to dine, where such dancing raised dust likely to cause damage to the machines at which they worked and to the material upon which they had to work.

A fine imposed upon the breach of such a rule, & under such circumstances, is in respect of "an

Sect. 5.—Wages: Sub-sect. 2, B. (b), C. & D. Part VI. Sects. 1, 2 & 3.]

act or omission "causing or likely to cause damage to the employer within above sub-sect.—*SQUIRE v. BAYER & Co.*, [1901] 2 K. B. 299; 70 L. J. K. B. 705; 85 L. T. 247; 65 J. P. 629; 49 W. R. 557; 17 T. L. R. 492; 45 Sol. Jo. 503, D. C.

Deduction in respect of frame rents—In hosier's trade.]—See Nos. 276-279, post.

275. Fixed weekly deduction—For steam power supplied—As means of fixing wages.]—*HUGHES v. BONELLA* (1891), 10 T. L. R. 197.

C. Special Provisions as to Hosiery Trade.

See, now, Hosiery Manufacture (Wages) Act, 1874 (c. 48).

276. Deductions for use of trade implements—By custom.]—The deductions made either by the master-manufacturer, or by the undertaker or middleman who rents frames of such master-manufacturer, from the workmen or artificers employed by him, in respect of frame-rent, winding, & a poundage compensation of 1d. in 1s. for every 1s. above 14s. per week earned by such workman or artificer, the balance being paid in money to such workman or artificer, is not a payment of the portion so deducted to the workman, of a portion of his wages in goods, or otherwise than in the current coin of the realm, within Truck Act, 1831 (c. 37).—*CHAWNER v. CUMMINGS* (1846), 8 Q. B. 311; 15 L. J. Q. B. 161; 6 L. T. O. S. 364; 10 J. P. 229; 10 Jur. 454; 115 E. R. 893.

Annotations:—Folld. Archer v. James (1862), 31 L. J. Q. B. 153. *Consd. Hewlett v. Allen*, [1892] 2 Q. B. 662; *Williams v. North's Navigation Collieries* (1889) Ltd., [1906] A. C. 136. *Reid. Ingram v. Barnes* (1857), 7 E. & B. 115; *Abram Coal Co. v. Southern* (1903), 19 T. L. R. 579. *Mentd. Homer v. Taunton* (1860), 29 L. J. Ex. 318.

277. ———.]—The deduction made by the master-manufacturer from the artificer employed by him in the hosiery trade in respect of frame & machine rent & standing room, winding of yarns, gas & fire in waiting-room, supplied by the master to the artificer, & fines for his non-attendance, the balance being paid in money, is not a payment of a portion of the artificer's wages in "goods" or "otherwise than in current coin of the realm," within Truck Act, 1831 (c. 37).—*ARCHER v. JAMES* (1862), 2 B. & S. 67; 31 L. J. Q. B. 153; 6 L. T. 167; 8 Jur. N. S. 166; 10 W. R. 489; 121 E. R. 998, Ex. Ch.

Annotations:—Consd. Cutts v. Ward (1867), L. R. 2 Q. B. 357; *Hedgrave v. Kelly* (1889), 37 W. R. 543; *Hewlett v. Allen*, [1892] 2 Q. B. 662; *Hughes v. Bonella* (1894), 10 T. L. R. 197; *Williams v. North's Navigation Collieries* (1889), Ltd., [1906] A. C. 136. *Reid. Moorhouse v. Lee* (1864), 4 F. & F. 354; *Abram Coal Co. v. Southern* (1903), 19 T. L. R. 579.

278. ———.]—*MOORHOUSE v. LEE* (1864), 4 F. & F. 354.

279. "Other charges"—Whether fine included—Hosiery Manufacture (Wages) Act, 1874 (c. 48), s. 3.]—Pltf., a handframe worker, was in the employment of defts., who were hosiery manufacturers. By the regulations of the factory he was liable to a fine of 8d. a day for staying away from work without permission. Pltf., having been fined for such absence & the amount having been deducted from his wages, brought an action to recover from defts. the penalty mentioned in above sect.:—*Held*: the employer was prohibited from deducting from the wages of the artificer frame-rent & standing or other charges *ejusdem*

generis with rent & standing, but fines were not charges within above sect., & therefore defts. had not incurred the penalty under that sect.—*WILLIS v. THORP* (1875), L. R. 10 Q. B. 383; 33 L. T. 11; 23 W. R. 730; *sub nom. WALLIS v. THORP*, 44 L. J. Q. B. 137; 40 J. P. 6.

Annotation:—Apld. Beetham v. Crewdson (1890), 55 J. P. 55.

D. Proceedings under Truck Acts.

See, generally, Truck Acts, 1831-1896.

280. Jurisdiction of justices—Note for goods given within jurisdiction—Shop where actually supplied outside jurisdiction.]—In payment of the wages of an artificer within Truck Act, 1831 (c. 37), the master gave a note for 11s. on a shop kept for the supply of goods, meaning at the time that it should be paid in goods, & not in money; the note was taken to an office beside the shop, & a clerk there immediately exchanged it for another piece of paper, to be presented at the shop; upon presenting this piece of paper the 11s. was paid in goods. The place where the first note was given was within the jurisdiction of the justices of the borough of W., but the office & shop were without their jurisdiction:—*Held*: the giving of the first note was an offence within sect. 3, & therefore the justices of W. had jurisdiction to convict.—*ATHERSMITH v. DRURY* (1858), 1 E. & E. 46; 28 L. J. M. C. 5; 32 L. T. O. S. 103; 23 J. P. 214; 5 Jur. N. S. 433; 7 W. R. 11; 120 E. R. 825.

281. ——— Recovery of penalty—Though Truck Act, 1896 (c. 44), s. 1 (2) b, not complied with.]—The jurisdiction of justices under the Employers & Workmen Act, 1875 (c. 41), is not ousted by Truck Act, 1896 (c. 44), s. 1, & proceedings may be taken before justices to recover a penalty under a contract between an employer & a workman, although particulars under above sub-sect. have not been supplied to the workman.—*BUXTON LIME FIRMS Co. v. HOWE*, [1900] 2 Q. B. 232; 69 L. J. Q. B. 498; 82 L. T. 422; 64 J. P. 503; 48 W. R. 472; 16 T. L. R. 315; 44 Sol. Jo. 361, D. C.

282. Admissibility of evidence—Pressure on workman to deal at shop—By employer's agent—Not authorised by employer.]—In an action for wages, by a collier, it was proved that he had received the amount due to him, in the current coin of the realm, at a pay-office, adjoining a shop kept by his employers, a joint-stock iron co., for the sale of goods to their own workmen, & other people; but that he had spent the money in the masters' shop immediately upon the receipt of it. In order to show that he had dealt at the shop under compulsion, evidence was offered of a conversation, between pltf. & the overlooker under whom he worked. The overlooker had no authority to employ or dismiss the men under him, which was the duty of the coal agent, but he stated that he had received a paper from a clerk in the office of a coal agent, whose principal duty was, to ascertain the amount of work done by the men, containing a list of the persons whom he was to remember as not dealing at the shop, that that paper contained pltf.'s name & that he produced it at the time of the conversation above mentioned. In that conversation, the overlooker threatened pltf. with his employers' displeasure, if he did not deal more largely at the shop:—*Held*: that statement was not admissible in evidence against pltf.'s employers.

Qu.: If the evidence had been admissible

whether it would have rendered subsequent payments of money spent at the shop, invalid as contrary to the Truck Act.—*OLDING v. SMITH* (1852), Cox, M. & H. 620; 19 L. T. O. S. 140; 16 J. P. 600; 16 Jur. 497.

Annotation:—*Reid*. *Ingram v. Barnes* (1857), 5 W. R. 232.

283. — Oral agreement for part payment in

goods—Supplementary to contract in writing for payment in coin.]—*JONES v. WASLEY*, No. 259, *ante*.

284. Part payment in goods—Subsequent payment of deficit in coin—Effect on prosecution.]—*WILSON v. COOKSON*, *FISHER v. JONES*, No. 257, *ante*.

Part VI.—Administration and Penalties.

SECT. 1.—INSPECTORS AND CERTIFYING SURGEONS.

See 1901 Act, ss. 118–123, 124 (1) & (2), 125, 126; Factory & Workshop Act, 1907 (c. 39), s. 6; Truck Act, 1887 (c. 90), s. 13.

Duties of certifying surgeons.—See, also, Police, Factories (Miscellaneous Provisions) Act, 1916 (c. 31).

SECT. 2.—NOTICES, REGISTERS AND RETURNS.

See 1901 Act, ss. 127–134, & Census of Production Act, 1906 (c. 49).

SECT. 3.—PENALTIES.

See 1901 Act, ss. 135–148, & Trucks Acts, 1831–1896.

285. Jurisdiction of justices—To reduce fine.]—*OSBORN v. WOOD BROTHERS*, No. 56, *ante*.

286. Proceedings for enforcement—Time for bringing—Continuing nuisance.]—Upon an information against applt. for a nuisance through a chimney sending forth black smoke, an order was made on July 20, 1868, that within two months he should make such alterations in the chimney, etc., so as to consume the smoke arising therefrom. Applt. thereupon made certain alterations & the smoke ceased to issue until Feb. 4, when for a certain limited period on that day & following days it again issued. In the following

July an information was laid for disobedience to the order. No evidence was given as to the cause of the issuing of the smoke, & the justices convicted applt.:—*Held*: first, that there was evidence justifying the conviction; secondly, that as the nuisance was a continuing one Summary Jurisdiction Act, 1848 (c. 43), did not apply.—*HIGGINS v. NORTHWICH UNION GUARDIANS* (1870), 22 L. T. 752; 34 J. P. 806.

287. — Construction of 1901 Act, s. 136.]—*R. v. TAYLOR*, No. 77, *ante*.

288. — Within three months of knowledge of offence.]—*VERNEY v. FLETCHER (MARK) & SONS, LTD.*, No. 78, *ante*.

289. — Effect where inquest held.]—In case of an inquest being held, the information is in time under 1901 Act, s. 146 (1), if it is laid within three months after the offence has come to the knowledge of the inspector, or within two months after the conclusion of the inquest, whichever period is the longer, provided it is laid within six months after the commission of the offence.—*BOYDEL v. LEVANT MINE ADVENTURERS*, [1916] 1 K. B. 692; 85 L. J. K. B. 923; 114 L. T. 416; 80 J. P. 151; 14 L. G. R. 471; 25 Cox, C. C. 300, D. C.

Annotation:—*Apld.* *Felton v. Heal*, [1920] 3 K. B. 1.

— Limitation of time for criminal proceedings generally.]—See CRIMINAL LAW, Vol. XIV., p. 151.

290. — Removal by certiorari—Prohibition against.]—By 42 Geo. 3, c. 73, penalties were imposed on masters & mistresses working children in cotton mills more than a certain time during the day, & no certiorari was allowed. By 6 Geo. 4,

PART VI. SECT. 1.

a. Obstruction of inspector—What amounts to—Refusal to produce books—Not required by statute to be kept.]—A refusal to produce to an Inspector books not required to be kept in pursuance of Factories & Shops Act, 1912, is not an obstruction of the inspector in the execution of his duties, nor is it a delaying of the inspector in the exercise of any power under the Act.—*BISHOP v. ROCHE & CO. PROPRIETARY, LTD.*, [1914] V. L. R. 429.—AUS.

p. Inquiry by inspector—Place for holding.]—Upon a prosecution for obstructing an inspector of factories & workshops who was making "examination & inquiry" under Factory & Workshop Act, 1878, s. 68 (4), the Justices having held that "inquiry for the purpose of carrying out the Act, could not legally be made by complainant except in place where

work is given out":—*Held*: such decision was erroneous.—*SQUIRE v. SWRENEY* (1899), 34 L. T. 26.—IR.

q. Conviction—Appeal—Costs—Whether payable by inspector.]—Where a conviction was obtained under Shops & Shop-assistants Acts by an inspector of factories, & was quashed on appeal, costs were not allowed against the inspector, the case being a new one, & he being a public officer whose duty it was to see to the execution of the Act.—*GATENBY v. SLATTERY* (1897), 16 N. Z. L. R. 461.—N.Z.

r. *tories Act, 1894, s. 76, which gives an appeal against a decision or direction of an inspector under that Act to the stipendiary magistrate does not confer on the magistrate hearing such an appeal a power to award costs. Where a magistrate had ordered an applt. to pay costs to an inspector against*

whose direction he had unsuccessfully appealed, & the Supreme Ct., on an application by the applt., opposed by the inspector, prohibited the enforcement of the order:—*Held*: the inspector must pay the costs of the application for prohibition, notwithstanding that he was a public officer supporting a decision in his favour.—*ANDREW v. COLLERTON* (1897), 16 N. Z. L. R. 466.—N.Z.

PART VI. SECT. 2.

s. Assistant signing register—Duty of shopkeeper.]—The responsibility of a shopkeeper to have the necessary entries made under Shop Hours Bye-law No. 9 of the Durban Municipality is not an absolute obligation, & a shopkeeper who does all he can to induce an assistant to sign the register cannot be convicted of contravening the bye-law.—*JORDAN v. DURBAN POLICE INSPECTOR* (1920), 41 N. L. R. 207.—S. AF.

Sect. 3.—Penalties.]

c. 63, additional restrictions were imposed as to working on Saturdays, & the penalties increased in amount were extended to foremen; & it was further provided, that all the powers, provisions, exemptions, penalties, forfeitures, payments, remedies, matters, & things contained in the former Act, except as varied by the present statute, should be as effectual for carrying the same into execution as if re-enacted:—*Held*: on conviction of a foreman for employing children on Saturday, contrary to the last-mentioned statute, the clause taking away *certiorari* was a provision of the former Act incorporated, by reference, in the new.—*R. v. FELL* (1830), 1 B. & Ad. 380; 9 L. J. O. S. K. B. 37; 109 E. R. 828.

Annotation:—*Reid. R. v. West Riding of Yorkshire JJ.* (1834), 1 Ad. & El. 563.

See, now, 1901 Act, s. 146 (4).

291. — Summons to appear day after service — Reasonableness of time allowed — In discretion of justices.]—Where a summons under 7 & 8 Vict. c. 15, s. 41, required defts. to appear & answer the charges on the day following the service:—*Held*: as the statute was silent as to the time to elapse between the service & the appearance, the justices were the proper judges of the reasonableness of the time, & they having held the notice to be sufficient, the ct. could not say that it was necessarily bad, so as to warrant their interference. The due issuing & service of the summons are sufficient to give the justices jurisdiction. No appearance by deft. is necessary for this purpose, nor can it be said that the justices acted without jurisdiction because they proceeded to convict deft. without hearing any evidence in support of the charges preferred against him.

If the justices have misconducted themselves & acted *malâ fide*, they may be liable to a criminal information. The question is, whether we can review the conduct of the justices in the ct. below, our common law jurisdiction by *certiorari* having been taken away. Unless it can be clearly shown that they have acted altogether without jurisdiction, we certainly have no power to do so (*LORD CAMPBELL, C.J.*).

The writ of *certiorari* has been taken away by the statute; it cannot, therefore, be granted if the magistrates had jurisdiction. The summons was duly served, & the magistrates, who were the

proper tribunal for determining the question, held the summons to be reasonable; they had, therefore, jurisdiction over the matter, & it was competent for them to proceed without any appearance by defts. They proceeded without evidence; but that clearly does not show that they acted without jurisdiction (*PARTESON, J.*).—*Ex p. HOPWOOD* (1850), 15 Q. B. 121; 4 New Sess. Cas. 174; 19 L. J. M. C. 197; 14 Jur. 812; 117 E. R. 404; *sub nom. Re HOPWOOD*, 15 L. T. O. S. 134; 14 J. P. 590.

Annotations:—*Reid. Ex p. Williams* (1851), 2 L. M. & P. 380; *Osgood v. Nelson* (1869), 10 B. & S. 119; *R. v. Whitfield* (1885), 15 Q. B. D. 122; *R. v. Glamorganshire JJ.* (1889), 5 T. L. R. 636; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128.

292. — Maintainable against limited company.]—A limited co., as the occupier of a factory, may be proceeded against for a contravention of 1901 Act, s. 137, in employing persons contrary to the Act.—*R. v. GAINSFORD, ETC., JJ.* (1913), 29 T. L. R. 359, D. C.

293. — — — — —]—*EVANS & CO., LTD. v. LONDON COUNTY COUNCIL*, No. 214, *ante*.

294. Liability of occupier — Child employed by independent contractor.]—W. was the occupier of a brickyard, & received a sum from C. for the use of the yard. C. was to give his exclusive services in making bricks, & W. found the coal, but did not interfere in the management of the yard, & C. engaged his own work-people:—*Held*: W. was not liable under Workshops Regulation Act, 1867 (c. 146), s. 7, as an occupier where C. employed a child contrary to that Act.—*FITTON v. WOOD* (1875), 32 L. T. 554; 39 J. P. 646.

295. Liability of employer — Child employed on casual visit to factory — Unknown to employer.]—B., a young person formerly in the employment of an occupier at the factory, one day called on a friend engaged at the factory, & while waiting, did a little work after 6 p.m., but without the knowledge of the employer. *Semble*: the occupier was not liable to be convicted of employing B. after 6 p.m.—*MAY v. BOWERS* (1866), 30 J. P. 406.

296. — Employment during prohibited hours — How absolved.]—*PRIOR v. SLAITHWAITE SPINNING CO., No. 46, ante*.

297. — — — — — Effect of stringent precautions to prevent.]—*ROGERS v. BARLOW & SON*, No. 47, *ante*.

298. — To penalty — Effect on action for

PART VI. SECT. 3.

296 i. Liability of employer — Employment during prohibited hours — How absolved.]—An employer is liable to the penalty imposed by Shops & Shop-assistants Act, 1894, s. 5, as amended by Act of 1896, s. 5, where an assistant, employed by him to deliver goods from his shop to customers by means of a horse & cart, does so in an idle & dilatory way, & so does not finish & return with the horse & cart until more than half an hour after the prescribed time for closing. But if the failure to return within the time had been caused by the assistant, after delivering the goods, choosing to go about some business of his own, the employer would not have been liable.—*SHANAGHAN v. CRESPIE* (1897), 16 N. Z. L. R. 457.—N.Z.

298 i. — To penalty — Effect on action for damages.]—The duties prescribed by Ontario Factories Act, R. S. O. 1887, c. 208, can be enforced only by penalty; no civil liability is

imposed on the owner of the factory, if, apart from the statute, he would not have been liable at common law.—*FINLAY v. MISCAMPRELL* (1890), 20 O. R. 29.—CAN.

t. — — — — — Overtime by female — Failure to pay minimum rate of wage.]—Where a permit has been obtained under Factories Act, 1894, s. 55, for a woman or girl to work overtime in a factory, but the employer fails to pay the minimum rate of wage for such overtime required by the sect., the permit cannot for that reason be treated as non-existent, so as to leave the employer open to be convicted & fined under s. 55 for an offence against s. 54, as he would be if he had never obtained a permit at all. Nor can the employer be convicted, on an information charging him with "failing to pay" the woman or girl for the overtime "a rate of wage of not less than sixpence an hour."

But he could be convicted & fined under s. 67 of the Act on an informa-

tion charging him with "employing" a person in his factory "contrary to the provisions" of the Act.—*SHANAGHAN v. KIRKCALDIK & STAINS* (1899), 17 N. Z. L. R. 534.—N.Z.

a. Proceedings for enforcement — Separate proceedings for separate offences.]—Occupier of a factory was charged for that the factory was unlawfully not kept in conformity with the Act in that every part of the mill-gearing was not securely fenced. He pleaded guilty. Separate proceedings were then taken against him for that on the same date the factory was unlawfully not kept in conformity with the Act in that the fly-wheel was not securely fenced:—*Held*: the offence charged in the informations were separate offences for which occupier was liable to separate proceedings under Factories & Shops Act, 1912, No. 39, ss. 33 & 56.—*ARMITAGE v. ASHBURY* (1914), 14 S. R. N. S. W. 42; 31 N. S. W. W. N. 29.—AUS.

b. — Not permitting employee

damages.]—GROVES v. WIMBORNE (LORD), No. 80, ante.

299. — Not affected by contributory negligence—Of workmen injured by employer's neglect.]—By Factory & Workshop Act, 1878 (c. 16), s. 82, "If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery . . . the occupier of the factory or workshop shall be liable to a fine not exceeding £100, the whole or any part of which may be

applied for the benefit of the injured person or his family or otherwise as a Secretary of State determines":—*Held*: where a person had been injured by the occupier's neglect to fence, the fact that the injury was proximately caused by such contributory negligence on the part of the injured person as would have debarred him from maintaining a civil action was no answer to a complaint under the above sect.—BLENKINSOP v. OGDEN, [1898] 1 Q. B. 783; 67 L. J. Q. B. 537; 78 L. T. 554; 40 W. R. 512; 14 T. L. R. 300; 42 Sol. Jo. 450.

to have a half-holiday.]—DANGERFIELD v. McDONALD & Co., [1914] V. L. R. 357.—AUS.

c. — Employing at less than minimum rate of wages—Defence.]—Knowledge & wilfulness are not necessary for the commission of an offence under Factories & Shops Act, 1915 (No. 2650), s. 226 (1) (a). For a prosecution for employing a person at a lower rate of wages than the rate determined by a special Board, it is no defence that deft. paid such wages under a reasonable belief in facts which if true would have rendered him not guilty of an offence.—DUNCAN v. ELLIS, [1916] V. L. R. 325.—AUS.

d. — Paying less than ordered rate of wages.]—The word "employed" in the expression "employed on time wages for a number of hours less than the number of hours of an ordinary week's work" in Factories & Shops Act, 1922, s. 18 (3), relates to the actual number of hours during which in any one week the employee has in fact worked, & not to the terms of the contract under which he was engaged. A., who before & after the week ending June 6, 1923, had been & remained in the employment of C., had worked during that week only 39½ hrs., having done no work on June 4, which

was a public holiday. The Wages Board in his trade had fixed 48 hrs. as the ordinary week's work, & the rate of wages as £4 3s. 0d. C. paid A. £3 7s. 11d. in respect of the 39½ hrs. during which he had worked:—*Held*: C. was properly convicted.—BISHOP v. CONCRETE CONSTRUCTION PROPRIETARY, LTD., [1923] V. L. R. 638.—AUS.

e. — For breach of determination of Grocers' Board—Employment of "improver."]—SLATTERY v. BISHOP, [1919] V. L. R. 675.—AUS.

f. — Extent of liability.]—Accused, who was the manager of a textile mill, employed 18 workmen to work at his mill after 7 p.m. in violation of Indian Factories Act, 1911, s. 29 (1):—*Held*: accused was liable to be convicted & sentenced separately in each of the eighteen cases.—R. v. JOHNSON (1919), 1 L. R. 41 Bom. 88.—IND.

g. — Employment of Females & Others Act, 1881—What must be proved.]—MCBRIDE v. GAMBLE, NOLAN'S CASE (1889), 7 N. Z. L. R. 396.—N.Z.

What information must contain.]—MCBRIDE v. GAMBLE, BIRLEY'S CASE (1889), 7 N. Z. L. R. 393.—N.Z.

k. — Registration of factory—Payment of annual fee.]—The occupier of a factory whose factory has once been registered under Factories Act, 1891, cannot be proceeded against as the owner of an unregistered factory provided he has paid the annual fee required by the Act.—FERGUSON v. VAN BREDA (1893), 11 N. Z. L. R. 761.—N.Z.

l. Liability of occupier—Manager of factory not occupier.]—The manager of a ginning factory at D., residing in a part of the premises on which the factory stood. He was charged with having neglected to fence certain machinery in the factory:—*Held*: accused was not liable to conviction under Indian Factories Act (XV. of 1881), s. 15 (1) (c), since the manager of a factory cannot be said to have been the occupier thereof.—R. v. RAMPRATAP (1905), 1 L. R. 29 Bom. 423.—IND.

m. Holidays — Non-payment of wages—Whether penalty provided.]—Factories Act, 1891, s. 58, did not provide any penalty for a breach of its provisions, & no penalty in such a case could be inflicted under sect. 61 of the Act.—VAN BREDA v. FERGUSON (1893), 11 N. Z. L. R. 764.—N.Z.

FACTORS.

See AGENCY.

FACULTIES.

See ECCLESIASTICAL LAW.

FAIRS.

See MARKETS AND FAIRS.

FALSE DECLARATIONS.

See CRIMINAL LAW AND PROCEDURE ; ELECTIONS ; EVIDENCE.

FALSE IMPRISONMENT.

See TRESPASS.

FALSE PERSONATION.

See CRIMINAL LAW AND PROCEDURE ; ELECTIONS ; MISREPRESENTATION AND FRAUD.

FALSE PRETENCES.

See CRIMINAL LAW AND PROCEDURE.

FALSE REPRESENTATION.

See CRIMINAL LAW AND PROCEDURE ; MISREPRESENTATION AND FRAUD.

FALSE RETURN.

See ELECTIONS ; EXECUTION ; SHERIFFS AND BAILIFFS.

FALSE STATEMENT.

See CRIMINAL LAW AND PROCEDURE ; MISREPRESENTATION AND FRAUD.

FAMILY ARRANGEMENTS.

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<p><i>Disentail</i> <i>See</i> REAL PROPERTY.</p> <p><i>Duress</i> „ CONTRACT ; CRIMINAL LAW ; EQUITY ; WILLS.</p> <p><i>Fraudulent Conveyances</i> „ FRAUDULENT AND VOIDABLE CON- VEYANCES.</p> <p><i>Gifts</i> „ GIFTS.</p> <p><i>Guardian and Ward</i> „ HUSBAND AND WIFE ; INFANTS.</p> <p><i>Parent and Child</i> „ INFANTS.</p> <p><i>Separation Deeds</i> „ HUSBAND AND WIFE.</p>	<p><i>Settlements.</i> <i>See</i> SETTLEMENTS.</p> <p><i>Trusts</i> „ TRUSTS AND TRUS- TEES.</p> <p><i>Undue Influence.</i> „ CONTRACT ; EQUITY ; FRAUDULENT AND VOIDABLE CONVEY- ANCES ; MISREPRE- SENTATION AND FRAUD ; WILLS.</p> <p><i>Voidable Conveyances</i> „ FRAUDULENT AND VOIDABLE CON- VEYANCES.</p>
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Part I.—Meaning and Formation.

SECT. 1.—IN GENERAL.

1. Distinguished from dealings between strangers.]—(1) By indenture made in 1827 between R. P. & his eldest son D. P., reciting that R. P. P. of C. was seised of large real estates, was never married, & was then in a state of mental & bodily imbecility; that in the event of his dying so seised, intestate & without issue, R. P. as his heir-at-law would be entitled to the reversion of his estates in fee; that R. P. was desirous of having a commission of lunacy sued out for the protection of R. P. P. & his property & his own reversion, & that D. P., at R. P.'s request, agreed to sue out & prosecute such commission & take other necessary law proceedings at his own expense, in R. P.'s name; R. P. in consideration of the agreement & of love & affection for D. P., covenanted to convey all the estates that would descend to him on the decease of R. P. P. to the use of himself for life, remainder to the uses expressed respecting the estate of R. in D. P.'s marriage settlement, being for the benefit of D. P. & the heirs male of the marriage. The commission was accordingly issued; R. P. P. was declared a lunatic, & D. P. was reimbursed for his expenses out of his estate. R. P. was then 63 years of age; the lunatic was 40; D. P. was younger. The lunatic died in 1829, & R. P. entered into possession of his real estates, & conveyed them to his second son, R. H. P., for valuable consideration. On a bill filed by D. P. to set aside that conveyance & for specific performance of the covenant, R. P., by his answer, said he entered into it without legal advice, & by fraud, imposition & misrepresentation on the part of D. P. It was proved in evidence that both parties employed the solr. who prepared the indenture under advice of counsel for each; that R. P. read it & heard it read before executing it, & afterwards as well as before expressed his desire that the estate of C. should be united to the estate of R. & go to his eldest son:—*Held*: regard being had to the ages & relative situation of the parties, & to the benefits secured by the issuing of the commission, there was some, & not very inadequate consideration for the covenant.

(2) Deeds in the nature of family arrangements are exempt from the rules applicable to other deeds; the consideration for the former being partly value, & partly love & affection.—*PERSSE v. PERSSE* (1840), 7 Cl. & Fin. 279; West, 110; 4 Jur. 358; 7 E. R. 1073, H. L.

Annotations:—*As to* (2) *Appld.* *Williams v. Williams* (1865), 2 Drew. & Sm. 378. *Generally, Mentd.* *Persse v. Persse* (1856), 2 Jur. N. S. 551.

2. —.]—The ordinary rule as applied to strangers or to persons not placed in that peculiar relation does not apply, but a new & distinct set of principles are applicable to the peculiar relation which subsists between them, the foundation of

which principle is a due regard for what in the most extended view of the matter has been found to be most for the interest of families (*ROMILLY, M.R.*).—*JODRELL v. JODRELL* (1851), 14 Beav. 397; 51 E. R. 339.

Annotations:—*Reid.* *Hart v. Tribe* (1854), 23 L. J. Ch. 462; *Macrae v. Harnoss* (1910), 103 L. T. 629.

3. —.]—*HOGHTON v. HOGHTON*, No. 87, *post*.

4. —.]—*HOBLYN v. HOBLYN*, No. 161, *post*.

5. Distinguished from sale of reversion.]—Where a tenant for life purchased the reversion of his nephew in the family estate:—*Held*: the transaction fell within the ordinary rule as to reversionary interests, & was not to be regarded as a family arrangement.—*TALBOT v. STANFORTH* (1861), 1 John. & H. 484; 31 L. J. Ch. 197; 5 L. T. 47; 7 Jur. N. S. 961; D W. R. 827; 70 E. R. 837; *on appeal* (1862), 6 L. T. 794, L. C.

Annotations:—*Consd.* *O'Rourke v. Bollingbroke* (1877), 2 App. Cas. 814. *Reid.* *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

SECT. 2.—WHAT ARE FAMILY ARRANGEMENTS.

SUB-SECT. 1.—AGREEMENTS TO SETTLE OR RESETTLE PROPERTY.

6. Covenant to settle property on nephew—To reconcile father & son.]—*WISEMAN v. ROPER* (1645), 1 Rep. Ch. 158; 1 Eq. Cas. Abr. 16; 21 E. R. 537.

Annotations:—*Reid.* *Skirme v. Meyrick* (1739), 2 Com. 700. *Mentd.* *Frankland v. Frankland* (1753), 1 Dick. 231.

7. Resettlement to provide for illegitimate children.]—*STAPILTON v. STAPILTON*, No. 48, *post*.

8. —.]—Testator gave his residuary estate to his three daughters in equal shares, with power to them, in case they should leave issue, to appoint to such children or child, in such manner as they should choose. One of the daughters, with the consent of her only daughter & her husband, executed an appointment of her share, in the nature of a resettlement, & thereby gave £2,000 to a natural child of a deceased child, & appointed the residue to the daughter for life, & then to her children. After the death of the mother & her daughter & her husband:—*Held*: this arrangement between the parties, in the nature of a family settlement, was valid, & the appointment was good.—*WRIGHT v. GOFF* (1856), 22 Beav. 207; 25 L. J. Ch. 803; 27 L. T. O. S. 179; 2 Jur. N. S. 481; 4 W. R. 522; 52 E. R. 1087.

Annotation:—*Reid.* *Re Turner's S. E.* (1884), 28 Ch. D. 205.

9. Agreement by parent & child—To alter

P. C. 148.—CHANNEL ISLANDS.

PART I. SECT. 1.

a. General rule.]—Family arrangements are exempt from the ordinary rule which affects other deeds, even as against creditors, the considerations being composed partly of natural love & affection, partly of value.—*KEARNEY v. KEARNEY* (1893), 11 E. L. R. 401.—*CAN.*

b. Distinguished from contract of

sale & purchase.]—A deed by which the wife's father conveys lands to the husband & wife, in consideration of an annuity paid to himself, & under which the spouses take a joint interest during their joint lives & the survivor takes the whole, is not a contract of sale & purchase, but a family arrangement, & is the source & measure of the rights acquired by each of the spouses.—*BROOMER v. ARTHUR* (1898), 67 L. J.

PART I. SECT. 2, SUB-SECT. 1.

a. Agreement between husband & wife—Providing for wife's maintenance—During separation.]—A husband & wife were living separate, in consequence of adultery by the husband, & proceedings were about to be taken against him for divorce & alimony.

limitations of settlement.]—
91, *post*.

10. ——— & provide for sisters.]—WYCHERLEY v. WYCHERLEY, No. 50, *post*.

11. ———.]—DAVIS v. UPHILL, No. 90 *post*.

tenant in tail, in 1831, joined in mortgaging the estate, to secure payment of a debt.

ate :—*Held* : neither the agreement, or apparently acted upon it, in the lifetime of the father, the ct. could not, after the death of the father, enforce the specific performance.

13. ——— Providing jointure for mother.]—HARTOPP v. HARTOPP, No. 112, *post*.

14. Settlement in consideration of marriage—Giving estate for life to mother of intended wife—Release of property subject to dower.]—JONES v. BOULTER, No. 136, *post*.

17. Agreement by heir-at-law of lunatic to settle property—On trust of family settlement.]—PERSSE v. PERSSE, No. 1, *ante*.

18. Agreement between

of a domiciled Englishman, in 1834 married M. an Italian lady. On Jan. 11, 1834, prior the marriage, a contract in Italian was executed the terms of the Sicilian law the father

land belonging to T. C. & his wife executed a deed confirming the contract of 1834, & declaring the deed of 1847, so far as it purported to vary that contract, void. T. C. died in 1887, & by his will confirmed

The result of a negotiation was an agreement by which the husband undertook to pay his wife £60 a year during the time they lived separate, & a part of the income from employment in his profession :—*Held* : the agreement was in the nature of a family arrangement, & for sufficient consideration. *Duck* (1858), 7 I. Ch.

PART I. SECT. 2, SUB-SECT. 2.

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into effect. A. M., the widow of T. C., commenced a cross action to enforce the marriage contract of 1834, & for a declaration that the deed of 1847, so far as it purported to vary that contract, was void :—*Held* : there was a

the ct. would not interfere
3 (1889), 61 L. T. 789 ; 38
.]—See Nos. 41—

SUB-SECT. 2.—AGREEMENTS FOR DIVISION OF PROPERTY.

19. Agreement made before death of ancestor.]

—Two article that whatever J. S. shall by his will leave to either of them should be equally divided betwixt both ; such agreement good ; also if after this one of them contrives that J. S. shall leave part of his estate to a third person in trust for him, this is within the articles.—*BECKLEY v. NEWLAND* (1723), 2 P. Wms. 182 ; 24 E. R. 691, L. C.

Annotations :—*Distd.* Debenham v. Ox (1749), 1 Ves. Sen. 276. *Consd.* Wright v. Wright (1750), 1 Ves. Sen. 409. *Foll.* Wethered v. Wethered (1828), 2 Sim. 183. *Apprvd.* Lyde v. Mynn (1833), 1 My. & K. 683. *Consd.* Houghton v. Houghton (1852), 15 Beav. 278 ; *Head v. Godlee*, Reynolds v. Godlee (1859), John. 536. *Foll.* Higgins v. Hill (1887), 56 L. T. 426. *Refd.* Smith v. Baker (1842), 1 Y. & C. Ch. Cas. 223 ; Cook v. Field (1850), 14 Jur. 951.

20. ———.]—An agreement between two persons, having expectations from a third, to divide equally whatever he might leave them, is valid.—*HARWOOD v. TOOKE* (1812), 2 Sim. 192 ; 57 E. R. 761, L. C.

Annotations :—*Foll.* Wethered v. Wethered (1828), 2 Sim. 183 ; Hyde v. White (1832), 5 Sim. 524. *Apprvd.* Lyde v. Mynn (1833), Coop. temp. Brough. 123. *Foll.* Houghton v. Lees (1854), 24 L. T. O. S. 201. *Refd.* Hawker v. Hallowell, Ex p. Sturgis (1854), 2 Sm. & G. 498.

21. ———.]—An agreement between two sons, to divide equally whatever property they may receive from their father in his lifetime, or become entitled to under his will or by descent, or otherwise, from him, is not a but will be enforced in *WETHERED* (1828), 2 Sim.

Annotations :—*Foll.* Hyde v. White (1832), 5 Sim. 524. *Apprvd.* Lyde v. Mynn (1833) *Foll.* Houghton v. Lees (1854)

598.—AUS.

•. ——— *Effect of want of consideration—No compromise of disputed claim.*—Testator devised land to his widow for life, & after her death, to two nephews, & in the case of the death of them, or either of them, in his own lifetime he devised the share of such deceased to the heir-at-law. One nephew of testator died in 1858, leaving two sons & two daughters. Testator died in 1866, & his widow in 1870. Upon the death of testator's

—On the death of testator, his sons, on hearing the contents of the will, came to the conclusion that a mistake had been made. In order to avoid litigation & expense, an agreement was drawn up & signed by the five brothers as parties, the other beneficiaries the will

Sect. 2.—What are family arrangements: Sub-sect. 2. Sect. 3.]

23. —.]—GRAY v. GRAY (1843), 1 L. T. O. S. 385.

24. —.]—Contracts made during the lifetime of testator, & fairly obtained, by persons living in expectation of receiving benefits under his will, to divide among them any such benefits after his death, if amounting to agreements to use undue influence upon testator, are bad; but they are good if amounting to agreements disinterestedly to abstain from interfering with testator & will be upheld where there is mutuality of consideration.

A father & his two daughters, married women, & both upwards of forty years of age, agreed to divide the benefits to be received by them under the will of the father's brother, who was living:—*Held*: there was no ground for saying that pltf. had exerted any undue influence; the agreement was fairly obtained; & there was no ground for saying that the consideration was illegal as being against public policy.—HIGGINS v. HILL (1887), 56 L. T. 426; 3 T. L. R. 403.

25. Agreement to divide money directed to be laid out in land & settled.]—Money devised to be laid out in land to the use of B. in tail, remainder to the use of C. in fee; B., having no issue, agrees with C. by deed to divide the money, & before this agreement is executed B. dies; this agreement shall bind in favour of his exors.—CARTER v. CARTER (1733), Cas. temp. Talb. 271; 25 E. R. 773, L. C.

26. Agreement made after death of ancestor—Disputed will.]—GASCOYNE v. CHANDLER (1755), 3 Swan. 418, n.; 30 E. R. 932, L. C.

Annotation:—*Folld.* Wilcocks v. Carter (1875), L. R. 19 Eq. 327.

27. —.]—NEALE v. NEALE, No. 46, post.

28. —.]—J. by will, gave one moiety of a barn to his son, the deft., in fee; certain real estate to his daughter H., a piece of land & six messuages to his daughter M. in fee; & the other moiety of the barn & two cottages to a third daughter, the pltf., in fee. J. was entitled to three of the messuages devised to M., also to two cottages & to part of the barn, for an estate for life, with remainder to his son, deft., in fee. After the execution of the will, the terms of which were known to the family, by the advice & with the concurrence of J. & in order to avoid disputes an agreement was entered into by the four children whereby pltf. agreed to assign her moiety of the

barn to deft., deft. on his part agreeing to convey the two cottages to pltf. absolutely, & to pay her a certain sum which appeared to be very small. On a bill for specific performance, the ct. confirmed the agreement:—*Held*: the smallness of the consideration did not support deft.'s case as the ct. did not consider the adequacy or inadequacy of the consideration in a family agreement, especially when entered into between near relations.—Houghton v. Lees (1854), 24 L. T. O. S. 201; 1 Jur. N. S. 862; 3 W. R. 135.

29. —.]—By a deed made between the residuary legatee under a will & some of the other next of kin, after reciting that the will had been made, but a draft only of it had been found, & that the other next of kin were desirous of giving full effect to the will, the other next of kin assigned to the residuary legatee the estate of testator. One of the other next of kin afterwards applied for administration to estate of testator as if he had died intestate:—*Held*: the Ct. of Ch. had jurisdiction to restrain proceedings in the Ct. of Probate, but on the construction of the deed there was nothing in it to prevent the other next of kin from obtaining administration.—WILCOCKS v. CARTER (1875), 10 Ch. App. 440; 32 L. T. 444; 23 W. R. 530, L. JJ.

30. — Will supposed to be lost.]—A deed conveying the property of an intestate, upon trusts, in pursuance of an agreement for the division of such property, made soon after the death of the intestate, between his sister & heiress-at-law, her husband, & her illegitimate son, & which agreement was founded on the supposition that the intestate had made a will disposing of his property in favour of the illegitimate son, which will had not been found:—*Held*: not to be voluntary within 27 Eliz. (c. 24); but supported & enforced against the heiress-at-law & her husband, & also against subsequent purchasers from them for valuable consideration with notice of the trust deed.

Under the agreement & trust deed other children of the sister & heiress-at-law, both legitimate & illegitimate, besides the child in whose favour it was suggested that a will might have been made, took interests in the property of the intestate; & it was held that the deed was not voluntary as to such other parties, but that they were within the consideration of the family contract.—HEAP v. TONGE (1851), 9 Hare, 90; 20 L. J. Ch. 661; 68 E. R. 427.

Annotations:—*Reid.* Ford v. Stuart (1852), 15 Beav. 493; Clarke v. Wright (1861), 6 H. & N. 849; Wright v. Dickenson (1861), 4 L. T. 21; Salt v. Standish (1863), 2 New Rep. 573.

widow, the three surviving children of the deceased nephew entered into possession & enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases & sales of portions of the land were made, in which all parties joined, & in 1885 a partition deed was executed of part of the unsold portion:—*Held*: as there was no consideration therefor, & no compromise or settlement of any disputed question, the partition deed & other dealings could not be supported as in the nature of family arrangements.—BALDWIN v. KINGSTONE (1890), 18 A. R. 63.—CAN.

1. — Addition to property de-

vised.]—The will of a proprietor, who died in 1864, disposed of a zamindari, & of one village within it, as two distinct properties, giving the zamindari to the testator's two widows, & the village in equal shares, in perpetuity, to the two brothers of his junior wife. Neither of the two brothers took possession of their respective moieties on testator's death, & the whole village was treated for some time as part of the zamindari, the profits of it being received by, or on behalf of, the widows. One of the brothers having died, leaving a son, who succeeded to his rights in the village, a family arrangement was made that the entirety of it should be made over to the surviving brother, the son of the other receiving from the widows satisfaction in lieu of his moiety.

The junior widow having died, the senior got possession of the village, alleging that the surviving brother had merely been appointed to act as manager of it on behalf of herself & her co-widow:—*Held*: the transaction was good & valid as a family arrangement; & the surviving brother had made out his title to the whole village.—VELLANKI VENKATA RAMA RAU v. PAPAMMA RAU (1898), I. L. R. 21 Mad. 299; L. R. 25 Ind. App. 8.—IND.

g. — Dispute as to shares of next of kin.]—MILLER v. HARRISON (1871), I. R. 5 Eq. 324.—IR.

h. — Trustee of will receiving benefits.]—MCCAUL v. FRASER (1915), 34 N. Z. L. R. 680.—N.Z.

SECT. 3.—FORMALITIES.

Formalities of execution of deeds.]—*See* DEEDS, Vol. XVII., pp. 199 *et seq.*

31. Whether parol agreement enforceable—Disposition of personalty—Statute of Frauds.]—A question upon the construction of a will whether the personal estate was wholly or partially disposed of, was not decided; an agreement upon the subject, though the instrument that was prepared was not executed, being established, as clear, fair, & reasonable, not within above Act, concluded with full knowledge of the circumstances, & not waived, & the bill, in effect, though not in terms, praying a performance.—*GIBBONS v. CAUNT* (1799), 4 Ves. 840; 31 E. R. 435.

*Annotations:—*Consd. *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911. *Mentd.* *Fox v. Marston & Hordern* (1837), 1 Curt. 494.

32. — Disposition of realty — Part performance.]—One gives her son other lands in lieu of lands entailed, & by her will gives the entailed lands to her daughter, & takes a bond from her son, to permit her daughter to enjoy the entailed lands. The son dies, leaving an infant son, who being in possession of the lands that came in recompense, brings an ejectment for the entailed lands. By reason of the infancy of the grandson, the bond could not be sued. The daughter brings a bill, & is decreed to be quieted in possession of the entailed lands, until six months after the infant comes of age, & then the infant may show cause.—*THOMAS v. GYLES* (1691), 2 Vern. 232; 23 E. R. 750.

—.]—*STOCKLEY v.*

No. 147, *post.*

34. — — —.]—*NEALE v. NEALE*, No. 46, *post.*

35. — — —.]—In 1831, A. made a will by which, after certain provisions for his wife, he gave all his property to his two sons equally; but this will was not admitted to probate, being incomplete. At an interview between the brothers shortly after the will had been refused probate, the elder brother declared that the invalidity of the will should make no difference, & that the property should be "not mine, or thine, but ours." No agreement in writing was made, but for twenty years after the death of A. the two sons carried on the partnership together, & dealt with the whole property, real & personal, as if it belonged to them equally, & the widow never insisted on her rights in her husband's property. In 1851 the partnership was dissolved. The younger brother having died, his representative filed a bill for the equal division of the property:—*Held*: there was sufficient evidence of a family arrangement which the ct. would uphold, although there was no formal contract between the parties. A family arrangement may be such as the ct. will uphold, although there are no rights in dispute; & if sufficient motive for the arrangement is proved, the ct. will not consider the quantum of the consideration.—*WILLIAMS v. WILLIAMS* (1867), 2 Ch. App. 294; 36 L. J. Ch. 419; 16 L. T. 42; 15 W. R. 657, L. C. & L. J.

*Annotation:—**Refd.* *Sadler v. Butler* (1867), 15 W. R. 1219.

Specific performance generally, *see* SPECIFIC PERFORMANCE.

36. Agreement not inferred from course of dealing—Division of residue—Acquiescence.]—During the life of the son, & till the time of filing the bill, which was twenty-four years after his death, all the members of the family had believed, & had done many acts on the belief, not the result of legal discussion, but a mere family assumption, that the son was not entitled to a share of the residue as one of the next of kin, but that his title to the property expired with his life estate:—*Held*: this was not such an acquiescence in a family arrangement as prevented the son's personal representatives from enforcing their claim.

I concur in dismissing the appeal without costs, considering the long acquiescence which there has been (*LORD CAMPBELL, C.*).—*BULLOCK v. DOWNES* (1860), 9 H. L. Cas. 1; 3 L. T. 194; 11 E. R. 627, H. L.; *affg.* *S. C. sub nom. DOWNES v. BULLOCK* (1858), 25 Beav. 54.

*Annotations:—**Mentd.* *Chalmers v. North* (1860), 28 Beav. 175; *Lees v. Massey* (1861), 3 De G. F. & J. 113; *Royds v. Royds* (1863), 1 New Rep. 516; *Mitchell v. Bridges* (1864), 11 L. T. 727; *Travis v. Taylor* (1866), 12 Jur. N. S. 791; *Stockdale v. Nicholson* (1867), L. R. 4 Eq. 359; *Re Rankling's Settlement, Trusts* (1868), L. R. 6 Eq. 601; *White v. Springett* (1869), 4 Ch. App. 300; *Day v. Day* (1870), 18 W. R. 417; *Cusack v. Rood* (1876), 24 W. R. 391; *Re Morley's Trusts* (1877), 25 W. R. 825; *Mortimer v. Mortimer* (1879), 4 App. Cas. 448; *Sturge v. G. W. Ry.* (1881), 19 Ch. D. 444; *Clarke v. Hayne* (1889), 37 W. R. 667; *Hood v. Murray* (1889), 14 App. Cas. 124; *Re King's Settlement, Gibson v. Wright* (1889), 60 L. T. 745; *Re Rees, Williams v. Davies* (1890), 44 Ch. D. 484; *Re Nash, Prall v. Bevan* (1894), 71 L. T. 5; *Re Ford, Patten v. Sparks* (1895), 72 L. T. 5; *Re Wilson, Wilson v. Batchelor*, [1907] 2 Ch. 572; *Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71; *Re Nightingale, Bowden v. Griffiths*, [1909] 1 Ch. 385; *Re Winn, Brook v. Whitton*, [1910] 1 Ch. 278; *Re Helsby, Neate v. Bozie* (1914), 84 L. J. Ch. 682; *Re Mellish, Day v. Withers*, [1916] 1 Ch. 562; *Hutchinson v. National Refuges for Homeless & Destitute Children*, [1920] A. C. 795.

37. — Maintenance of step-children — Onus of proof.]—In 1875 deft. married a widow with four children, two sons & two daughters. She was possessed of property producing an income of between £2,000 & £3,000 *per annum*. She died in 1888, having by her will appointed deft. sole exor. & trustee, & bequeathed the residue of her estate upon trust in equal fourth shares, one being for each of the three younger children of her first marriage, namely E. & W. the daughters, & C., one of the sons, & the other fourth for deft. for life, with remainder to the only child of the marriage of deft. with testatrix. At the time of the death of testatrix, her daughters E. & W. were of the ages of twenty-six & twenty-four respectively. Testatrix contemplated that they would after her death continue to reside with deft., which in fact they did, E. until her marriage in July, 1899, & W. until deft. himself married again in May, 1901. E. & W. brought an action against deft. claiming an account of the income to which they were entitled under the will of testatrix from the date of testatrix's death. Deft. stated that shortly after testatrix's death he made a verbal arrangement with E. & W. that in consideration of their contributing or permitting him to retain the whole of the income of their shares of the trust estate, he should bear the cost of their maintenance as

PART I. SECT. 3.

321. Whether parol agreement enforceable—Disposition of realty—Part performance.]—O., the owner of real estate, promised his brother A. that he would abandon his intention of

leaving this province & remain & support their mother & sister, C. would convey to A. a portion of the land on which A. was then residing & assisting in their support. In consequence of such request & promise, A. did remain

& assumed the whole charge of the support of his mother & sister:—*Held*: this was a sufficient part performance to take the case out of the Statute of Frauds.—*McDONALD v. McKINNON* (1878), 26 G. 10 — 222.

Sect. 3.—Formalities. Sect. 4. Part II. Sect. 1.]

members of his household, & pay or provide the money for the payment of their personal expenditure, including any cash that they might require:—*Held*: the onus lay upon deft., to make out that he brought home to the minds of the daughters that they were to pay for their maintenance; & he had failed to discharge it.—*Re MOULTON, GRAHAME v. MOULTON* (1906), 94 L. T. 454; 22 T. L. R. 380, C. A.

38. Agreement must be executed by all parties.]

—The eight children of A. being entitled to a fund, equally, in the event of their surviving B., seven of them, in pursuance of an arrangement made amongst themselves whilst the eighth, J., was in India, executed a deed by which they & he were made to covenant with each other reciprocally, that, in case any of them should die in B.'s lifetime leaving a child or children, such child or children should be entitled to the share or shares of his, her, or their parent or parents, in such & the same manner as if such parent or parents had survived B. J. never executed the deed; but he & six of those who did execute it survived B. The other left children, & those children claimed to be entitled, under the deed, to their parent's share:—*Held*: the deed was made upon the assumption that all the persons named as parties would execute it, & as one of them had not executed it, it was not binding upon the others, though they had executed it.—*PETO v. PETO* (1849), 16 Sim. 590; 13 L. T. O. S. 134; 13 Jur. 646; 60 E. R. 1003.

Annotation:—*Apld. Bolitho v. Hillyar* (1865), 34 Beav. 180.

39. —.]—A deed of arrangement was executed by various members of a family, whereby they agreed to resign in favour of each other the right, in a certain form, of survivorship, to which they were entitled in case they survived a tenant for life. One of the parties to the deed was a married woman who survived the tenant for life, & died without having confirmed the deed:—*Held*: she was not bound by the deed, & consequently, it was binding upon none of the parties to it.—*BOLITHO v. HILLYAR* (1865), 34 Beav. 180; 11 Jur. N. S. 556; 13 W. R. 600; 55 E. R. 603.

Stamp duties.]—See REVENUE.

SECT. 4.—PARTIES.

40. Party under disability—Reversioner.]—BEL-LAMY v. SABINE, No. 58, *post*.

See, further, FRAUDULENT & VOIDABLE CONVEYANCES; MONEY & MONEY-LENDING.

41. — Infant—Contingent interest changed into possession.]—Residuary personal estate was given by a will to such of the children of P. as

PART I. SECT. 4.

k. Party under disability—Infant—Family compromise declared void—Whether binding on adult parties.]—A family compromise, which was entered into upon the assumption that all the parties thereto were equally bound, was subsequently declared

void as against some of the parties, on the ground of infancy:—*Held*: the compromise was one & indivisible, & was, therefore, not binding on the adults.—*CONOLLY v. CONOLLY* (1903), 38 R. N. S. W. 381; 20 N. S. W. W. N. 139.—**AUS.**

l. — Represented by father—Absence of fraud or

should be living at his death, in equal shares. At the death of testator there were five children of P., & no more, four of whom being adults entered into an agreement to the effect that, as amongst themselves, their respective shares, & any share that might accrue to them by the death of their infant sister, should be considered vested in them immediately, notwithstanding P. was living. After this, two of the children settled their respective interests in favour of their issue, who were minors. Upon the remaining child coming of age, she was desirous to join in the arrangement, which the master found would be beneficial to all parties. The ct., however, declined, on the ground of want of jurisdiction, to make a decree for carrying the arrangement into execution.—*PETO v. GARDNER* (1843), 2 Y. & O. Ch. Cas. 312; 12 L. J. Ch. 371; 7 Jur. 969; 63 E. R. 137.

Annotations:—*Foll.* *Day v. Day* (1845), 5 L. T. O. S. 143. **N.F.** *Re Wells, Boyer v. Maclean*, [1903] 1 Ch. 848.

42. — — — — — No compromise.]—Testator directed a mixed trust fund to be held upon trust for such members of a class as should be living at the death of the last survivor of certain annuitants. When three of the annuitants were still alive, the then members of the class, seven in number, agreed to apply part of the fund in buying out the surviving annuitants & the next of kin & heir-at-law of testator, & to make an immediate division of the residue of the fund amongst themselves in equal shares. This arrangement affected the rights of infants under settlements previously executed by some of the members of the class of their contingent interests in the fund:—*Held*: the ct. had jurisdiction on behalf of the infants to sanction the arrangement, notwithstanding that it did not partake of the nature of a compromise; & the arrangement, being in effect a sale of contingent rights for a sum of money down, & wholly beneficial to the infants, was, in the special circumstances of the case, a proper one to receive the approval of the ct.—*Re WELLS, BOYER v. MACLEAN*, [1903] 1 Ch. 848; 72 L. J. Ch. 513; 88 L. T. 355; 51 W. R.

43. — — —.]—Where an arrangement had been entered into as to a contingent interest which was subject to the trusts of a settlement in which infants were concerned, the ct. refused to carry it out though the arrangement was clearly beneficial for the infants.—*DAY v. DAY* (1845), 1 Holt, Eq. 223; 5 L. T. O. S. 143; 9 Jur. 785; 71 E. R. 729.

Annotation:—**N.F.** *Re Wells, Boyer v. Maclean*, [1903] 1 Ch. 848.

See, further, INFANTS.

— Wife.]—See HUSBAND & WIFE.

44. Strangers to arrangement—Enforcement of benefits—Illegitimate child.]—Where two persons for valuable consideration as between themselves, covenant to do some act for the benefit of a mere stranger, that stranger [a natural child] cannot enforce the covenant against the two, though either of the two might do so against the other.—

The members of a Hindu family, one of whom was a minor, entered into a compromise concerning the partition of certain property in the course of mutation proceedings, & the partition agreed to was carried into effect by these proceedings:—*Held*: inasmuch as the minor was represented by his father & there was no evidence or

COLYEAR v. MULGRAVE (COUNTESS) (1836), 2 Keen, 81; 5 L. J. Ch. 335; 48 E. R. 559.

Annotations:—**Reid**, *Davenport v. Bishopp* (1843), 2 Y. & C. Ch. Cas. 451; *Fletcher v. Fletcher* (1844), 4 Hare, 67; *Kekewich v. Manning* (1851), 1 De G. M. & G. 178; *Page v. Cox* (1852), 10 Hare, 163; *Re D'Angilau, Andrews*

v. Andrews (1880), 15 Ch. D. 228; *Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1881), 44 L. T. 414; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89; *Pullan v. Koe*, [1913] 1 Ch. 9.

45. — **Arising on an intestacy.**] — **HEAP v. TONGE**, No. 30, *ante*.

Part II.—Validity and Effect.

SECT. 1.—COURT SUPPORTS ARRANGEMENTS.

46. **Completion enforced.**]—A. & B., having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, & divided them accordingly, A., the elder brother, taking somewhat the larger share, a doubt being then entertained whether their father had a right to devise the lands. A. was, in fact, at the time of this agreement, tenant in tail under the limitations of a surrender made by his grandfather; & after A.'s death without issue, B., having discovered his own title as tenant in tail, repudiated the agreement, & brought an action of ejectment to recover the whole estate.

On a bill by the devisee of A., the ct. upon the principle on which it supports family arrangements, decreed B. to do all necessary acts to bar the entail & vest the parts of the lands, allotted under the agreement to A., upon the trusts of A.'s will.—**NEALE v. NEALE** (1837), 1 Keen, 672; 48 E. R. 466, L. C.

47. **Assent to action of trustees.**]—The ct. always maintains family arrangements fairly entered into, & thus where testator gave certain directions to his trustees with respect to property he had sold to one of the trustees, to which he conceived the title to be defective, & the trustee had made arrangements which were within the scope of his powers, & were assented to by the parties beneficially interested, the ct. would not interfere upon the ground that certain rents had not been brought into the account.—**MINOR v. MINOR** (1847), 10 L. T. O. S. 221, L. C.

48. **Preservation of honour of family.**]—

(1) Where agreements are entered into to save the

honour of a family, & are reasonable ones, a ct. of equity will, if possible decree a performance.

(2) Where a ct. of law or equity finds that the general & substantial intent of the parties was, that the estate should pass, they will construe deeds in support of that intention, different from the formal nature of those deeds themselves.

(3) Where a valuable consideration for an agreement on all sides, there is a sufficient ground to come into a court of equity, but a mere volunteer not entitled to come here for an execution of an agreement.

(4) An agreement upon a supposition of a right, though it may afterwards come out on the other side, is binding, & shall not prevail against the agreement of the parties.—**STAPILTON v. STAPILTON** (1739), 1 Atk. 2; 26 E. R. 1, L. C.

Annotations:—*As to* (1) **Reid**, *Dunnage v. White* (1818), 1 Swan. 137; *Gordon v. Gordon* (1821), 3 Swan. 400; *Cooke v. Turner* (1845), 14 Sim. 493; *Cooke v. Turner* (1846), 15 M. & W. 727; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Dimsdale v. Dimsdale* (1856), 3 Drew. 556; *Head v. Godlee, Reynolds v. Godlee* (1859), John. 536; *Williams v. Williams* (1865), 2 Drew. & Sm. 378; *Fane v. Fane* (1875), L. R. 20 Eq. 698. *As to* (2) **Consd.** *Houghton v. Tate* (1829), 3 Y. & J. 486. *As to* (4) **Reid**, *Stockley v. Stockley* (1812), 1 Ves. & B. 23; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911. *Generally*, **Mentd.** *Baker v. Hart* (1747), 3 Atk. 542; *Doe d. Odienne v. Whitehead* (1759), 2 Burr. 704; *Goodright d. Tyrrell v. Mead & Shilson* (1765), 3 Burr. 1703; *Goodright v. Moss* (1777), 2 Cowp. 591; *Baker v. Booker* (1819), 6 Price, 379; *Tarleton v. Liddell* (1851), 17 Q. B. 390.

49. —.]—**HOBLYN v. HOBLYN**, No. 161, *post*.

50. **Preservation of peace of family.**]—The ct. will support contracts entered into to preserve the peace of families; & therefore, where a son upon his marriage, joined with his father in resettling the estate, & by a memorandum executed

fraud of collusion, the compromise was binding on him.—**DAYA SHANKAR v. HUB LAL** (1914), 1 L. R. 37 All. 105.—**IND.**

m. Strangers to arrangement—Enforcement of benefits.]—A person though not a party to a contract can sue to enforce the terms thereof if it be a family settlement by which some provision is made for him or her as a member of the family though the same is not made a charge upon the family properties.—**SUNDARAJAN AIYANGAR v. LAKSHMIAMMAL** (1914), 1 L. R. 38 Mad. 788.—**IND.**

PART II. SECT. 1.

n. General rule.]—A family settlement, when *bona fide*, the law much favours.—**JOHNSTONE v. JOHNSTONE** (1860), 22 Dunl. (Ct. of Sess.) 3; 3 Macq. 619; 32 Sc. Jur. 286, H. L.—**SCOT.**

46 i. **Completion enforced.**]—By deed between father & son, for large consideration from the son, his object

being to preserve B. in the family, the lands A. & B. were conveyed to a trustee in trust to sell A., in the first instance, to pay incumbrances & debts of the father; & as to B., subject to so much of the debts & incumbrances as should remain unpaid by the sale of A., in trust to raise a sum to pay them, & subject thereto to the father for life, remainder to the son in fee. The ct. refused to make an order for the sale of B. on the father's petition, a part of A. remaining unsold.—*Ex p. KENNEDY* (1849), 11 I. Eq. R. 171.—**IR.**

o. Preservation of peace of family—Question of legitimacy.]—This ct. will endeavour to support arrangements by which family differences have been compromised, especially when those differences relate to questions of legitimacy, even where resting upon grounds, which might not be considered satisfactory, if the transaction had occurred between strangers.—**WESTBY v. WESTBY** (1842), 2 Dr. & War. 502.—**IR.**

p. When court will withhold support.]—J. C. died in New York, leaving a will, which the cts. there declared void, & letters of administration of his effects in Ontario were granted to his widow by the proper ct.; & she & the next of kin made an agreement for a distribution of all the assets, whereupon she filed a bill in this ct. to have such agreement established & the intended will declared invalid, with a view of stopping the intended legatees thereunder from afterwards attempting to set up the same. The ct. in the circumstances, & in view of the fact that the intended legatees were not parties & that no controversy was shown to exist, refused to make any declaration, & dismissed the bill.—**CLARKE v. COOK** (1875), 23 Gr. 110.—**CAN.**

q. Giving effect to testator's intentions—Absence of fraud.]—Testator's son being unwilling to undertake the trusts & to carry on the business on the terms of the will, an agreement was made between him,

**Sect. 1.—Court supports arrangements. *Seeds.*
& 3: Sub-sects. 1 & 2.]**

at the same time, agreed to secure £500 to each of his sisters:—*Held*: there was sufficient consideration for the ct. to decree a specific performance of this agreement, an attempt to show that it had been obtained by an undue exercise of parental influence having failed.

The ct. considers the ease & comfort & security of families as a sufficient consideration (LORD HENLEY, C.).—WYCHERLEY v. WYCHERLEY (1763), 2 Eden, 175; 28 E. R. 861, L. C.

Annotations:—*Consd.* Houghton v. Houghton (1852), 15 Beav. 278. *Refd.* Bentley v. Mackay (1862), 31 Beav. 143; Hoblyn v. Hoblyn (1889), 41 Ch. D. 200. *Mentd.* Baker v. Bradley (1854), 2 Sm. & G. 531.

51. —.]—HOUGHTON v. HOUGHTON, No. 8.

SECT. 2.—CHANGE IN RIGHTS OF PARTIES.

52. Changes subsequent to arrangement—*Immaterial.*—STAPILTON v. STAPILTON, No. 48, *ante*.

53. —.]—REFFELL v. KING, No. 69,

54. —.]—LAWTON v. CAMPION, No. 70,

SECT. 3.—CONSIDERATION.

SUB-SECT. 1.—IN GENERAL.

Consideration generally, *see* CONTRACT, Vol. XII., pp. 172 *et seq.*

55. Adequacy not essential.]—WYCHERLEY v. WYCHERLEY, No. 50, *ante*.

56. —.]—A deed entered into by parties apprised of their rights, in order to put an end to a suit, although upon inadequate consideration, shall not be set aside.—STEPHENS v. BATEMAN (1778), 1 Bro. C. C. 22; 28 E. R. 962, L. C.

57. —.]—The ct. cannot inquire into the adequacy or inadequacy of the consideration of a compromise fairly & deliberately made.—NAYLOR v. WINCH (1824), 1 Sim. & St. 555; 2 L. J. O. S. Ch. 132; 57 E. R. 219.

Annotations:—*Refd.* Brent v. Brent (1840), 10 L. J. Ch. 84; Stone v. Godfrey (1853), 1 Sm. & G. 590; Houghton v. Lees (1854), 24 L. T. O. S. 201; Lawton v. Campion (1854), 18 Beav. 87.

58. —.]—Circumstances to be taken into consideration in judging of the fairness of an arrangement between a father, tenant for life, & son, tenant in tail, for barring the entail.

Where the main consideration moving from the son was an undertaking to pay the father's debts,

even the circumstance of several of the most important items being left in blank was held insufficient to set the transaction aside as against the father, though the son was only just of age; as a family arrangement of that description cannot be supposed to have depended upon any very exact calculation as to the amount of the debts.—BELLAMY v. SABINE (1847), 2 Ph. 425; 17 L. J. Ch. 105; 10 L. T. O. S. 181; 41 E. R. 1007, L. C.

Annotations:—*Refd.* Bellamy v. Sabine (1857), 26 L. J. Ch. 797; Talbot v. Stanforth (1861), 1 John. & H. 484; Cornwall v. Prioleau (1904), 30 T. L. R. 606. *Mentd.* Browne v. London Necropolis & National Mausoleum Co. (1857), 6 W. R. 188.

59. —.]—HOUGHTON v. LEES, No. 28, *ante*.

60. —.]—Transactions between parent & child, if in the nature of a settlement of property or rights, are regarded with favour, & not with minute regard to the consideration; but if in the nature of bounty from the child soon after he attains majority, are to be viewed with jealousy, & as the subject of interposition of the ct. to guard against undue influence.—BAKER v. BRADLEY (1855), 7 De G. M. & G. 597; 25 L. J. Ch. 7; 20 L. T. O. S. 160; 2 Jur. N. S. 98; 4 W. R. 78; 44 E. R. 233, L. J.

Annotations:—*Consd.* Berdoo v. Dawson (1865), 34 603. *Refd.* Jenner v. Jenner (1860), 2 De G. F. & J. 359; Chambers v. Crabbe (1865), 11 Jur. N. S. 277; Turner v. Collins (1871), 7 Ch. App. 334, n.; Lovell v. Wallis (No. 2) (1884), 50 L. T. 681; Barron v. Willis, [1899] 2 Ch. 578; De Witte v. Addison (1899), 80 L. T. 207; London & Westminster Loan & Discount Co. v. Bilton (1911), 27 T. L. R. 184. *Mentd.* Wright v. Vanderplank (1856), 8 De G. M. & G. 133; *Re* Smith, Chapman v. Wood (1884), 51 L. T. 501.

—.]—HEAD v. GODLEE, REYNOLDS v. GODLEE, No. 158, *post*.

62. —.]—It was quite unnecessary that A. should give to B. exactly the same as B. gave; each gave & got something (KINDERSLEY, V.-C.).—BARNETT v. BLAKE (1862), 2 Drew. & Sm. 117; 62 E. R. 566; *sub nom.* BLAKE v. BARNETT, 31 L. J. Ch. 898; 11 L. T. 886; 20 J. P. 692; 8 Jur. N. S. 812; 10 W. R. 767.

Annotations:—*Mentd.* Hurst v. Hurst (1882), 21 Ch. D. 278; Talbot v. Jevers (1917), 117 L. T. 430.

63. —.]—WILLIAMS v. WILLIAMS, No. 35, *ante*.

64. — Unless party imposed upon.]—(1) There is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition (LORD WESTBURY).

(2) In family arrangements it is required that there shall be on all sides *uberrima fides* (LORD WESTBURY).—TENNENT v. TENNENTS (1870), L. R. 2 Sc. & Div. 6, H. L.

65. What is sufficient consideration—Forgiveness of statute-barred debt.]—PENHALL v. ELWIN, No. 143, *post*.

his sisters & his mother in accordance with what they believed to be the intentions of testator expressed verbally before his death. Probate was then granted to the mother & son; & in 1895 an indenture was executed which, recited the family arrangement:—*Held*: the indenture was executed in pursuance of a family arrangement made for valuable consideration at a time when the son was not in a fiduciary position with

to his sisters, & there was no want of good faith & no undue influence on his part.—HARRIS v. JENKINS (1923), 31 C. L. R. 341.—AUS.

—.]—An agreement as a family arrangement, entered into for the purpose of giving effect to the intentions of the deceased, without fraud or misrepresentation, should be upheld.—SEANE v. HICKS (1906), 3 B. Eq. Rep. 281; 1 E. L. R. 451.—

s. Apparent intention of parties—*In absence of express words.*—In construing family deeds, the intention to give interest being plain, the ct. must effectuate it, even though there are not express words to that effect.—CLAYTON v. GLENGALL (EARL) (1841), 1 Dr. & War. 1; 1 Con. & Law. 311.—IR.

t. Benefit of children.]—*Re* GREAVES, LYSAGHT v. GREAVES, [1921] N. Z. L. R. 406.—M 7.

66. Whether consideration sufficient to exclude 27 Eliz. c. 4—Against subsequent assignee for value.]—A son, tenant in tail in remainder, when just of age, 1769, joined his father, tenant for life, in a recovery, for the purpose of raising £3,000 for the father, & re-settling the estate; the son taking back only an estate for life, with remainder to his first & other sons, etc.

Whatever equity he might have had against that settlement was lost by his marriage & acquiescence till after the death of his father in 1793; though in the circumstances there was no probability of issue. Upon that ground a bill by trustees under a general trust for his creditors, claiming as purchasers under above Act was dismissed without deciding whether they could sustain that character; or, how far a settlement, merely as being voluntary, is affected by above Act.—**BROWN v. CARTER** (1801), 5 Ves. 862; 31 E. R. 898.

*Annotations:—*Consd. **Hoghton v. Hoghton** (1852), 15 Beav. 278. *Reid.* **Scott v. Scott** (1854), 4 H. L. Cas. 1065.

67. ———.]—**HEAP v. TONGE**, No. 30, *ante*.

SUB-SECT. 2.—COMPROMISE OF DISPUTED CLAIM.

68. Sufficiency as consideration.]—**STAPILTON v. STAPILTON**, No. 48, *ante*.

69. ———.]—On the occasion of the death of a person, intestate, & without wife or children, in one of the colonies, a deed was executed between the parents, & brothers & sisters of intestate, by which it was recited, that intestate was, at his death, possessed of real & personal estate, & the real estate was settled, in consideration of the settlement of the personal estate, by the eldest brother as heir-at-law; & the personal estate, together with other property of the father, was settled by the father as sole next of kin, in consideration of the settlement of the real estate. Intestate, as it afterwards appeared, had no real estate:—*Held*: the possibility of there being real estate was a valuable consideration, sufficient to support the settlement against the father.—**REFFELL v. KING** (1833), 2 L. J. Ch. 155.

70. ———.]—The validity of a compromise or family arrangement of disputed rights depends on the facts existing at the time, & will not be affected by subsequent judicial determinations, showing the rights of parties to be different from what was supposed, or that one party had nothing to give up.

The children of J. a deceased remainderman, insisted as against their uncle C. a prior tenant for life in possession, that they were entitled, under the terms of a settlement, to have their portions raised from the death of their father in 1831. Some discussion took place, & a bill was filed by them. An arrangement was come to by deed, which, proceeding on the foundation of the validity of the claim, compromised the amount of arrears of interest, & settled the amount of the future interest which C. thereby engaged to pay. It having been afterwards determined, in another

suit, that on the true construction of the settlement the claim of the children was unfounded, C. instituted a suit to set aside the deed:—*Held*: if the right to have the portions raised in 1831 had formed one of the matters compromised, the transaction could not be disturbed, although the claim of the children had turned out to be wholly unfounded. But the ct. having arrived at the conclusion that the parties had all proceeded on the foundation of the children's claim being unquestionable, & that all that had been compromised was the amount of arrears payable on that foundation, set aside the deed.—**LAWTON v. CAMPION** (1854), 18 Beav. 87; 23 L. J. Ch. 505; 23 L. T. O. S. 201; 18 Jur. 818; 2 W. R. 209; 52 E. R. 35.

*Annotation:—**Reid.* **Cloutte v. Storey**, [1911] 1 Ch. 18.

71. ———.]—A wife having instituted a suit against her husband for a divorce, an arrangement was come to, & the husband executed a deed, by which he assigned a house to trustees, to permit the wife to enjoy it & accommodate herself & children; & an income of £4,000 a year was also provided for her separate use to keep up the establishment for herself & children, "upon such a scale & regulated in such a manner as she should think fit," & the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous to reside in the house " & to conform to the spirit & intention of the deed, & to partake of the benefit of the establishment to be kept up therein by the wife, he should be at liberty so to do." The suit was discontinued, & the husband partook of the establishment:—*Held*: the deed being a family arrangement & a compromise of disputed rights, there was a sufficient consideration.—**JODRELL v. JODRELL** (1845), 9 Beav. 45; 15 L. J. Ch. 17; 6 L. T. O. S. 186; 9 Jur. 1022; 50 E. R. 259.

72. ———.]—**PARTRIDGE v. SMITH**, No. 146,

73. ———.]—The compromise of a disputed claim, made *bonâ fide*, is a good consideration for a promise, even although it ultimately appears that the claim was wholly unfounded.—**OCKFORD v. BARELLI** (1871), 25 L. T. 504; 20 W. R. 116.

*Annotations:—**Mentd.* *Re* **Blythe, Ex p. Banner** (1881), 17 Ch. D. 480; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266.

74. ———.]—M. appointed his son J. & his son S. his exors. & bequeathed his property to them on trust for all his children as joint tenants, & not as tenants in common. Ten years after his death questions arose as to the children entitled, on account of the illegitimacy of the eldest three children, of whom J. was one. To avoid litigation a deed was executed by all the adult children, by which it was agreed that all the children should share equally & should take as tenants in common.

A bill was filed in 1872, by two of the children who had been infants at the date of the deed, but who came of age respectively in 1857 & 1861, to have the rights of all parties under the will declared:—*Held*: the rights were as declared by the deed; the arrangement come to between the members of the family to avoid litigation was sufficient consideration to support it as between the parties to it, & pltfs. were bound by

PART II. SECT. 3, SUB-SECT. 2.

68 i. Sufficiency as consideration.]—**KUMARA TIRUMALAI NAIK v. BANGARU TIRUMALAI SAURI NAIK** (1898), 1 L. R.

21 Mad. 310.—IND.

68 ii. ———.]—The compromise of a doubtful right is a sufficient foundation for an agreement amongst the members of a family, & shall be binding

on them.—**RAMESHWAR PRASAD SINGH v. LACHMI PRASAD SINGH** (1904), 1 L. R. 31 Cal. 111.—IND.

68 iii. ———.]—**WESTBY v. WESTBY** (1842), 2 Dr. & War. 502.—IR.

Sect. 3.—Consideration: Sub-sect. 2. Sects. 4 & 5:
Sub-sect. 1.]

acquiescence.—*SMITH v. MOGFORD* (1873), 21 W. R. 472.

75. Must be intention to compromise.]—Intestate at his death was indebted to D. M. in £1,687; disputes, however, arose between the administrator & next of kin as to the legality of the debt, & an agreement was come to between them & the brother of intestate, whereby reciting that all the property had been got in &, excluding the disputed debt, amounted to £533; that doubts having arisen as to the validity of that debt, & that being desirous of maintaining the good fame & character of deceased, the three parties had agreed to waive all questions as to the validity of the debt, & raise a fund to make good the deficiency that the next of kin had agreed to "relinquish all claim to any residue or surplus," that intestate's brother should furnish £384 towards payment of the debt, & the administrator should make good all the residue. It was witnessed that the next of kin released to the administrator all his right, etc., to the personal estate of intestate, as his next of kin or otherwise, the brother covenanted to pay his part, & the administrator covenanted to pay the residue out of his own money, & also to pay all other debts, etc., of intestate. The debt was paid & other funds afterwards fell into intestate's estate:—*Held*: the administrator was not, under the release, entitled thereto.—*LINDO v. LINDO* (1839), 1 Beav. 496; 8 L. J. Ch. 284; 48 E. R. 1032.

Annotations:—Consd. Re Trustee Relief Act, Re Owen's Trust (1855), 1 Jur. N. S. 1069; *Turner v. Turner, Hall v. Turner* (1880), 14 Ch. D. 829. *Mentd. Re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182.

76. —.]—A compromise under the ct., held not to exclude a point of construction not then under consideration.—*BENNETT v. MERRIMAN* (1843), 6 Beav. 360; 49 E. R. 865.

Annotations:—Reid. Cloutte v. Storey, [1911] 1 Ch. 18. *Mentd. Smith v. Palmer* (1849), 7 Harc. 225; *Penny v. Clarke* (1859), John. 619; *Lanphier v. Buck* (1865), 2 Drew. & Sm. 484; *Martin v. Holgate* (1866), L. R. 1 H. L. 175.

77. —.]—*LAWTON v. CAMPION*, No. 70, *ante*.

78. —.]—A family arrangement was entered into under the common belief of all parties that A. was entitled to one moiety, & B. to the other moiety of certain property, whereas, in fact, B. was entitled to the whole; & in pursuance of that arrangement A. settled the moiety, supposed to be his, by deed, upon certain trusts, & B. executed a will whereby he devised "all that his moiety" in the property in question upon the same trusts, & devised & bequeathed his residuary estate upon other trusts:—*Held*: the first-mentioned moiety passed under B.'s will to his residuary devisees, who were not bound to give effect to the family arrangement.—*HEALD v. WALLS* (1870), 39 L. J. Ch. 217; 21 L. T. 705; 18 W. R. 398.

79. —.]—In construing a deed of release entered into by way of compromise, the ct. will have regard to the knowledge & intention of the parties at the time the deed was executed, & will not extend it to property which was not intended to be comprised in it.

In consideration of the payment by an extrix. of various debts & legacies, & by way of compromise, the parties interested in the residuary estate released to the extrix. all further claims on

the estate. It was subsequently discovered that certain property in which testator was interested had been sold at an undervalue, & the extrix. succeeded in setting aside the sale. In an action by one of the parties to the release, claiming to share in the money recovered by the extrix.:—*Held*: the existence of the property not being known to the parties when the deed was entered into, was not included in the release.—*TURNER v. TURNER, HALL v. TURNER* (1880), 14 Ch. D. 829; 42 L. T. 495; 44 J. P. 734; 28 W. R. 859.

Annotation:—Mentd. Monk v. Arnold (1902), 86 L. T. 580.

80. —.]—It is not in accordance with principle or authority to construe deeds of compromise of ascertained specific questions so as to deprive any party thereto of any right not then in dispute & not then in contemplation by any of the parties to the deed.—*CLOUTTE v. STOREY*, [1911] 1 Ch. 18; 80 L. J. Ch. 193; 103 L. T. 617, C. A.

Annotation:—Reid. Thompson v. Thompson, [1923] 2 Ch. 205.

SECT. 4.—ESSENTIAL REQUIREMENTS.

81. Must be reasonable.]—*STAPILTON v. STAPILTON*, No. 48, *ante*.

82. —.]—*HOGHTON v. HOGHTON*, No. 87, *post*.

83. Terms must be certain.]—Certain members of a family, interested under a will, entered into an arrangement for obtaining an Act of Parliament, empowering the trustees to grant a lease of the estates devised. It was insisted by one of the parties, as one of the terms for his assent to the Act, & it was assented to by the intended lessee, that the party should have the right of becoming the tenant to the lessee of the mansion house, to hold the same from year to year, for so long a time during the existence of any lease under the Act, as he should choose, at the fair annual rental of the same, to be paid by him:—*Held*: the terms of the arrangement were too vague & uncertain for the ct. to carry them into effect.—*THELLUSSON v. RENDLESHAM (LORD)* (1846), 8 L. T. O. S. 463; 11 Jur.

84. —.]—A party to a deed of family arrangement thereby covenanted that if he should at any time become entitled to property exceeding the value of —, which was left in blank, he would settle it upon certain specified trusts. Before any such property accrued, or the persons entitled under the trusts were ascertained, he filed a bill to have it declared that the covenant was void for uncertainty:—*Held*: the bill was properly dismissed as filed prematurely. *Semble*: there was no such uncertainty as to render the covenant void.—*FYFE v. ARBUTHNOT* (1857), 1 De G. & J. 406; 3 Sm. & G. 547; 20 L. J. Ch. 646; 29 L. T. O. S. 306; 3 Jur. N. S. 651; 5 W. R. 793; 44 E. R. 780, L. C.

Annotations:—Reid. Carroll v. Graham (1865), 11 Jur. N. S. 1012; *Re Clarke, Coombe v. Carter* (1887), 35 Ch. D. 109.

85. Necessity for uberrima fides.]—A real estate was devised to trustees upon trust to sell, invest the produce & pay the dividends to a husband & wife for life, & after the death of the survivor then to her children as she should appoint. The estate was not sold, & the wife, having nine children, appointed the estate to the six younger, & all the nine joined with the husband & wife in raising money upon annuities, & finally, in selling

the estate to the annuitant. The trustee refused to join in any of the deeds, but he paid the rent of the estate to the purchaser during the life of the surviving tenant for life; after whose death he refused to make any further payments. Upon a bill by the purchaser against the trustee & the *cestuis que trust*, to obtain a conveyance of the legal estate, they alleged that the deed was executed by them under pressure, that none of the children received any part of the money paid for the annuities or for the purchase of the reversion; that the youngest was under age at the time she executed the purchase deed, & that he had refused to confirm it:—*Held*: the purchaser must prove the transaction fair & perfect, before the ct. would interfere to give a complete title; there was no proof of the owners of the reversion having received any consideration, it was not necessary to consider whether the youngest child was of age; & the bill was dismissed against defts. without costs, but as against the trustee with costs.—*HANNAH v. HODGSON* (1861), 30 Beav. 19; 30 L. J. Ch. 738; 5 L. T. 42; 7 Jur. N. S. 1092; 9 W. R. 729; 54 E. R. 795.

86. —.]—*TENNENT v. TENNENTS*, No. 61, *ante*.

Parental influence.—See Sect. 5, sub-sect. 1, *post*.

Drunkenness.—See Sect. 5, sub-sect. 2, *post*.

Ignorance.—See Sect. 5, sub-sect. 3, *post*.

Misrepresentation & nondisclosure.—See Sect. 5, sub-sect. 4, *post*.

SECT. 5.—PARENTAL AND OTHER INFLUENCES, DRUNKENNESS, ETC.

SUB-SECT. 1.—PARENTAL AND OTHER INFLUENCES.

Undue influence, generally, see *CONTRACT*, Vol. XII., pp. 98 *et seq*.

87. General rule — Personal influence disregarded—If no benefit taken by parent.—Distinction between the cases where, as between strangers, benefits are obtained by undue influence, & arrangements entered into for the peace of families & the security of family property.

If a person obtain by voluntary donation a large pecuniary benefit from another, the burden of proving the transaction righteous falls on the person taking the benefit, & this is proved by showing that the donor fully understood what he was doing; but where the relation of the parties is such that undue influence might have been exercised, it must also be shown that the disposition of the donor was not produced by undue influence. In many cases, the ct. from the relations existing between the parties, infers the probability of undue influence, as in the cases of guardian & ward, solr. & client, spiritual adviser & pupil, medical adviser & patient, & the like. Transactions between such persons are watched with jealousy, not only to see that the party fully understood the act, but also that it was not brought about by the exercise of that influence. The relation of parent & child comes within this class.

Such an influence is not discountenanced by the ct., but it ought to be exercised for the benefit of the person subject to, & not of the person possessing it.

In family arrangements, though the influence exist, & has probably been exercised, yet if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes & litigation, or to the preservation of the family property, the same principles are not applied as to dealings between strangers, but such principles are then applied, as, on the most comprehensive experience, have been found to tend most to the interest of families. The cases relating to the resettlement of the family property appear stronger.

Eleven months after a tenant in tail attained twenty-one, he concurred with his father in barring the entail & resettling the family estates, the ct. being of opinion that the father thereby took direct benefits proceeding from the son: that the property had not been resettled in a reasonable & proper mode, if the interest of the family alone was to be regarded: that in the preparation of the deed, the son had no professional assistance, & that the contents were not properly made known to him, set aside the arrangement.—*HOGHTON v. HOGHTON* (1852), 15 Beav. 278; 21 L. J. Ch. 482; 17 Jur. 99; 51

Annotations:—*Distd.* *Beanland v. Bradley* (1854), 2 Sm. & G. 339. *Consd.* *Jenner v. Jenner* (1860), 2 De G. F. & J. 359; *Potts v. Surr* (1865), 34 Beav. 543. *Apld.* *Fane v. Fane* (1875), L. R. 20 Eq. 698. *Consd.* *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200. *Apld.* *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188. *Refd.* *Cobbett v. Brock* (1855), 20 Beav. 524; *Dimsdale v. Dimsdale* (1856), 25 L. J. Ch. 806; *Hartopp v. Hartopp* (1856), 21 Beav. 259; *Wright v. Vanderplank* (1856), 4 W. R. 410; *Bury v. Oppenheim* (1859), 26 Beav. 594; *Head v. Godlee*, *Reynolds v. Godlee* (1859), John. 536; *James v. Holmes* (1862), 31 L. J. Ch. 567; *Chambers v. Crabbe* (1865), 34 Beav. 457; *Turner v. Collins* (1871), 7 Ch. App. 329; *Carnegie v. Carnegie* (1874), 30 L. T. 460; *Lovell v. Wallis* (No. 2) (1884), 50 L. T. 681; *Allcard v. Skinner* (1887), 38 Ch. D. 145. *Mentd.* *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223.

88. — — —.]—*HARTOPF v. HARTOPF*, No. 112, *post*.

89. — — —.]—*JENNER v. JENNER*, No. 132, *post*.

90. — — —.]—*FANE v. FANE*, No. 113, *post*.

91. Application of rule — Agreement to vary limitations of settlement.—An agreement between a child & a father to alter the limitations under a settlement, will not be set aside, on pretence of being drawn in by the father's power & authority.—*TENDRIL v. SMITH* (1740), 2 Atk. 85; 26 E. R. 452, L. C.

Annotations:—*Refd.* *Judd v. Pratt* (1806), 13 Ves. 168; *Hoghton v. Hoghton* (1852), 15 Beav. 278. *Mentd.* *White v. Vitty* (1826), 2 Russ. 484.

92. — — —.]—Son tenant in tail of an estate, upon the death of the mother, who was tenant for life, makes a settlement of it for the benefit of the family, in consequence of an agreement so to do in the mother's life; although the father derives some benefit under the settlement, it shall not be set aside, as entered into under undue influence.—*KINCHANT v. KINCHANT* (1784), 1 Bro. C. C. 369; 28 E. R. 1183.

Annotations:—*Consd.* *Brown v. Carter* (1801), 5 Ves. 862; *Hoghton v. Hoghton* (1852), 15 Beav. 278. *Mentd.* *Pickett v. Loggon* (1807), 14 Ves. 215.

93. — — —.]—*HOBLYN v. HOBLYN*, No. 161, *post*.

94. — Agreement to settle family disputes.—Agreement, if reasonable & to settle family disputes, & no unfair advantage, not to be set aside because the party was drunk, or paternal authority

Sect. 5.—Parental and other influences, drunkenness, etc.: Sub-sects. 1, 2, 3 & 4.]

exercised.—**CORY v. CORY** (1747), 1 Ves. Sen. 19; 27 E. R. 864, L. C.

Annotations:—*Consd.* **Turner v. Collins** (1871), 25 L. T. 374. *Refd.* **Kinchant v. Kinchant** (1784), 1 Bro. C. C. 369; **Hawes v. Wyatt** (1790), 2 Cox, Eq. Cas. 263; **Stockley v. Stockley** (1812), 1 Ves. & B. 23; **Clifton v. Cockburn** (1834), 3 My. & K. 76; **Hoghton v. Hoghton** (1852), 15 Beav. 278; **Lovell v. Wallis** (No. 2) (1884), 50 L. T. 681. *Mentd.* **Cooke v. Clayworth** (1811), 18 Ves. 12; **Shaw v. Thackray** (1853), 1 Sm. & G. 537.

95. — Arrangement to put an end to litigation.]—A father & son, an infant, entered into an arrangement to put an end to a litigation & for the enjoyment of portions of the family estates by both father & son successively. The son attained his majority; an Act of Parliament was passed in order to effectuate the arrangement, reciting the consent of the son to it, & directing a proper settlement of the estates. A deed was then executed by the son for the above stated purposes & amongst others, for raising £25,000 to pay the debts of himself & his father, which was done. The son now filed a bill to have it declared that his consent to the provisions inserted in the Act was wrongfully obtained & by undue influence on the part of his father, & to have the deed of arrangement set aside:—*Held*: the bill must be dismissed.

No special benefit was obtained by that arrangement to pltf.'s father alone, nor was any such advantage purchased by pltf. for his father, the benefit was one common to both. . . . It was said that a large benefit accrued to the father from getting the Bill passed & that he ought not to have procured his son's consent. If the father had been the only person benefited by the bill then the case would be within the ordinary rules of this ct. as to parental influence (**WOOD, V.-C.**).—**BOSVILLE v. MIDDLETON** (LORD) (1857), 29 L. T. O. S. 341.

96. — Benefit taken by parent—Agreement between children.]—An estate being limited under her marriage settlement to A. for life, with remainder to her children by her deceased husband in such manner as she should appoint, remainder in default of appointment to all the children as tenants in common, an agreement by the children that on her joining in suffering a recovery, the first use to which the recovery should enure should be to A. for life, without impeachment of waste, is, it seems, valid in equity.

In an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent who had a power to distribute property among, some advantage which the parent, without their contract with each other, could not have.—**DAVIS v. UPHILL** (1818), 1 Swan. 129; 36 E. R. 326.

Annotation:—*Refd.* **Baker v. Bradley** (1855), 7 De G. M. & G. 597.

97. — — For valuable consideration.]—A son attained twenty-one in 1855 & in 1857 he conveyed to his father his reversionary estate & interest in consideration of moneys advanced for his commission outfit & debts during his minority & a further sum of £500 then advanced:—*Held*: the deed could not stand except as a security for the £500.

Transaction between father & son, seven years after the latter came of age by which the father obtained a benefit of £5,790 in the event of the son dying without children, supported; there being a valuable consideration on the part of the

father the settlement being a fit & proper family arrangement & the transaction not having been impeached until after the death of the father.—**PORTS v. SURR** (1865), 34 Beav. 543; 13 W. R. 909; 55 E. R. 745.

98. — — Son separately advised.]—**BRUTY v. EDMUNDSON** (1915), 85 L. J. Ch. 568; 113 L. T. 1197.

Transactions between parent & child.]—*See, generally,* FRAUDULENT & VOIDABLE CONVEYANCES; INFANTS.

99. Influence by third parties.] —**BENTLEY v. MACKAY**, No. 127, *post*.

SUB-SECT. 2.—DRUNKENNESS.

100. Agreement not rendered voidable—If reasonable—& no unfair advantage taken.]—**CORY v. CORY**, No. 94, *ante*.

101. Necessity for strict examination — Where habitual intoxication proved.]—A deed executed by the members of a family to determine their interests under the will & partial intestacy of an ancestor, not enforced, it appearing on the face of the deed that the parties did not understand their rights, or the nature of the transaction, & that the heir surrendered an unimpeachable title without consideration, & evidence being given of his gross ignorance, habitual intoxication, liability to imposition, & want of professional advice; in the absence of direct proof of fraud or undue influence, & after an acquiescence of five years.

There is strong testimony that he was dissolute, illiterate, addicted to intoxication. . . . Such habits though not constituting absolute incapacity lay a ground for strict examination whether the instrument contains in itself evidence that advantage was taken of them (**PLUMER, M.R.**).—**DUNNAGE v. WHITE** (1818), 1 Swan. 137; 1 Wils. Ch. 67; 36 E. R. 329.

Annotations:—*Refd.* **Stewart v. Stewart** (1839), 6 Cl. & Fin. 911; **Baker v. Bradley** (1855), 7 De G. M. & G. 597.

Effect of drunkenness on contractual capacity.]—*See* CONTRACT, Vol. XII., pp. 41, 42, Nos. 199–217.

SUB-SECT. 3.—IGNORANCE.

102. Ignorance of rights by one party—Not fatal defect.]—Where an agreement though conceived upon mistake, shall bind the party.—**FRANK v. FRANK** (1667), 1 Cas. in Ch. 84; 22 E. R. 706.

Annotations:—*Refd.* **Naish v. East India Co.** (1735), 2 Com. 462; **Stewart v. Stewart** (1839), 6 Cl. & Fin. 911; **Hoghton v. Hoghton** (1852), 15 Beav. 278.

103. — —.]—The widow, brother, & sister of an American who died in Italy, leaving considerable personal estate in the hands of trustees in Scotland, agreed, by advice of their law agent, to compromise their respective claims to the succession by taking equal shares. The widow, after receiving her share, brought an action in Scotland, to rescind the agreement, on the ground of having thereby sustained injury through ignorance of her legal rights & the erroneous advice of the law agent. There was no allegation of fraud against him or against the parties to the agreement:—*Held*: although the fair inference

from the evidence was that she was ignorant of her legal rights, & would not have entered into the agreement had she known them, yet, as the extent of her ignorance & of the injury sustained was doubtful, & there was no proof of fraud or improper conduct on the part of the agent, she was bound by his acts & affected by the knowledge which he was presumed to have of her rights, & was therefore not entitled to disturb the arrangement.

It is not necessary to the validity of a compromise of a family dispute that the parties did not distinctly understand their rights, if they were understood by their agents, by whose acts & knowledge, in the absence of fraud, the principals are bound.—*STEWART v. STEWART* (1839), 6 Cl. & Fin. 911; MacL. & Rob. 401; 7 E. R. 940, H. L.

Annotations:—*Consd.* Lovell v. Wallis (No. 2) (1881), 50 L. T. 681. *Refd.* Stone v. Godfrey (1853), 22 L. T. O. S. 208; Jenner v. Jenner (1860), 2 De G. F. & J. 359; Triggs v. Lavalley (1862), 15 Moo. P. C. C. 270; Partridge v. Smith (1863), 2 New Rep. 100; *Re* Roberts, Roberts v. Roberts, [1905] 1 Ch. 704.

104. — — —.] — There was no allegation of any concealment by the father of his deceased son's reversionary interest in the stock; the bill proceeded on the assumption that the father did not know, or had altogether forgotten, the existence of that interest. The deed itself purported to pass everything that T. possessed. In such a case, suppose the deed to have been founded on some degree of mistake as to the actual property which belonged to him, & that there was some degree of mutual ignorance as to their rights, the ct. was not aware of any instance in which the ct. had set aside a family arrangement of that nature (*per* CUR.).—*DEVY v. DEVY* (1851), 9 Hare, 232, n.; 68 E. R. 487.

105. — — —.] — *DIMSDALE v. DIMSDALE*, No. 157, *post*.

106. Ignorance of nature of transaction.] — *DIMSDALE v. DIMSDALE*, No. 157, *post*.

107. Knowledge of legal adviser — Imputed to party.] — *PULLEN v. READY*, No. 145, *post*.

108. — — —.] — *STEWART v. STEWART*, No. 103, *ante*.

109. What amounts to wilful ignorance—Omission to seek information of suspected fact.] — Where one party to a compromise suspected the existence of a fact which he considers of importance to his success, & asks his adversary, who refuses all information, but does not ask other parties, whom he has reason to believe are able & willing, to give him the information, his ignorance of that fact at the time of a compromise is to be treated as wilful ignorance, & not as an improper concealment by the adversary.—*BAINBRIDGE v. MOSS* (1856), 3 Jur. N. S. 58.

Annotation:—*Mentd.* Smith v. Kay (1859), 7 H. L. Cas. 750.

SUB-SECT. 4.—MISREPRESENTATION AND NON-DISCLOSURE.

110. Effect of misrepresentation.] — Release set aside by reason of the misapprehension of the

party.—*GEE v. SPENCER* (1681), 1 Vern. 32; 1 Eq. Cas. Abr. 170; 23 E. R. 286.

Annotation:—*Refd.* Baugh v. Price (1752), 1 Wills. 320.

111. — — — Though innocently made.] — *LANS-DOWN v. LANSDOWN* (1730), 2 Jac. & W. 205; Mos. 364; 25 E. R. 441.

Annotations:—*Consd.* Stewart v. Stewart (1839), 6 Cl. & Fin. 911. *Refd.* Orrell v. Coppock (1856), 26 L. J. Ch. 269.

112. — — —.] — Parental influence is inseparable from arrangements between father & son for the resettlement of family estates; but its existence & operation are not sufficient to invalidate the transaction, if it be not exerted for the benefit of the person possessing it.

Transactions between parent & child are to be regarded with jealousy, but, in arrangements between father & son for the resettlement of family estates, if the resettlement be not obtained by misrepresentation or suppression of the truth, if the father acquires no personal benefit, & if the settlement is a reasonable one, the ct. will support it, even though the father did exert parental authority & influence over the son to procure the execution of it.

Pltf. was tenant in tail, & deft., his father, tenant for life of family estates. Pltf., eleven months after attaining twenty-one, being in pecuniary difficulties, joined his father in a resettlement of the estates. The ct. though satisfied that parental authority & influence had been exerted to obtain the execution of the settlement, but not for the father's individual advantage, who obtained no direct personal benefit from it, supported the settlement, holding that a jointure thereby provided for the son's mother did not come within the definition of benefit to the father, & that the postponement of the son's daughters to his younger brother was not unreasonable, considering that thereby the estates were made to accompany the family title.

If one party be acting under a misapprehension, & the other is accessory to it, although unintentionally, the transaction cannot stand.

The ct. refused to set aside the transaction although the family solr. had acted for all parties.

If the settlement does not in all the minute details carry into effect the intentions of either pltf. or his father, this is not a ground for setting it aside but for rectifying it & making it conformable to their intentions (*ROMILLY, M.R.*).—*HARTOPP v. HARTOPP* (1856), 21 Beav. 259; 25 L. J. Ch. 471; 27 L. T. O. S. 37; 2 Jur. N. S. 794; 52 E. R. 858.

Annotations:—*Refd.* Jenner v. Jenner (1860), 2 De G. F. & J. 359; Turner v. Collins (1871), 7 Ch. App. 334, n.

113. — — —.] — A family settlement will not be supported if founded on a mistake of either party to which the other party is accessory, although such mistake may have been innocently made. A son, tenant in tail in remainder, shortly after attaining twenty-one, joined with his father, the tenant for life, in resettling the family estates. The son was influenced to make the resettlement by the representation of his father that a portion's charge of £5,000 was not, as in fact it was, a subsisting charge on the estates, but was a charge to take effect only in case the father should so direct, & a release of the supposed power to charge

Sect. 5.—Parental and other influences, drunkenness, etc.: Sub-sect. 4. Sect. 6.]

contained in the resettlement was the principal consideration for its execution:—*Held*: although this misrepresentation was innocently made, the resettlement must be set aside as founded on mistake.

The parental influence in reference to such resettlements where there is no other consideration or element in the case is to be disregarded (*HALL, V.-C.*).—*FANE v. FANE* (1875), L. R. 20 Eq. 698.

Annotation:—*Reid. Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200.

114. — Opinion of counsel founded on imperfect statement of facts.]—Where parties claiming different interests under a will have come to a settlement of their claims between themselves, although on an erroneous view of the will, the ct. will not disturb such settlement if the means of the parties were equal in making the same. But in a case where a tenant for life of a residuary bequest, after having enjoyed for twenty-nine years the estate of testator as it stood at his death, with the acquiescence & by the agency of the exor., who was also the remainder-man, was induced, under an imperfect apprehension of her rights, & by an opinion of counsel on the construction of the will, obtained by the exor. upon an imperfect statement of the will & facts of the case, to sign a settlement of accounts founded on the principle that she was only entitled to interest of testator's property, if the same had been converted at his death; such settled account was set aside, it being held, she was entitled to specific enjoyment of testator's estate, although the ct. did not think it necessary to impute a fraudulent intention to the exor.—*PICKERING v. PICKERING* (1839), 2 Beav. 31; 3 Jur. 331; 48 E. R. 1090; *affd.*, 4 My. & Cr. 289, L. C.

Annotations:—*Consd. Smith v. Pincombe* (1852), 3 Mac. & G. 653. *Reid. Mason v. Mason* (1886), 2 T. L. R. 266. *Mentd. Benn v. Dixon* (1840), 10 Sim. 636; *Lichfield v. Baker* (1840), 13 Beav. 447; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Smith v. Pugh* (1842), 6 Jur. 701; *Daniel v. Warren* (1843), 2 Y. & C. Ch. Cas. 290; *Hinves v. Hinves* (1844), 3 Hare, 609; *Cafe v. Bent* (1845), 3 Hare, 24; *Chambers v. Chambers* (1846), 15 Sim. 183; *Pickup v. Atkinson* (1846), 4 Hare, 621; *Simpson v. Earles* (1847), 11 Jur. 921; *Burton v. Mount* (1848), 2 De G. & Sm. 383; *Milne v. Parker* (1848), 17 L. J. Ch. 194; *Howe v. Howe* (1849), 14 L. T. O. S. 290; *Marshall v. Sladden* (1849), 7 Hare, 428; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Morgan v. Morgan* (1851), 14 Beav. 72; *Blann v. Bell* (1852), 5 De G. & Sm. 658; *Craig v. Wheeler* (1860), 29 L. J. Ch. 374; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Macdonald v. Irvine* (1878), 8 Ch. D. 101; *Re Game, Game v. Young*, [1897] 1 Ch. 881; *Re Bland, Miller v. Bland*, [1899] 2 Ch. 336; *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779; *Stanier v. Hodgkinson* (1903), 73 L. J. Ch. 179; *Re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312; *Re Evans' Will Trusts, Pickering v. Evans*, [1921] 2 Ch. 309.

115. —.]—E. S. by will gives to trustees, their exors., administrators, & assigns, all his messuages, etc., for his term & interest unexpired therein, upon trust for his son J. S. for so long a time as should run out during his life, with a power of appointment & remainder to his children; & in default to his son W. S. in the same terms, with a gift of the residue to his son E. S. J. S. dies without issue, & W. S. by his will gives all his property to his wife & she by her will gives all her property to her daughter E. There are five children of W. S., four sons & the daughter E.,

who, upon the representation of her eldest brother that the property is freehold & therefore descended to him, & did not pass by her mother's will, executes a deed of compromise under which a fifth is to be paid to each. One brother sells his fifth to a purchaser for value without notice, & a bill is filed by E. to set aside the deed of compromise on the ground of fraudulent representation & ignorance of E. of her rights. Decree made setting aside the deed, but without costs.

Semble: a deed of compromise is only binding where every party is aware of his rights equally, & the nature of the question clearly appears on the deed.—*DAVIS v. CHANTER* (1855), 3 W. R. 321.

116. Necessity for full disclosure — Of all material facts.]—Where a daughter of a freeman of London accepts a legacy of £10,000 left her by her father, who recommended it to her to release her right to her orphanage part, which she does release accordingly; if the orphanage part be much more than her legacy, though she were told she might elect which she pleased; yet, if she did not know she had a right first to inquire into the value of the personal estate, & the quantum of her orphanage part, before she made her election; this is so material, that it may avoid her release.—*PUSEY v. DESBOUVRIE* (1734), 3 P. Wms. 315; 2 Eq. Cas. Abr. 270; 24 E. R. 1081, L. C.

Annotations:—*Reid. Clifton v. Cockburn* (1831), 3 My. & K. 76. *Mentd. Salkeld v. Vernon, Salkeld v. Salkeld* (1758), 1 Eden, 64; *Pym v. Lockyer* (1841), 5 Jur. 620; *Lee v. Head* (1855), 26 L. T. O. S. 12; *Pickford v. Brown, Brown v. Brown* (1856), 2 K. & J. 426; *Boyd v. Boyd* (1867), L. R. 4 Eq. 305; *Pearse v. Dobinson* (1867), 3 Ch. App. 1.

117. —.]—The father on his marriage had articulated to settle his whole estate on that marriage, but neglecting so to do, when the eldest son of that marriage attained his full age, the father without giving him notice of the arts., & with threats to allow him nothing unless he complied, & on promise to make an absolute settlement on him in case he would comply, prevailed on him to join in making a settlement on the younger children, & thereby to give the father a power to make a jointure on another wife; the father afterwards gives bond to make such jointure, & marries. The bond was set aside as against the heirs, & the first arts. established, & the second wife put to seek satisfaction of her bond out of the personal estate.—*JEVERS v. JEVERS* (1735), 1 Bro. Parl. Cas. 272; 1 E. R. 562; *sub nom. IVERS v. IVERS*, 2 Eq. Cas. Abr. 51, H. L.

118. —.]—Relief against agreement made under a misconception of right.

Agreement as to distribution of personal estate set aside, although ratified; the value appearing much greater than was known to pltf. at the time.—*COCKING v. PRATT* (1750), 1 Ves. Sen. 400; 27 E. R. 1105.

Annotations:—*Reid. M'Carthy v. Decaix* (1831), 2 Russ. & M. 614; *Clifton v. Cockburn* (1834), 3 My. & K. 76; *Watkin & Bligh v. Brent* (1836), 1 Curt. 264; *Re Roberts, Roberts v. Roberts*, [1905] 1 Ch. 704.

119. —.]—Concealment of marriage ceremony.]—An agreement between two brothers, the younger of whom disputed the legitimacy of the elder, for a division of the family estates, rescinded after a lapse of nineteen years; the legitimacy of the elder being established on the trial of an issue directed, & the younger brother

116 i. Necessity for full disclosure—Of material facts.]—*LEONARD v. LEONARD* (1812), 2 Ball. & B. 171.—*IR.*

116 ii. —.]—*JOHNSTONE v. JOHNSTONE* (1860), 22 Dunl. (Ct. of Sess.) 3;

3 Macq. 619; 32 Sc. Jur. 280, H. L. **SCOT.**

having been apprised at the time of the agreement of a private ceremony of marriage which had passed between their parents, & not having communicated that fact to the elder, & not possessing a legal power, on the supposition of the elder brother's illegitimacy, to secure to him the benefits stipulated in the agreement.—*GORDON v. GORDON* (1821), 3 Swan. 400; 36 E. R. 910, L. C.

Annotations :—*Consd.* *Malone v. Malone* (1841), 8 Cl. & Fin. 179; *Smith v. Pincombe* (1852), 3 Mac. & G. 653; *Fane v. Fane* (1875), L. R. 20 Eq. 698. *Reid.* *Watkin & Bligh v. Brent* (1836), 1 Curt. 264; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; *Hayward v. Purssey* (1849), 3 De G. & Sm. 399; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Lawton v. Campion* (1854), 18 Beav. 87; *Baker v. Bradley* (1855), 7 De G. M. & G. 597; *Bainbrigge v. Moss* (1856), 3 Jur. N. S. 58; *Bentley v. Mackay* (1862), 31 Beav. 143; *Micholls v. Corbett* (1866), 34 Beav. 376; *Maynard v. Eaton* (1873), 9 Ch. App. 416, n.; *Smith v. Mogford* (1873), 21 W. R. 472; *Lovell v. Wallis* (No. 2) (1884), 50 L. T. 681. *Mentd.* *Nelthorpe v. Holgate* (1844), 1 Coll. 203; *Watts v. Hyde* (1846), 2 Coll. 368; *Holmes v. P'owell* (1856), 8 De G. M. & G. 572.

120. ———.]—A transaction cannot be considered as a family arrangement, where the doubts, existing as to the rights alleged to be compromised, are not presented to the mind of the party interested. A defect of parties may be cured at the hearing, by the undertaking of pltf. to give full effect to the utmost rights which the absent party could have claimed, those rights being such as do not affect the rights of defts.—*HARVEY v. COOKE* (1827), 4 Russ. 34; 6 L. J. O. S. Ch. 84; 38 E. R. 717.

Annotations :—*Appld.* *Reynell v. Sprye* (1849), 8 Hare, 222; *Smith v. Pincombe* (1852), 3 Mac. & G. 653; *Lawton v. Campion* (1854), 18 Beav. 87. *Reid.* *Brent v. Brent* (1840), 10 L. J. Ch. 84; *Ashhurst v. Mill*, *Mill v. Ashhurst* (1848), 7 Hare, 502; *Baker v. Bradley* (1855), 7 De G. M. & G. 597.

———.]—A wife, who had been deserted by her husband, became entitled to a share of an intestate's property, amounting to £3,600. The husband, whilst he was ignorant of the amount of the share, assigned it in trust for his wife & children, subject to the payment of 10s. a week, to himself for his life. Although the deed recited that the intestate's estate was very considerable yet, as the administrators, who were the wife's brothers & parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside.—*GROVES v. PERKINS* (1834), 6 Sim. 576; 58 E. R. 710.

Annotation :—*Appld.* *Smith v. Pincombe* (1852), 3 Mac. & G. 653.

122. ———.]—Conveyance by pltf., an eldest son, to defts. his brothers, of his interest in an estate, for an inadequate consideration, set aside, on the ground of pltf.'s ignorance of his rights, & of the absence of a full & free disclosure of all the material facts known by defts., & of pltf. being under pecuniary pressure & without proper legal advice.—*STURGE v. STURGE* (1849), 12 Beav. 229; 19 L. J. Ch. 17; 14 Jur. 159; 50 E. R. 1049; *on appeal*, 2 H. & Tw. 469, L. C.

123. ———.]—To render a family compromise binding, there must be an honest disclosure by each party to the other of all such material facts known to them relative to the rights & title of either as are calculated to influence the judgment in the adoption of the compromise; & any advantage taken by either of the parties of the known ignorance of the other of such facts

would render the compromise void in equity, & liable to be set aside.—*SMITH v. PINCOMBE* (1852), 3 Mac. & G. 653; 20 L. T. O. S. 10; 16 Jur. 205; 42 E. R. 411, L. C.

124. ———.]—Specific performance decreed of an agreement in the English form, made between husband & wife, Armenian Christians, in the nature of a family compromise, respecting the wife's separate property.

In the answer of the wife it was alleged, that property purchased by the husband had been concealed by him from her when she executed the agreement:—*Held*: (1) in the circumstances, that fact if proved was not sufficient to entitle the wife to treat the agreement as a nullity; (2) if the property said to have been concealed by the husband had been purchased by him out of moneys belonging to the wife's separate estate, which was clothed with a trust for the children of the marriage, the wife's remedy was, to enforce her own & children's rights by bill, to compel a settlement of any property improperly withheld by the husband at the date of the execution of the agreement.—*GREGORY v. COCKRANE* (1860), 8 Moo. Ind. App. 275; 19 E. R. 535.

125. ———.]—*GREENWOOD v. GREENWOOD* (1863), 2 De G. J. & Sm. 28; 40 E. R. 285, L. JJ.

126. ———.]—*Legal opinion wrongly explained.*—*Re ROBERTS*, *ROBERTS v. ROBERTS*, No. 128, *post*.

SECT. 6.—SEPARATE ADVICE.

See, generally, FRAUDULENT & VOIDABLE CONVEYANCES.

127. *General rule*—*Separate advice not necessary.*—By a voluntary deed two ladies & two of their brothers directed certain annual payments to be made during their respective lives, for the benefit of another brother, his wife & children. The payments were made during the life of the brother, a period of fourteen years. Upon his death, leaving a widow & children, the two ladies claimed to be relieved from the further operation of the deed, upon the ground that when they executed it they believed that the provision was for the life of the brother only, & that they did not discover the contrary until after the brother's death. No case of undue influence was made, & the other parties to the deed were desirous to act upon it as being in accordance with the intentions of the parties. The ct. refused to grant any relief.

In the case of a family arrangement, upon the question of mistake as to its full effect upon some of the parties executing it, it is immaterial that no separate solr. was employed by them in carrying out the arrangement.

Qu.: whether a transaction can be set aside for undue influence, when it has been exercised, not by the party obtaining benefits under it, but by a third person.—*BENTLEY v. MACKAY* (1862), 31 Beav. 143; 31 L. J. Ch. 607; 6 L. T. 632; 8 Jur. N. S. 857; 10 W. R. 593; 54 E. R. 1092; *affd.*, 4 De G. F. & J. 279, L. JJ.

PART II. SECT. 6.

127 l. *General rule*—*Separate advice not necessary.*—The advice of an independent solicitor or other person is not a *sine qua non*.—*EMPEY v. FICK* (1908), 10 O. W. R. 144; 15 O. L. R. 19.—CAN.

Sect. 6.—Separate advice. Sect. 7.]

128. — — —.]—A compromise between members of a family of their supposed rights under a will or other document, made after a joint consultation with the family solr., he acting as the common agent, is, in general, binding upon all the parties, even though it may not be quite in accordance with the exact legal rights, provided the solr. has first fully explained to the parties what those rights are. But if any one of the parties has entered into the compromise in consequence of what afterwards proves to have been an erroneous view taken by the solr. of the facts or of the law, or merely because the solr. may have considered a compromise would be for the advantage of all parties irrespective of their legal rights, that party may have the compromise set aside.—*Re ROBERTS, ROBERTS v. ROBERTS*, [1905] 1 Ch. 704; 74 L. J. Ch. 483; 93 L. T. 253, C. A.

129. Application of rule—Opposite party acting as solicitor.]—A transaction between parties dealing upon a doubtful question as to their rights, if it be not tainted with fraud, will be upheld although one of the parties being an advocate & brother of the other party acted generally in the transaction as the legal adviser of the other party.—*HOTCHKIS v. DICKSON* (1820), 2 Bli. 303; 4 E. R. 340, H. L.

130. — — — Family solicitor acting for all parties.]—*HARTOPP v. HARTOPP*, No. 112, *ante*.

131. — — —.]—A son, when at the age of twenty-one, & while residing with his father, made a settlement in favour of his father, who was at the time in receipt of a comparatively small income, whereas the son was in affluent circumstances. Fourteen years afterwards the son filed a bill to set aside the settlement on the ground of his youth, inexperience in business, want of proper advice, & undue influence on the part of his father at the time of its execution:—*Held*: upon the evidence, no proper ground had been shown to induce the ct. to set aside the settlement, &, in any case, the delay in filing the bill was fatal.

A careful consideration of all the circumstances of the case, & of the evidence by which it is supported, leads me irresistibly to the conclusion that the execution of the deed was the voluntary, deliberate, & well-understood act of pltf., & shows that he had also ample, competent, & independent professional advice from the commencement down to the final close of the transaction. There was H., the family solr., who, although he acted for the father, I am satisfied never lost sight of the interests of the son (*MALINS, V.-C.*).—*TURNER v. COLLINS* (1871), 7 Ch. App. 334, n.; 25 L. T. 374; *varied*, 7 Ch. App. 329, L. C.

Annotations:—*Reid. Lovell v. Wallis* (1884), 50 L. T. 681; *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200. *Mentd. Kronheim v. Johnson* (1877), 7 Ch. D. 60; *Re Maddever, Three Towns Banking Co. v. Maddever* (1883), 31 W. R. 720; *Ogilvie v. Littleboy* (1897), 13 T. L. R. 399.

132. — — — Transaction reasonable & for benefit of all parties.]—A re-settlement, executed by a tenant for life & his son, who was tenant-in-tail in remainder, had been prepared by the father's solr., & the son had not the advantage

of independent professional advice, but it appeared that the son was well acquainted with & had been advised respecting the provisions of the deeds of re-settlement before they were executed by him, & that the transaction was a reasonable one & for the good of the family, & not upon the whole for the personal benefit of the father:—*Held*: not a case for setting aside or altering the deed.—*JENNER v. JENNER* (1860), 2 De G. F. & J. 359; 30 L. J. Ch. 201; 3 L. T. 488; 6 Jur. N. S. 1314; 9 W. R. 109; 45 E. R. 660, L. C.

Annotations:—*Reid. Turner v. Collins* (1871), 7 Ch. App. 334, n.; *Lovell v. Wallis* (No. 2) (1884), 50 L. T. 681; *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200.

133. When separate advice necessary—Party in inferior position.]—Deed set aside as improvidently obtained, being obtained for an inadequate consideration from persons in low circumstances, & unapprised of their right until the time of the transaction, though no misrepresentation or actual fraud whatever appeared to have been made use of.

It is sufficient for me to see that the party had not the protection he ought to have had & therefore the ct. will harrow up the agreement (*KENYON, M.R.*).—*EVANS v. LLEWELLYN* (1787), 1 Cox, Eq. Cas. 333; 2 Bro. C. C. 150; 29 E. R. 1191.

Annotations:—*Apprvd. Baker v. Monk* (1864), 4 De G. J. & Sm. 388. *Consd. O'Rourke v. Bolingbroke* (1877), 2 App. Cas. 814; *Barnes v. Richards* (1902), 71 L. J. K. B. 341. *Reid. Watkin & Bligh v. Brent* (1836), 1 Curt. 264; *Curson v. Belworthy* (1852), 3 H. L. Cas. 742; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

—*STURGE v. STURGE*, No. 122,

ante.

135. — — — May be by separate solicitor — Or by separate counsel.]—*HOBLYN v. HOBLYN*, No. 161, *post*.

Duties of solicitor in advising.]—*See SOLICITORS.*

SECT. 7.—CREDITORS' RIGHTS.

136. Whether impeachable by creditors—Under 13 Eliz. c. 5.]—On the treaty of marriage between A. & B. the father & mother of B. in consideration of the settlement to be made by A. join in conveying a small estate, out of which the mother was dowable, to A. in fee; but no fine was levied, & they also joined in settling another estate of which the father was seised in fee on the father for life, remainder to the mother for life, remainder to the uses of the marriage. At the time of the settlement the father was indebted by specialty. This being a fair & reasonable family settlement, & not made with any view to defeat creditors, the limitation to the mother for life is not fraudulent as against creditors, within above statute more especially as she had joined in conveying the small estate in fee to the husband.—*JONES v. BOULTER* (1786), 1 Cox, Eq. Cas. 288; 29 E. R. 1170.

Annotation:—*Reid. Crofts v. Middleton* (1856), 8 De G. M. & G. 192.

137. — — —.]—Upon a bill filed by creditors to impeach [under above Act] a complicated family

set aside.—*MCDONALD v.* (1894), 9 Man. L. R. 315.—*CAN.*

b. — — —.]—In an action by a creditor to set aside certain conveyances made by his debtor, which had the effect of divesting him of practically

PART II. SECT. 7.

136 i. Whether impeachable by creditors—Under 13 Eliz. c. 5.]—*HOTCHKIS v. DICKSON* (1820), 2 Bli. 303.—*SCOT.*

a. — — — If made in good faith.]—Although family transactions by which creditors are defeated are ordinarily looked upon by the ct. with a good deal of suspicion, yet when the evidence is clear & satisfactory they will not be

arrangement between a father who subsequently became insolvent & his son:—*Held*: the latter having assumed certain burdens for the relief of his father, had acquired the right to stipulate as a creditor for the carrying out of the arrangement in question. Bill dismissed accordingly.—*WAKEFIELD v. GIBBON* (1857), 1 Giff. 401; 26 L. J. Ch. 505; 29 L. T. O. S. 50; 3 Jur. N. S. 353; 5 W. R. 479; 65 E. R. 974.

138. — — —.]—By an indenture dated May 14, 1880, after reciting that A. had contracted with B. his son, for the absolute sale to him of B.'s reversionary interests in certain property, amounting to about £18,000 for the sum of £2,500 cash, & an annuity of £300, & also reciting that, in consideration of natural love & affection, A. had agreed to settle the reversions in manner thereafter expressed, it was witnessed that, in pursuance of the agreement, an annuity of £300 was settled by A. upon B. until he should become bkpt. or attempt to alienate the same, with trusts in either of such events in favour of B.'s wife & children if any. For these considerations B., by the same deed, assigned to trustees all his reversionary interest, which was resettled by A. upon B. & his wife & children, in a similar manner to the annuity of £300. The consideration money of £2,500 for the payment of B.'s debts proved insufficient for that purpose, & upon the application of a creditor, whose debt was unprovided for, B. was adjudicated a bkpt.:—*Held*: the transaction being a purchase by the father of his son's reversionary interest for full consideration, it was reasonable & lawful that the father should prescribe the terms when consenting to resettle it upon the son, & the deed having been entered into in good faith, & for valuable consideration was not impeachable under above Act or Bkpcy. Act, 1869 (c. 71), s. 91.—*Re EYRE, Ex p. EYRE* (1881), 44 L. T. 922.

Annotations:—*Consd. Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111. *Folld. Denny's Trustee v. Denny & Warr*, [1919] 1 K. B. 583. *Consd. Re Wombwell* (1921), 37 T. L. R. 625.

139. — — —.]—By a deed of gift J. granted farming property in trust for her daughters, in consideration of which they covenanted to pay the debts "incurred by J. up to the date of the deed in connection with the working arrangement of the farm," & to maintain J.—J. had no other property than that comprised in the deed, & pltf.'s debt not having been incurred by J. in connection with the farm, was defeated by the deed. The ct. found that the deed was an honestly intended family arrangement, & was not executed with the object of defeating creditors:—*Held*: the deed was valid under above Act.—*Re JOHNSON, GOLDEN v. GILLAM* (1881), 20 Ch. D. 389; 51 L. J. Ch. 154; 46 L. T. 222; *affd.* (1882), 51 L. J. Ch. 503, C. A.

Annotations:—*Consd. Hance v. Harding* (1887), 4 T. L. R. 185; *Re Fasey, Ex p. Trustees*, [1923] 2 Ch. 1. *Reid. Re Maddever, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523.

140. — — —.]—A father, being anxious to save his son, who was of extravagant & dissolute habits, from moral & financial ruin, entered into

a deed under which the son transferred such property as he had to the father, the father agreed to pay all the son's debts, amounting to more than £4,000, to redeem & hand over to him all the articles pawned, of the value of more than £500, & to pay the bkpt. an annuity of £800 a year, by monthly instalments, on the conditions contained in the deed.

The object of the deed was to save the son. For a time it had an excellent effect, but subsequently the son borrowed money again, & was made a bkpt. on the petition of a money-lender, who was the chief creditor. In an action brought by the trustee in bkpcy. of the son for, *inter alia*, a declaration that the deed was void & of no effect as against pltf. as being against public policy & also as contravening above Act, & alternatively for a declaration that the annuity of £800 a year payable by the father to the son had become payable to pltf.:—*Held*: the action failed on all points. As to above Act, the deed was made *bond fide* & for good consideration. It neither hindered nor delayed nor defrauded creditors, nor was it intended to hinder, delay, or defraud them. Its object was to pay all the creditors, & this object was achieved.—*DENNY'S TRUSTEE v. DENNY & WARR*, [1919] 1 K. B. 583; 88 L. J. K. B. 679; 120 L. T. 608; 35 T. L. R. 238; [1918–19] B. & C. R. 139.

Sec, further, FRAUDULENT & VOIDABLE CONVEYANCES.

141. — — — Under Bankruptcy Act, 1869 (c. 71), s. 91.]—*Re EYRE, Ex p. EYRE*, No. 138, *ante*.

142. — — —.]—By a post-nuptial settlement made in pursuance of an arrangement between the settlor & his father, the settlor assigned a policy of insurance upon his life to trustees on trusts for the benefit of his children, the settlor's father at the same time conveying certain leasehold property to the trustees on similar trusts. The transaction was entered into in good faith for the purpose of securing a provision for the children, & not with any intention to defraud or defeat the settlor's creditors.

The settlor having become bkpt. within two years from the date of the settlement & subsequently dying, the official receiver in bkpcy. claimed the money payable under the policy on the ground that the settlement was void under above Act:—*Held*: the settlement was valid, on the ground either that it was not within above Act, the bkpt.'s father being a purchaser in good faith for valuable consideration, or that it was protected under sect. 94, of the same Act, as being a dealing with the bkpt. by the father made in good faith & for valuable consideration without notice of any act of bkpcy.—*HANCE v. HARDING* (1888), 20 Q. B. D. 732; 57 L. J. Q. B. 403; 59 L. T. 659; 36 W. R. 629; 4 T. L. R. 463, C. A.

Annotations:—*Consd. Re Dale to Elsdon* (1892), 36 Sol. Jo. 347; *Mackintosh v. Pogose*, [1895] 1 Ch. 505; *Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111; *Sturmey's Trustee v. Sturmey* (1912), 107 L. T. 718. *Reid. Re Vansittart, Ex p. Brown*, [1893] 2 Q. B. 377; *Re Parry, Ex p. Salaman*, [1904] 1 K. B. 129; *Re Pope, Ex p. Dicksee*, [1908] 2 K. B. 169; *I. R. Comrs. v. Gribble*, [1913] 3 K. B. 212;

all his property, in answer to which action there were pleaded family arrangements & understandings as justifying the conveyances:—*Held*: although the cts. view with favour the carrying out of family agreements when made *bond fide*, & for good consideration, & although in the present

case the family intention was to make provision for the sons, yet such intention cannot validate conveyances which were evidently intended to benefit the sons at the expense of the father's creditors. A transfer of land by debtor to his son & a mtge. thereon made by this son to his mother executed

in accordance with an actual & definite agreement made & acted upon prior to the incurring of the original debt to pltf., which in effect caused debtor to hold the land merely as trustee for his son, was upheld.—*KIEHL v. FUSSEL*, [1923] 2 D. L. R. 1135; 2 W. W. R. 251.

Sect. 7.—Creditors' rights. Sect. 8: Sub-sect. 1.]

Re Collins (1914), 112 L. T. 87; *Re Chartors, Ex p. Trustee*, [1923] B. & C. R. 94.

See, further, **BANKRUPTCY**, Vol. V., pp. 842-845, Nos. 7105-7122.

143. — Where intention to defraud creditors.]—In a settlement executed by a person in embarrassed circumstances, being in part merely meritorious, but untruly recited as valuable, where the operation of the deed was to withdraw property from the creditors of the settlor, the ct. declared the deed invalid as against creditors, & set it aside.

Semble: advances made by a parent to a child, which formed a debt, but had ceased by lapse of time to be a legal obligation, are yet a sufficient consideration to support a deed by way of family arrangement, but not against creditors.—*PENHALL v. ELWIN* (1853), 1 Sm. & G. 258; 1 W. R. 273; 65 E. R. 112.

144. Arrangement containing provision for benefit of creditors.]—By a deed of "family arrangement" executed in 1867 on the resettlement of an estate by father & son the estate was limited to the use of the father for life, with remainder to the use of trustees, upon trust with the consent of the father & son during their joint lives, or of the survivor during his life, & after the death of the survivor at the discretion of the trustees, to sell the same & apply the proceeds & also the rents & profits until sale, in payment in such order & in such manner as the trustees should, with the concurrence of the father during his lifetime, determine, of all debts owing by the father; & subject thereto to hold any unsold hereditaments to the uses of an indenture of even date under which the father & son were successive tenants for life with remainder to an infant son in tail. The father's creditors were neither parties to nor named in the deed, nor was it ever communicated to them. After the father's death the trustees sold part of the settled estates with the consent of the son, & applied the proceeds in payment of all the father's debts, except one due to a sister, of which the trustees were unaware. In 1889 the trustees, with the concurrence of the son, who was his father's legal personal representative, conveyed the unsold hereditaments to the uses of the second indenture of 1867. The son died in 1890. In 1896 the exors. of the sister who had died having become aware of the deeds of 1867 & 1889 brought an action seeking to charge the hereditaments in the possession of the infant tenant in tail with the debt due to the sister's estate:—*Held*: the infant tenant in tail took the estate subject to the liability for the debt.—*PRIESTLEY v. ELLIS*, [1897] 1 Ch. 489; 66 L. J. Ch. 240; 76 L. T. 187; 45 W. R. 442; 41 Sol. Jo. 206.

SECT. 8.—ACTIONS TO SET ASIDE OR VARY.**SUB-SECT. 1.—SETTING ASIDE.**

145. General rule.]—C. by his will gives legacies to his nieces, to be paid to them at twenty-one, or marriage, which shall first happen, provided they

marry with the consent of their father & mother, or the survivor of them; otherwise to sink into his personal estate. The legacies vested at their attaining the age of twenty-one, & either of them marrying without consent afterwards is of no consequence; for the marriage with consent of father & mother must be construed so as to relate to the time of the legacies vesting.

If parties are entering into an agreement, & the will out of which the forfeiture arose was lying before them, & their counsel, while the drafts were preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point.

After an agreement has entirely settled all disputes between parties & their several rights, the hands of the ct. are so tied up, they will not enter into a question which might have been started, had there been no such agreement.—*PULLEN v. READY* (1743), 2 Atk. 587; 26 E. R. 751, L. C.

Annotations:—*Consd.* *Stockley v. Stockley* (1812), 1 Ves. & B. 23; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; *Hoghton v. Hoghton* (1852), 15 Beav. 278. *Refd.* *Baker v. Bradley* (1855), 7 De G. M. & G. 597.

146. —.]—Where parties who are in doubt as to their respective rights in a certain property, being fully informed as to facts, & standing on an equal footing with respect to legal advice, come to a deliberate agreement not influenced by fraud, circumvention, surprise, or misrepresentation, the ct. will not set aside such agreement, although a ct. of justice might have come to a different conclusion as to the rights of the parties, to that given effect to by the agreement.

Controversy & doubts as to the rights under a will are a sufficient consideration to support an agreement to divide the property.—*PARTRIDGE v. SMITH* (1863), 2 New Rep. 100; 8 L. T. 530; 9 Jur. N. S. 742; 11 W. R. 714.

147. Grounds for refusal to set aside—Rights acquired by third parties.]—Specific performance of a parol agreement as to land: the effect of a family compromise of doubtful rights; with part-performance by possession, & improvements; & acquiescence near nineteen years: a third person being permitted to act upon his conception of the rights, not questioned at the time by debt.; who cannot object that he acquiesced under expectations from that person, which were in part disappointed.—*STOCKLEY v. STOCKLEY* (1812), 1 Ves. & B. 23; 35 E. R. 9, L. C.

Annotations:—*Consd.* *Reynell v. Sprye*, *Sprye v. Reynell* (1849), 8 Hare, 222; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Williams v. Williams* (1865), 2 Drew. & Sm. 378. *Refd.* *Clifton v. Cockburn* (1834), 3 My. & K. 76; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; *Ashhurst v. Mill*, *Mill v. Ashhurst* (1848), 7 Hare, 502.

—.]—*LLOYD v. PASSINGHAM* (1815), Coop. G. 152; 35 E. R. 512, L. C.

149. —.]—The daughter of intestate sold her share of her father's estate to the administrators, & settled the purchase-money on her marriage. The ct. dismissed an action by herself & husband to set aside the sale, without prejudice to any action by the trustees of her settlement, & refused to make an inquiry in this action whether it was for the benefit of infants, etc., that the sale should be set aside.

PART II. SECT. 8, SUB-SECT. 1.

JENKINS, [1922] S. A. S. R. 59.—**AUS.**

*c. Grounds for refusal to set aside
-Delay in application.]*—*HARRIS v.*

23 Gr. 277.—**CAN.**

—.]—*Re CURRY* (1875),

c. —.]—*MITCHELL v. MITCHELL* (1852), 14 Dunl. (Ct. of Sess.) 318; 24 Sc. Jur. 150; 1 Stuart, 246.—**SCOT.**

Pltfs. therefore fail on the ground that they are unable to restore the [third] parties to the *status quo* (FRY, J.).—*Re WORSSAM, HEMERY v. WORSSAM* (1882), 51 L. J. Ch. 669; 46 L. T. 584.

150. ——— Delay in application—Nineteen years.]—*STOCKLEY v. STOCKLEY*, No. 147, *ante*.

151. ——— ———.]—A father, tenant for life, remainder to his first & other sons successively in tail male; the eldest son, soon after he attained twenty-one, joined his father in suffering a recovery, an annuity was secured to him during his father's life, & parts of the estates were limited to the father in fee, the residue of them were resettled, the son taking back an estate for life, with remainder to his first & other sons in tail general, remainder to his daughters in tail general. The transaction to be considered as a mixed case of bargain & sale, & of family arrangement; & the eldest son having died without issue, a bill filed by his brother, the next remainderman in tail, who had done confirmatory acts & accepted interests under the will of his father, to set aside the settlement as obtained by undue influence was dismissed. Transactions of this nature between father & child, to be viewed with a reasonable degree of jealousy, not in the light of reversionary bargains. *Qu.*: whether, after the lapse of twenty years such a suit could be maintained at all.—*TWEDDELL v. TWEDDELL* (1822), Turn. & R. 1; 37 E. R. 992, L. C.

Annotations:—*Consd.* Bellamy v. Sabine (1835), 2 Ph. 425; Hartopp v. Hartopp (1856), 21 Beav. 259. *Reid.* Baker v. Bradley (1855), 7 De G. M. & G. 597; Talbot v. Stanforth (1861), 1 John. & H. 484. *Mentd.* Arnold v. Bainbrigg (1860), 2 De G. F. & J. 92.

152. ——— Twenty-four years.]—*BULLOCK v. DOWNES*, No. 36, *ante*.

153. ——— Thirteen years.]—*BENTLEY v. MACKAY*, No. 127, *ante*.

154. ——— Seventeen years.]—A. was the administrator of an estate, to one-third of which each of his brothers C. & D. was entitled. In 1833 A. wrote to B. & C. offering, in order to prevent the necessity of accounts & the probability of dispute, to pay each £1,000 for his share. B. accepted the offer, & C. wrote to say that whatever B. determined "would meet with his approbation." A. & B. acted on the contract as complete, & C. never repudiated it or asked for any accounts or explanations. Upon the death of B., seventeen years afterwards, C. insisted that there was no contract binding on him, & he claimed one-third of the estate:—*Held*: C. had acquiesced & was bound by the contract.—*COOD v. COOD* (1863),

33 Beav. 314; 3 New Rep. 275; 33 L. J. Ch. 273; 9 Jur. N. S. 1335; 55 E. R. 388.

Annotations:—*Mentd.* Adams v. Clutterbuck (1883), 31 W. R. 723; Bank of Africa v. Cohen, [1909] 2 Ch. 129.

155. ——— ———.]—Purchase of reversion by a father from his son, under alleged pressure, & at an alleged undervalue, upheld after the lapse of seventeen years.—*WILLOUGHBY v. BRIDEOAKE, BRIDEOAKE v. LEES* (1865), 6 New Rep. 395; 13 L. T. 141; 11 Jur. N. S. 706; 13 W. R. 1056, L. JJ.

156. ——— Forty years.]—*CASE v. CASE*, No. 18, *ante*.

157. ——— Acquiescence—Acts done on assumption of validity.]—Father & son tenant for life in remainder of considerable family estates. The son being under the pressure of great pecuniary difficulties while under age, the father & son entered into arrangements, completed shortly after the son's majority, by which, firstly, as to part of the estates, portions of it were sold to pay certain debts of the father, & to release the son from difficulties, & the remainder resettled, so as to give the son only a life-estate, giving the father no interest in the estates; as to other parts, the father gave to his son an immediate life interest, & the son, in consideration of that & of the father having expended a large sum in improvements, gave up, as to a considerable portion, the inheritance to his father. Afterwards, during five years & more, the son dealt with his interests acquired under the arrangements, by mortgaging them, & settling them on his marriage, & was on each of these subsequent transactions advised by a separate solr. & the deeds executed distinctly referred to the alleged consideration of the expenditure by the father for the conveyance to him of the inheritance in some of the estates:—*Held*: the first arrangement of the sale & resettlement was in the nature of a family arrangement, & might have stood irrespective of the transactions subsequent to the son's majority; the second was not a family arrangement & could not have stood, but pltf.'s subsequent dealings with his interests amounted to a complete confirmation, & the bill was dismissed with costs.

When a father & son, the son having barely come of age & being still under the parental influence, arrange a resettlement of the family estates with a view to the peace & honour of the family or to prevent the destruction of the family estates, if the arrangement appears to the ct. reasonable in the whole & in all its parts the ct. will support it even though the son may not have been fully cognisant of his rights & of the nature

157 i. ——— Acquiescence—Acts done on assumption of validity.]—*BOYLE v. ARNOLD* (1869), 16 Gr. 501.—CAN.

f. ——— ———.]—*CHARLEBOIS & CHARLEBOIS* (1882), 5 L. N. 421.—CAN.

g. ——— ———.]—*SAMY AIYANGAR (alias RAMASAWMY AIYANGAR) v. ALAGASINGA AIYANGAR* (1866), 3 Mad. 33.—IND.

h. ——— ———.]—*RAMANATHAN CHETTI v. MURUCAPPA CHETTI* (1906), I. L. R. 29 Mad. 283; L. R. 33 Ind. App. 139.—IND.

k. ——— Where arrangement is reasonable.]—A farmer, 77 years old, conveyed his farm to two of his daughters, subject to a charge for the

maintenance of himself & his wife & of a money payment to another daughter. The evidence showed that he understood what he was doing & approved of it afterwards till his death, four years later. This action was brought by one of his sons, after his death, to set aside the conveyance to the defts., the two daughters:—*Held*: the transaction was a righteous one, not being promoted or obtained by undue influence, & being in itself reasonable & the conveyance, being executed voluntarily & deliberately, with knowledge of its nature & effect, should not be set aside.—*EMREY v. FICK* (1908), 10 O. W. R. 144; 15 O. L. R. 19.—CAN.

l. ——— ———.]—Where a family arrangement is in itself reasonable it

will not be set aside on the ground of fraud & mistake, except upon conclusive evidence.—*STEVENS v. GOODALL* (1884), 2 N. Z. L. R. 5.—N.Z.

m. ——— Compromise to avoid litigation—Whether binding on minors.]—When parties enter into a compromise, or family arrangement, in order to avoid litigating the question as to whether one of the parties is entitled to certain property or not, such compromise will not be set aside, although it should eventually turn out that the party taking something under the compromise was in reality legally entitled to nothing. But where such compromise was alleged to have been entered into by a mother on behalf of two minor sons on the one hand, &

Sect. 8.—Actions to set aside or vary: Sub-sects. 1, 2 & 3. Sect. 9.]

of the transaction (KINDERSLEY, V.-C.).—DIMS-DALE v. DIMSDALE (1856), 3 Drew. 556; 25 L. J. Ch. 806; 27 L. T. O. S. 317; 61 E. R. 1015.

*Annotations:—*Apld. Jenner v. Jenner (1860), 2 De G. F. & J. 359. *Consd.* Turner v. Collins (1871), 7 Ch. App. 334, n. *Apld.* Re Worssam, Hemery v. Worssam (1882), 51 L. J. Ch. 669.

158. ———.]—Discussion of the consideration necessary to support a family compact, & of the circumstances sufficient to establish laches, acquiescence & confirmation.

(1) In cases of family compacts the ct. does not look very closely into the consideration (WOOD, V.-C.).

(2) On the point of acquiescence it might be held that after putting B. into possession & after allowing him to reject the life interest under the impression that the remainder in the moiety was his undoubted property, after his second marriage in the same belief & with evidence that his expectations were communicated to the friends of the lady he was about to marry, & it might be held on this ground alone that it is too late for H. or any one claiming under her to dispute the disposition in which she has thus acquiesced (WOOD, V.-C.).—HEAD v. GODLEE, REYNOLDS v. GODLEE (1859), John. 536; 29 L. J. Ch. 633; 0 Jur. N. S. 495; 8 W. R. 141; 70 E. R. 531.

*Annotations:—*Refd. Wisc v. Piper (1880), 41 L. T. 794. *Mentd.* Curteis v. Wormald (1878), 10 Ch. D. 172.

SUB-SECT. 2.—VARIATION.

159. *Mistaken declaration of rights of parties—Not intended by either party.]—*A sum of money was charged upon an estate as portions for younger children, according to the appointment of the parents, to take effect after their deaths; & the parents, in contemplation of the marriage of their daughter, & of a settlement which her intended husband proposed to make, appointed £5,000, part of the sum so charged, to the daughter, in case the marriage should take effect.

By a settlement of the same date a jointure was secured to the daughter by the husband. The marriage took place, & some years afterwards, the father being then dead, an arrangement was made for the sale of the estate, & for the investment in the funds of the sum necessary to provide for the portions. The money was accordingly raised & invested in the names, among others, of the daughter & her husband, & a declaration executed, in which the trusts of the stock purchased with the £5,000 was declared to be, subject to the life interest of the mother, for the daughter absolutely. After the death of the father & mother & the husband the ct. at the suit of the representative of the husband, rectified the declaration of trust by declaring the £5,000 to be the property of the husband, inasmuch as it did not appear that the husband intended to part with his interest in the fund, or do more than

approve of the change of security; the declaration of trust omitting any recital of the settlement on the marriage, & it appearing from the letters which had passed between the solrs. of the parties, when the declaration was made, that neither of such solrs. was aware of that settlement, or of its effect as to the portion of the daughter.

Variation of the effect of a deed, made for the purpose of carrying into effect a family arrangement, where it contained a declaration of right inconsistent with the actual rights of the parties, & there was no evidence that the inconsistency was known to or contemplated by the parties or their solrs., or that their actual rights were intended to be altered.—ASHHURST v. MILL, MILL v. ASHHURST (1848), 7 Hare, 502; 18 L. J. Ch. 129; 11 L. T. O. S. 512; 12 Jur. 693, 1035; 38 E. R. 208, L. C.

160. *Slight variations from intentions of parties—Ground for rectification not cancellation.]—*HARTOPP v. HARTOPP, No. 112, ante.

161. *Some provisions objectionable—Expunged without affecting rest of deed.]—*In regarding claims to upset resettlements of family estates the ct. gives weight to considerations which in other cases would not be allowed in the scale. For the validity of such a resettlement, the son being tenant in tail in remainder, it is not essential that his son should have independent advice & the ct. will not inquire whether the influence of the father was exerted with more or less force. Where the father obtains a benefit, the jealousy of the ct. is necessarily aroused; but such a transaction is not necessarily unfair, nor if unfair is it fatal to the validity of the entire arrangement; & the objectionable provisions may be expunged without affecting the rest of the deed. Where in such a case the father abandons the benefit which he has obtained, the rest of the resettlement may stand good.

There are frequently other considerations, such as the preservation of the honour of the family (KEKEWICH, J.).

Does the ct. presume that the son has had independent advice or insist that he ought to have had it? I think not. Where proper precautions are taken the position of the son as tenant in tail is fully explained to him . . . & if this duty is often, & in simple cases sufficiently, discharged by the father's solr. it is sometimes with advantage handed over to another solr. called in for the particular purpose, or, referred to counsel instructed to advise the young man independently (KEKEWICH, J.).—HOBLYN v. HOBLYN (1889), 41 Ch. D. 200; 60 L. T. 499; 38 W. R. 12.

162. *Proposed alterations must carry out intentions of parties.]—*For the purpose of reforming an instrument, clear & unambiguous evidence must be produced, not merely showing a mistake, but showing the deed in its proposed state to be in conformity with the intention of all the parties at the very time of its execution, & a denial by one of the parties that the deed as it stands was not according to his intention at the time ought to have considerable weight.

an adult member of the family on the other agreeing to give the latter more than had been awarded by a judicial decision, it was held that the compromise was not binding on the minors.—DHARMAJI VAMAN v. GURRAY (1873), 10 Bom. 311.—IND

n. ———.]—RAM NIRUNJUN SINGH v. PRAYAG SINGH (1882), I. L. R. 8 Cal. 138; 10 C. L. R. 66.—IND.

*o. Burden of proof.]—*In a transaction between near relatives under suspicious circumstances in an action to set aside, not merely is the burden

on defts., but the judge should not consider that burden satisfied unless the evidence of the parties themselves is corroborated by some other evidence.—KILLIPS v. PORTER (1916), 35 W. L. R. 380; 9 W. W. 11. 949; 20 D. L. R. 326.—CAN.

A deed of compromise between a mother & son recited a letter of the mother's, who was a widow, written before the son's marriage, stating that by her will her residuary estate would be divided equally between her four sons. The deed also recited that the mother was seised, or had power to dispose of real estate, the particulars whereof were specified in a schedule to the deed. It further recited disputes as to the effect of the ante-nuptial letter, & that to end them the arrangement was entered into effected by the deed. By the witnessing part, the mother covenanted that her exors. would at her death pay to the son such a sum as should be found to be the amount to which he would have been entitled if her real & personal estate had consisted of the particulars specified in the sched., & she had died without altering her will as it stood when the letter was written. The descriptions in the sched. comprehended not only property of which she could dispose, but other property of which she was tenant for life only & which was intermixed with the former, & this was noticed in the schedule:—*Held*: there was not sufficient controlling context to restrict the covenant to the value of her own property; without conclusive evidence of an intention on the part of both parties at the execution of the deed to enter into some other contract, it could not be reformed.—*FOWLER v. FOWLER* (1859), 4 De G. & J. 250; 45 E. R. 97, L. C.

Annotations:—*Reid*. *Clarke v. Girdwood* (1877), 7 Ch. D. 9; *Rake v. Hooper* (1900), 83 L. T. 669; *Fowler v. Sugden* (1916), 115 L. T. 51; *Vaudeville Electric Cinema v. Murisot*, [1923] 2 Ch. 74.

SUB-SECT. 3.—COSTS.

163. No costs allowed — Where undue delay.]—
BULLOCK v. DOWNES, No. 36, *ante*.

SECT. 9.—EFFECT OF SETTLED LAND ACTS.

See, generally, SETTLEMENTS.

164. Settled Land Act, 1890 (c. 69), s. Effect on powers of tenant for life.]—As a general rule it is not necessary, whenever a deed has been executed affecting the interests created by an original settlement, so that that settlement is no

longer the only instrument “under or by virtue of which the land stands limited for the time being to or in trust for persons by way of succession,” to appoint trustees of a compound settlement constituted by the original settlement & the subsequent deed. Above sect. is not to be read as providing that an assignment made by a tenant for life of settled land, in consideration of marriage or by way of family arrangement, is to be deemed one of the instruments creating the settlement for all the purposes of the Act. It is limited to the purpose of excluding the operation of Set. Land Act, 1882 (c. 38), s. 50, altogether. Upon a sale, therefore, under the powers of Settled Lands Acts, by a tenant for life who has made such an assignment, it is not necessary to appoint trustees of the settlement constituted by the original deed & the instrument effecting the assignment; but the trustees of the original settlement, having powers of sale, or appointed for the purposes of the Set. Land Acts, are competent to receive & give receipts for the purchase-money.—*Re DU CANE & NETTLEFORD'S CONTRACT*, [1898] 2 Ch. 96; 67 L. J. Ch. 393; 78 L. T. 458; 46 W. R. 523; 42 Sol. Jo. 468.

Annotations:—*Reid*. *Re Mundy & Roper's Contract*, [1899] 1 Ch. 275; *Re Cornwallis-West & Munro's Contract*, [1903] 2 Ch. 150; *Re Wimborne & Browne's Contract*, [1904] 1 Ch. 537; *Re Dickin & Kelsalls' Contract*, [1908] 1 Ch. 213; *Re Cope & Wadland's Contract*, [1919] 2 Ch. 376.

165. — — —.]—Testator devised freeholds to the vendor for life, with remainders in strict settlement. The property was subsequently disentailed, resettled, & appointed so as to extinguish the vendor's life estate, but the original settlement created by the will was still subsisting in respect of a jointure & portions charged under the powers thereof:—*Held*: the vendor could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement created by the will & subsequent deeds.

Under these circumstances I declare that the vendor can sell under the will alone, & that the trustees of the will for the purposes of the Settled Land Acts can give a valid receipt for the purchase-money (*SWINFEN EADY, J.*).—*Re WIMBORNE (LORD) & BROWNE'S CONTRACT*, [1904] 1 Ch. 537; 73 L. J. Ch. 270; 90 L. T. 540.

Annotations:—*Reid*. *Re Trafford's S. E.* (1914), 112 L. T. 107; *Re Constable's S. E.*, [1919] 1 Ch. 178; *Re Cope & Wadland's Contract*, [1919] 2 Ch. 376; *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523.

See, now, Settled Land Act, 1925 (c. 18), s. 1 (1) (v).

FATAL ACCIDENTS.

See NEGLIGENCE.

FEE SIMPLE AND FEE TAIL.

See DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

FEEES.

See PARTICULAR TITLES *passim*.

FELO-DE-SE

See CRIMINAL LAW AND PROCEDURE.

FELONY.

See CRIMINAL LAW AND PROCEDURE.

FENCES.

See BOUNDARIES, FENCES AND PARTY WALLS.

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See ANIMALS ; NEGLIGENCE.

FERRIES.

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<i>Foreshore</i>	„ WATERS AND WATER- COURSES.	<i>Water, Rights to</i>	„ EASEMENTS; WATERS AND WATERCOURSES.
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Part I.—Definition and Nature of Ferries.

SECT. 1.—DEFINITION.

1. **A highway.]—PAYNE v. PARTRIDGE**, No. 87, *post*.

2. —.].—A ferry is in nature of a highway, & a bill does not lie to be quieted in possession of an highway (PARKER, V.-C.).—**HILTON v. SCARBOROUGH (LORD)** (1714), 2 Eq. Cas. Abr. 171; 22 E. R. 147.

3. —.].—**BLISSETT v. HART**, No. 33, *post*.

4. — **No right of occupation attached.]—R. v. NICHOLSON**, No. 162, *post*.

5. —.].—**HUZZEY v. FIELD**, No. 112, *post*.

6. —.].—In an action for the disturbance of a ferry, the first count of the declaration stated, that plffs. were possessed of a ferry across the river Tyne, between North Shields & South Shields, for the conveyance of carriages, etc., & passengers, & that defts. disturbed this ferry by carrying passengers. The second count stated a right to an ancient ferry. Defts. pleaded (*inter alia*) not guilty, not possessed, & also that the boat used by defts. was of less than four tons burthen. The co. was incorporated by a local Act for establishing a ferry across the river Tyne, within the limits of Tynemouth & the townships of South Shields & Westoe. It was enacted by sect. 85 of the Act that, after the ferry shall be established, no other ferry shall be set up & used by any person across the river Tyne, within the limits; & if any person, except the co. or persons acting under their authority, shall use any boat or other vessel "of the burthen of four tons or upwards," in ferrying for hire across the river within the limits aforesaid, every person so offending shall forfeit £5. At the time the above statute passed, there was an ancient ferry across the river within the same limits, which the co., under the powers of their Act, purchased of the owners:—*Held*: (1) the word "burthen" in sect. 85, did not mean "register admeasurement," but capacity of carrying; (2) the latter part of sect. 85 did not limit the general right of ferry, but only added a cumulative remedy by way of penalty; (3) there was no variance by reason of the first count describing the ferry generally from North Shields to South Shields, & not from one particular terminus to another; (4) the mere act of ferrying passengers was a disturbance of the franchise, although the franchise was not a prescriptive ferry, to the exclusion of all private boats, but simply of a ferry; (5) on the purchase of the ancient ferry & completion of the new ferry, the former became extinct by operation of the Act of Parliament. (6) In the case of a ferry, the act of taking across a person who would otherwise have gone by it is actionable.

(7) A ferry is a highway for all the Queen's subjects paying toll (PARKE, B.).—**NORTH & SOUTH SHIELDS FERRY CO. v. BARKER** (1848), 2 Exch. 136; 154 E. R. 437.

Annotation:—*As to* (3) *Reid*. General Estates Co. v. Beaver, [1914] 3 K. B. 918.

7. —.].—**LETON v. GOODDEN**, No. 34, *post*.

8. —.].—**EAST RIDING OF YORKSHIRE COUNTY**

COUNCIL v. SELBY BRIDGE COMPANY OF PROPRIETORS (1925), *Times*, June 30.

9. **A franchise—Under licence from Crown.]—LISSETT v. HART**, No. 33, *post*.

10. — —.].—**HUZZEY v. FIELD**, No. 112, *post*.

11. —.].—A railway co. were empowered by their Act to construct across a river, a few hundred yards above an ancient ferry, a railway bridge & a footway for passengers, from whom they were authorised to take toll; the bridge & way were constructed & used accordingly, & the consequence was that the traffic over the ferry was greatly reduced. The railway works in no way obstructed the ferry or the approaches to it on either side. The owner of the ferry claimed compensation under the Lands & Railways Clauses Consolidation Acts:—*Held*: the ferry, being a franchise, & therefore an hereditament, was "lands" within the definition of sect. 3 of Lands Clauses Consolidation Act, 1845 (c. 18), & it had been "injuriously affected" within the Acts: for the direct & immediate effect of the construction of the bridge was to divert the traffic & so injure the ferry.

I cannot bring my mind to doubt the principle that if a bridge were to be erected across a ferry, & people were to go across the bridge, & consequently the bridge would have the effect of disturbing the owner of the ferry in his right, he would be entitled to bring an action on the case & to recover damages (BLACKBURN, J.).—**R. v. CAMBRIAN RY. CO.** (1871), L. R. 6 Q. B. 422; 40 L. J. Q. B. 169; 25 L. T. 84; 36 J. P. 4; 19 W. R. 1138.

Annotations:—*Consd.* Jones v. Stanstead, Shefford & Chamblay Ry. (1872), L. R. 4 P. C. 98; Hopkins v. G. N. Ry. (1877), 2 Q. B. D. 224; Dibden v. Skirrow, [1908] 1 Ch. 41. *Reid*. Parkdale Corpn. v. West (1887), 12 App. Cas. 602; North Shore Ry. v. Pion (1889), 14 App. Cas. 612; Hammerton v. Dysart, [1916] 1 A. C. 57. *Mentd.* G. W. Ry. v. Swindon & Cheltenham Extension Ry. (1884), 9 App. Cas. 787.

—].—*See, further*, Part II., Sect. 1, sub-sect. 1, *post*.

12. **Exclusive right to carry passengers—From vill to vill—Across water severing highway.]—HUZZEY v. FIELD**, No. 112, *post*.

13. — — —.].—(1) A ferry is the exclusive right to carry passengers across a river or arm of the sea from one vill to another, or to connect a continuance line of road leading from one township or vill to another, & not a servitude imposed upon a district or large area of land; & is wholly unconnected with the ownership or occupation of land.

(2) A ferry exists in respect of persons using a right of way, where the line of way is across water. There must be a line of way on land coming to a landing place on the water's edge, or where the ferry is from or to a vill, from or to one or more landing places in the vill (*per CUR.*).

(3) It seems reasonable to infer that, if the franchise of a ferry is established for facility of passage, & if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would

carry with it a right to continue the line of those ways across a water highway, & it is obvious that the single landing place which sufficed for an uninhabited marsh, would be utterly inadequate for several towns thronged with industrial mechanics. . . . If the public convenience require a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable (*per cur.*).—*NEWTON v. CUBITT* (1862), 12 C. B. N. S. 32; 1 New Rep. 400; 31 L. J. C. P. 246; 6 L. T. 860; 142 E. R. 1053; *affd.* (1863), 13 C. B. N. S. 864, Ex. Ch.

Annotations:—*As to* (1) *Refd.* *Hopkins v. G. N. Ry.* (1877), 2 Q. B. D. 224; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918. *As to* (2) *Refd.* *Cowes U. C. v. Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918; *Hammerton v. Dysart*, [1916] 1 A. C. 57. *As to* (3) *Consd.* *Hopkins v. G. N. Ry.* (1877), 2 Q. B. D. 224; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918; *Hammerton v. Dysart*, [1916] 1 A. C. 57. *Refd.* *Letton v. Goodden* (1866), 14 L. T. 296; *Cowes U. C. v. Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287; *Dibden v. Skirrow*, [1907] 1 Ch. 437. (*Generally*, *Mentd.* *A.-G. v. Simpson*, [1901] 2 Ch. 671.

14. — **Derogation of public right.**—*LETTON v. GOODDEN*, No. 34, *post*.

15. — — — — —.]—*SIMPSON v. A.-G.*, No. 35, *post*.

16. — **Advantage conferred on public.**—*HOPKINS v. GREAT NORTHERN RY. CO.*, No. 118, *post*.

17. — — — — —.]—*HAMMERTON v. DYSART (EARL)*, No. 66, *post*.

— **Extent of right.**—*See* Part III., Sect. 1, sub-sect. 1, *post*.

18. **Floating bridge—Kept in course by chains.**—A floating bridge, which consists of a vessel propelled by steam from one side of a river to the other, & kept in its course by chains laid down across the bed of the stream, is in substance a ferry, & is not a "bridge" within *Mutiny Act*, 1864 (c. 3), s.

345; 34 L. T. M. C. 142; 12 L. T. 205; 20 L. T. 470; 11 Jur. N. S. 738; 13 W. R. 653; 122 E. R. 1223.

Unconnected with ownership of land.—*See* Sect. 2, sub-sect. 2,

SECT. 2.—NATURE.

SUB-SECT. 1.—IN GENERAL.

19. **Exists in respect of termini—Not water.**—*IPSWICH (INHABITANTS) v. BROWNE* (1581), Sav. 11, 14; 123 E. R. 984, 986.

Annotations:—*Expld.* *Peter v. Kendal* (1827), 6 B. & C. 703. *Refd.* *Matthews v. Peache* (1855), 20 J. P. 244.

PART I. SECT. 2, SUB-SECT. 1.

a. **Whether a servitude.**—A ferry is an easement arising in respect of land.—*STUNSON v. SMITH* (1889), 1 Terr. L. R. 183.—CAN.

b. **A public utility.**—A ferry is in its nature a public utility.—*HOOPER v. NORTH VANCOUVER CITY*, [1922] 1 W. W. R. 1249; 65 D. L. R. 286.—CAN.

c. **Waterway used for public purpose—Not a private right.**—A right

to use a waterway for purposes of a public ferry is not a private right, & if there be any obstruction of the waterway it is of the public right of navigation of the river.—*SOUTH AUSTRALIA CO. v. ADELAIDE CORPN.* (1914), S. A. L. R. 16.—AUS.

PART I. SECT. 2, SUB-SECT. 2.

d. **Whether independent of occupation or ownership.**—The right to a ferry, i.e., the right to carry passengers

20. — **Rights of public—Passing from town to town—Or vill to vill.**—*HUZZEY v. FIELD*, No. 112, *post*.

21. — — — — —.]—*NEWTON v. CUBITT*, No. 13, *ante*.

22. — — — — — **On highways leading to or from town or vill.**—*HUZZEY v. FIELD*, No. 112, *post*.

23. — — — — —.]—*NEWTON v. CUBITT*, No. 13, *ante*.

24. **Publici juris.**—*BLISSETT v. HART*, No. 33, *post*.

25. **A hereditament—Incorporeal in nature.**—*Agreement*, dated Apr. 14, 1804, not under seal, between M. & N., that N. shall rent of M. the ferry called D. for £6 6s. *per annum*, to be paid half yearly, for which N. is to have the sole use of the ferry & whatever profit may accrue from it for the time he holds the same. "Be it also known that N. has this day bought of M. the great ferry boat for the sum of £20, of which £5 shall be paid," etc.:—*Held*: the instrument, purporting to convey an incorporeal hereditament, was not a lease, because not under seal, & therefore did not require a lease stamp.—*MAYFIELD v. ROBINSON* (1845), 7 Q. B. 486; 14 L. J. Q. B. 265; 5 L. T. O. S. 389; 9 Jur. 826; 115 E. R. 572.

Annotation:—*Refd.* *Stratton v. Pettitt* (1855), 16 C. B. 420.

26. — **Within Lands Clauses Consolidation Act, 1845 (c. 18), s. 3.**—*R. v. CAMBRIAN RY. CO.*, No. 11, *ante*.

27. **Not a servitude.**—*NEWTON v. CUBITT*, No. 13, *ante*.

Carries right to tolls.—*See* Part III., Sect. 1, sub-sect. 2, *post*.

SUB-SECT. 2.—OWNERSHIP OR OCCUPATION OF

28. **Whether independent of occupation or ownership—Landing places.**—*IPSWICH (INHABITANTS) v. BROWNE* (1581), Sav. 11, 14; 123 E. R. 984, 986.

Annotations:—*Expld.* *Peter v. Kendal* (1827), 6 B. & C. 703. *Refd.* *Matthews v. Peache* (1855), 20 J. P. 244.

29. — — — — —.]—*WILLIAMS v. JONES*, No. 161, *post*.

30. — — — — —.]—*PETER v. KENDAL*, No. 150, *post*.

31. — — — — —.]—*R. v. GREAT NORTHERN RY. CO.*, No. 60, *post*.

32. — **Extent of right.**—*NEWTON v. CUBITT*, No. 13, *ante*.

to & fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them.—*HURBULLUBH NARAIN SINGH v. LUCHMESWAR PRASAD SINGH* (1899), I. L. R. 26 Calc. 188; 3 C. W. N. 49.—IND.

e. **Whether appurtenant to land.**—The franchise of a ferry is not necessarily appurtenant to land.—*NITYAHARI ROY v. DUNNE* (1891), I. L. R. 18 Calc. 652.—IND.

Part II.—Creation and Transfer of Ferries.

SECT. 1.—CREATION.

SUB-SECT. 1.—CROWN GRANT.

A. In General.

33. General rule.]—(1) In an action by the owner of an ancient ferry against a person who erects a new ferry near to his, pltf. may declare on his possession; & he need not set forth in his declaration that he keeps boats & ferrymen sufficient to carry passengers over.

(2) A ferry is *publici juris*. It is a franchise that no one can erect without a licence from the Crown: & when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a licence, the Crown has a remedy by a *quo warranto*, & the former grantee has a remedy by action. But what profits it yielded, & what repair it was in were proper for the consideration of the jury to found their damages upon. The county cannot change a bridge or highway from one place to another. The franchise is the ground of the action.

(3) In case of erecting a new market or ferry to my nuisance, I may have an assize of nuisance or an action on the case if the ferry be not well repaired, it is popular, & in nature of a highway & no action lies without special damage by reason of the infinity of suits; but it is to be reformed by presentment or information at the suit of the Crown. This differs from the cases of mills bakehouses, etc. which are grounded on customs & of a private nature; & this declaration is good without an averment of the sufficiency of a ferry (*per* CUR.).—BLISSETT v. HART (1744), Willes, 508; 125 E. R. 1293.

Annotations:—As to (1) Rehd. Newton v. Cubitt (1859), 5 Jur. N. S. 847. *As to (2) Consd.* Huzzey v. Field (1835), 2 Cr. M. & R. 432; *Hammerton v. Dysart*, [1916] 1 A. C. 57.

34. —.]—An Act of Parliament authorised the Watermen's Company to appoint watermen to ply on Sundays, within certain limits, from such common stairs or places of plying on the Thames as might be appointed, & provided that if any person except so appointed should ply for hire on Sundays from such appointed plying places, he should incur for each offence a penalty of 40s. The Act also provided for the leasing of the right to ply on Sundays at plying places, & that the profits or rent of the Sundays ferries should be applied for the relief of aged & sick watermen.

Upon bill by a lessee from the Company of the right of plying on Sundays from certain stairs to a certain point across the river, claiming a right of ferry, & seeking to restrain a new ferry, which had been established fifteen yards from his ferry:

—*Held*: (1) if pltf. had the right he alleged, he might come to the ct. to quiet such right, & would not be left constantly to insist on the penalties imposed by the Act; & the new ferry was so near pltf.'s that the ct. would have restrained it; (2) pltf.'s right relating only to Sundays, & he being under no obligation to keep up the ferry, but being free to abandon it at any time, his right did not stand upon the same footing as an ancient ferry. The ct. therefore dismissed the bill with costs.

(3) A ferry has been said to be the continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway, on the one side to its recommencement on the other side (KINDERSLEY, V.-C.).

(4) The Crown has from time to time granted rights of ferry, & all common ferries have their origin in Royal grant, or in prescription, which presumes such grant (KINDERSLEY, V.-C.).

(5) Such a right of ferry is an exclusive right or monopoly, & as such, it is in itself an evil, being in derogation of common right, for by common right any person may carry passengers across a river. But as a compensation for that derogation of common right, there is this great advantage to the public, that they have at all times at hand, by reason of the ferry, the means of travelling on the King's highway, of which the ferry forms a part; for the owner of the ferry is under the obligations of always providing proper boats, with competent boatmen, & all other things necessary for the maintenance of the ferry in an efficient state & condition for the use of the public; & this he is bound to do under pain of indictment; & if he be found in default, he would, as it is expressed, be liable to be grievously amerced (KINDERSLEY, V.-C.). — LETTON v. GOODDEN (1866), L. R. 2 Eq. 123; 35 L. J. Ch. 427; 14 L. T. 296; 30 J. P. 677; 14 W. R. 551.

Annotation:—As to (5) Consd. Hammerton v. Dysart, [1916] 1 A. C. 57.

35. —.]—All ancient ferries have their origin in Royal grant or in prescription, which presumes a Royal grant (LORD MACNAUGHTEN).

A right of ferry is in derogation of common right, for by common right any person entitled to cross a river in a boat is entitled to carry passengers too. Within the limits of an ancient ferry no one is permitted to convey passengers across but the owner of the ferry. No one may disturb the ferry. The ferry carries with it an exclusive right or monopoly. In consideration of that monopoly the owner of the ferry is bound to have his ferry always ready (LORD MACNAUGHTEN).

PART II. SECT. 1, SUB-SECT 1.—A.

33 i. General rule.]—The Govt. has power to grant a right of ferries on rivers separating Canada & the United States.—KERBY v. LEWIS (1842), 6 O. S. 207.—CAN.

1. Validity of grant—Letter from Governor's secretary.]—A letter from the Governor's secretary, authorising a person in the name of the Govt. to take possession of a ferry, is not sufficient to establish his right to the ferry.—JONES v. FRASER (1843), 6 O. S. 426.—CAN.

g. — By Governor-in-Council.]—The Governor-in-Council cannot establish a ferry, under Rev. Stat. c. 97, on the St. John river, where, by the Ashburton Treaty, it forms the boundary between New Brunswick & the United States.—*Ex p.* DUFOUR (1893), 32 N. B. R. 357.—CAN.

h. — By Dominion Government.]—The exclusive legislative authority over ferries given to the Dominion Parliament by British North America Act, 1867 (c. 3), ss. 13, 91, does not carry with it any right to grant ferries.—

PERRY v. CLERGUE (1903), 23 C. L. T. 91; 5 O. L. R. 357; 2 O. W. R. 89.—CAN.

k. —.]—The Crown has a right to grant a licence of ferry across the Ottawa, between Ontario & Quebec, free from the restrictions contained in C. S. U. C., c. 46, that statute not applying to such a case.—SMITH v. RATTÉ (1868), 15 Gr. 473.—CAN.

l. —.]—The Crown granted a licence to the town of B., giving the right to ferry "between the town of B.

—SIMPSON v. A.-G., [1904] A. C. 476; 74 L. J. Ch. 1; 91 L. T. 610; 69 J. P. 85; 20 T. L. R. 761; 3 L. G. R. 190, H. L.; *revsq.* S. C. *sub nom.* A.-G. v. SIMPSON, [1901] 2 Ch. 671, C. A.

Annotations:—*Consd.* Dibden v. Skirrow, [1908] 1 Ch. 41. *Reid.* Hammerton v. Dysart, [1916] 1 A. C. 57. *Mentd.* Newcastle v. Workson U. C., [1902] 2 Ch. 145; Queenborough Corpn. v. Smeed, Dean (1904), 68 J. P. 244; A.-G. v. Antrobus, [1905] 2 Ch. 188; Robinson v. Smith (1908), 24 T. L. R. 573; *Re* Hatachek's Patents, *Ex p.* Zerenner, [1909] 2 Ch. 68; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; Folkestone Corpn. v. Brockman, [1914] A. C. 338; Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co. & Donkin (1920), 90 L. J. Ch. 420.

36. Validity of grant—Right of ferriage throughout a district.—COWES URBAN COUNCIL v. SOUTHAMPTON, ISLE OF WIGHT, & SOUTH OF ENGLAND ROYAL MAIL STEAM PACKET CO., No. 41, *post*.

37. — Vill to vill ferry.—COWES URBAN COUNCIL v. SOUTHAMPTON, ISLE OF WIGHT, & SOUTH OF ENGLAND ROYAL MAIL STEAM PACKET CO., No. 41, *post*.

38. — — — — ——GENERAL ESTATES CO. v. BEAVER, No. 44, *post*.

Royal grants generally.—See CONSTITUTIONAL LAW, Vol. XI., pp. 557 *et seq.*

B. Extent of Enjoyment under Grant.

39. Terms of the grant.—By sect. 38 of a local Act, a penalty is imposed upon owners of boats working boats, within the limits of the Act, without a licence. Sect. 99 enacts that nothing in the Act contained shall extend to prejudice or affect the rights & privileges to which the owners of any ferries are entitled:—*Held*: (1) the owner of a ferry within the limits of the Act might exercise the right of ferry without a licence; (2) where the ferry appeared to have been always exercised from a given landing place in M. to given landing places in K., the privilege did not protect the owner of such ferry in working a boat from another landing place in M., distant eight hundred yards from the ancient landing place in M.

(3) A ferry may be granted in more or less extensive terms (COLERIDGE, J.).

(4) Though the words in the deed are large, it is clear to me that it was intended to grant the ferriage only from one definite place to another definite place. It is now found more convenient to use another landing place half a mile off; but the owner of the ferry has no right to apply his franchise to that new landing place (COLERIDGE, J.).—MATTHEWS v. PEACHE (1855), 5 E. & B. 546; 20 J. P. 244; 4 W. R. 22; 119 E. R. 583; *sub nom.* MATTHEWS v. THAMES WATERMEN & LIGHTERMEN CO. (MASTER, WARDENS & COM-

MONALTY), 1 Jur. N. S. 1204; *sub nom.* R. v. MATTHEWS, 25 L. J. M. C. 7; 26 L. T. O. S. 72.

Annotations:—*As to* (2) *Consd.* Newton v. Cubitt (1862), 12 C. B. N. S. 32. *Reid.* Letton v. Goodden (1866), 35 L. J. Ch. 427; Hammerton v. Dysart, [1916] 1 A. C. 57. *As to* (3) *Consd.* Cowes U. C. v. Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co., [1905] 2 K. B. 287. *Reid.* General Estates Co. v. Beaver, [1914] 3 K. B. 918. *As to* (4) *Reid.* General Estates Co. v. Beaver, [1914] 3 K. B. 918.

40. Termini—Change of termini—For greater convenience.—MATTHEWS v. PEACHE, No. 39, *ante*.

41. — — — Points within two districts—Such districts not villis.—(1) A franchise of ferry from vill to vill is a right known to the law.

(2) Under an indenture of lease from the Crown conveying a "ferry or right of passage across the river M. between East C. & West C., in the Isle of Wight," together with two landing places, one in West C. & the other in East C., *pltfis.* claimed an exclusive right of ferry between any point on the east bank & any point on the west bank of the river within East C. & West C. respectively. East C. & West C. were two populous districts. The termini of the ferry, which was an ancient ferry, had always been two defined points, though not always the same two points, one on each bank of the river:—*Held*: the indenture conveyed a right of ferry between the two landing-places, & not an exclusive right of ferry between any point on the east bank & any point on the west bank of the M. within East C. & West C. respectively. *Scmble*: East C. & West C. are not villis in such a sense that an exclusive right of ferry between them could be sustained in point of law.

(3) Defts., a steamboat co. carrying passengers in steamers between the mainland & C., conveyed those & other passengers in steam-launches between East C. & West C., embarking & landing them at two pontoons distant respectively 230 yards & 875 yards north of the landing place of *pltfis.* ferry. The evidence showed that defts.' launches dealt with a traffic which had recently come into existence, & which was different from that dealt with by *pltfis.*:—*Held*: there had been no disturbance of *pltfis.* ferry.—COWES URBAN COUNCIL v. SOUTHAMPTON, ISLE OF WIGHT, & SOUTH OF ENGLAND ROYAL MAIL STEAM PACKET CO., [1905] 2 K. B. 287; 74 L. J. K. B. 665; 92 L. T. 658; 69 J. P. 298; 53 W. R. 602; 21 T. L. R. 506; 49 Sol. Jo. 501; 3 L. G. R. 807.

Annotations:—*As to* (3) *Consd.* General Estates Co. v. Beaver, [1914] 3 K. B. 918; Hammerton v. Dysart, [1916] 1 A. C. 57. *Reid.* Dibden v. Skirrow, [1907] 1 Ch. 437.

42. Means of transport—Other means than by ferry.—HOPKINS v. GREAT NORTHERN RY. CO., No. 118, *post*.

43. — — — — ——The franchise of a ferry is

to A.:—*Held*: a sufficient grant of a right of ferriage to & from the two places named.—ANDERSON v. JELLETT (1883), 11 S. C. R. 1.—CAN.

m. — — — — —]—The grant of a ferry by the Crown is a valid grant although made since Magna Carta.—LONDONDERRY BRIDGE COMRS. v. M'KEEVER (1890), 27 L. R. Ir. 464.—IR.

n. *Necessity for Crown grant.*—There is nothing in the law of Bengal, as it was before the acquisition by the British Govt. or in the regulations before or after 1793 to show that any person is entitled to claim a monopoly of a right of ferry by prescription or by any other means than a grant from the Crown.—NITYAHARI ROY v. DUNNE (1891), 1 L. R. 18 Calc. 652.—IND.

PART II. SECT. 1, SUB-SECT. 1.—B.

39 i. Terms of the grant.—A charter from the Crown, granting "all our ferriages & passages" over certain rivers conveys only ferries existing at the date of the grant, & does not confer on the grantees the right to create new ferries over those rivers.—LONDONDERRY BRIDGE COMRS. v. M'KEEVER (1890), 27 L. R. Ir. 464.—IR.

o. *Charter to corporation — To establish & regulate ferries—Whether Crown grant of ferry taken away.*—The charter of Fredericton, which gives the corpn. power to establish & regulate ferries within the limits of the city, does not take away the right to a ferry previously granted by the Crown, nor authorise interference with

such pre-existing ferry.—UNIVERSITY OF NEW BRUNSWICK v. MCCLUSKEY (1864), 6 All. 136.—CAN.

p. *Grant of ferry—Subsequent lease to another—Whether breach of grant.*—The Crown, having granted to suppliant certain ferry rights over a river between two cities, subsequently leased certain property to two railway cos. to be used for the construction of a bridge across the river between the cities:—*Held*: the granting of the leases did not constitute a breach of any contract arising out of the grant of the ferry; & the Crown was not liable to suppliant in damages.—BRIGHAM v. R. (1900), 20 C. L. T. 423; 6 Exch. C. R. 414; 30 S. C. R. 620.—CAN.

q. *Termini—Change of termini—Whether allowed.*—The right of lessees

Sect. 1.—Creation: Sub-sect. 1, B.; sub-sects. 2 & 3. Sect. 2. Part III. Sect. 1: Sub-sect. 1.]

not a grant of an exclusive right to carry across a stream by any means whatever, but only a grant of the exclusive right to carry across by means of a ferry.

Where, therefore, a bridge was constructed by private enterprise connecting the same highways as the ferry, whereby the ferry owner lost all the income he used to receive from tolls:—*Held*: the bridge was not a disturbance of the ferry, & the ferry owner had no remedy.—*DIBDEN v. SKIRROW*, [1908] 1 Ch. 41; 77 L. J. Ch. 107; 97 L. T. 658; 71 J. P. 555; 24 T. L. R. 70; 6 L. G. R. 108, C. A.

Annotations:—Reid. General Estates Co. v. Beaver, [1914] 3 K. B. 918; *Hammerton v. Dysart*, [1916] 1 A. C. 57.

44. Area to be served—Vill to vill ferry—Whole area of each vill.]—(1) The franchise of a ferry from vill to vill is a franchise recognised by the law:—*Held*: such a franchise confers the exclusive right of ferriage throughout the area of the vill.

In an action claiming a declaration that pltfs. were entitled to & possessed of an ancient ferry from vill to vill & an injunction restraining deft. from disturbing them in the enjoyment thereof:—*Held*: (2) upon the evidence, a lost grant to pltfs.' predecessors of the franchise of a ferry from vill to vill ought to be presumed; (3) even if pltfs. were entitled only to a ferry from point to point, no change of circumstances or new & different traffic had arisen which would justify deft. in setting up a new ferry in proximity to pltfs.' ferry.—*GENERAL ESTATES CO. v. BEAVER*, [1914] 3 K. B. 918; 84 L. J. K. B. 21; 111 L. T. 957; 79 J. P. 41; 30 T. L. R. 634; 12 L. G. R. 1146, C. A.

Annotation:—As to (1) & (3) Reid. Hammerton v. Dysart, [1916] 1 A. C. 57.

45. Particular persons—Persons using highway—On both sides of water—Point to point ferry.]—HAMMERTON v. DYSART (EARL), No. 66, *post*.

SUB-SECT. 2.—PRESCRIPTION.

46. Presumption of lost grant—By Crown.]—LETTON v. GOODDEN, No. 34, *ante*.

47. ———.]—SIMPSON v. A.-G., No. 35, *ante*.

48. ———.]—GENERAL ESTATES CO. v. BEAVER, No. 44, *ante*.

deriving under a grant from the Crown is not limited as by a direct mathematical line from one point to another, but extends to any part of the river within the specified limits, & such lessees may change the localities of transit to any point within such limits.—*HEMPHILL v. M'KENNA* (1845), 11 L. R. 43.—IR.

PART II. SECT. 1, SUB-SECT. 2.

r. Period of user—Twenty years.]—Twenty years is the shortest period within which a private right of ferry can be established by user.—PAR-MESHARI PROSHAD NARAIN SINGH v. MAHOMED SYUD (1881), 1 L. R. 6 Cal. 608; 7 C. L. R. 504.—IND.

s. ——— Twelve years.]—Deft., a co-sharer in village lands, acted upon the right that a ferry may be established in India by a person on his own property taking toll from strangers, & that he may acquire such a right, by

grant or user, over the property of others, whether a co-sharer with them or not. He used property that he owned jointly with pltfs., his co-sharers, excluding none of them:—*Held*: as no grant was ever made to him, he could only set up an exclusive right by showing that he had either dispossessed them, or had had adverse possession for twelve years, or that he had used the ferry for twelve years as of right.—*LACHMESWAR SINGH v. MANOWAR HOSSAIN* (1891), 1 L. R. 19 Cal. 253; 19 Ind. App. 48.—IND.

t. Monopoly of right of ferry—Whether obtainable by prescription.]—NITYAHARI ROY v. DUNNE (1891), 1 L. R. 18 Cal. 652.—IND.

a. Grant not produced—Presumption of grant—No immemorial user.]—Between B. & K. there ran the M. river which people could cross until a dam was built in 1872. Pltfs.

then began to run a ferry to take people across & they received the income from the ferry until 1915 when deft. began to run a rival ferry. Pltfs. sued for a declaration that they alone had a right to ply a ferry between the two villages. There was no direct grant from Govt. produced by pltfs. but in 1879 the Collector had made an order that they should ply a private boat in the river within the limits of M. B.:—*Held*: although it was not possible to presume a grant from immemorial user, still on the facts of the case, a presumption arose that the Govt. had granted a ferry franchise to pltfs.—*SHAMA, ETC. v. GANGADHEW* (1922), 1 L. R. 46 Bom. 952.—IND.

PART II. SECT. 2.

b. How transferred—According to statute.]—The title to ferry boats running in the harbour of St. John must be transferred according to Merchants'

49. Who may prescribe—Inhabitants.]—GRAVES-END CASE (1612), 2 Brownl. 177; 123 E. R. 883.

Annotations:—Mentd. Fazakerley v. Wiltshire (1721), 1 Stra. 462; *Macclesfield Corpn. v. Podley* (1833), 4 B. & Ad. 397.

50. Validity of.]—HIX v. GARDINER, No. 68, *post*.

51. Period of user—Thirty-five years.]—(1) It is sufficient for pltf. to prove that he was in possession of the ferry at the time the cause of action accrued, to entitle him to maintain an action on the case for the disturbance of it.

(2) From an user of thirty-five years, the jury may presume that a ferry had a legal origin.

(3) A variation in the amount of ferriage will not avoid the franchise.—*TROTTER v. HARRIS* (1828), 2 Y. & J. 285; 148 E. R. 926.

Prescription generally.]—See EASEMENTS, Vol. XIX., pp. 53–75.

SUB-SECT. 3.—BY STATUTE.

52. General right of ferry given—Penalties for infringement of right—By boats of particular size—General right not limited.]—NORTH & SOUTH SHIELDS FERRY CO. v. BARKER, No. 6, *ante*.

53. Right limited by Act—Pending repair of bridge—Undue delay in repairing.]—NICHOLL v. ALLEN, No. 62, *post*.

54. ——— To one day a week—No obligation to maintain ferry—Ancient ferry distinguished.]—LETTON v. GOODDEN, No. 34, *ante*.

55. ——— Ultra vires acts by owners—Use of boat for pleasure purposes—Action by ratepayers.]—DUNDEE HARBOUR TRUSTEES v. NICOL, No. 63, *post*.

SECT. 2.—TRANSFER.

See Ferries (Acquisition by Local Authorities) Act, 1919 (c. 75).

56. Necessity for deed—On demise of ferry.]—PETER v. KENDAL, No. 150, *post*.

57. ———.]—ANGUSH v. EBDEN (1830), *Gunning on Tolls*, p. 111.

Annotations:—Reid. General Estates Co. v. Beaver, [1913] 2 K. B. 433; *Hammerton v. Dysart*, [1916] 1 A. C. 57.

58. ———.]—MAYFIELD v. ROBINSON, No. 25, ante.

—— On transfer of incorporeal hereditament.]—*See, generally*, DEEDS, Vol. XVII., pp. 192–194, Nos. 26–50.

59. Words effectual to pass—Grant of both way ferry—Passes one way ferry.]—PIM v. CURELL No. 109, post.

60. ——— Grant of land—With “all profits & commodities” belonging thereto—Coupled with evidence of long enjoyment of ferry.]—A compensation jury, of the city of L., awarded compensation to a landowner, under Railways Clauses Act, 1845 (c. 20), s. 6, in respect of the works of a railway co., by which he alleged that his land was injuriously affected.

The land was divided from the railway works by a river. The land was in the city; the works were not. The mode in which the works injuriously affected the land was, that they obstructed the access to a ferry over the river &

appurtenant to the land in question:—*Held*: (1) the ferry might pass with the land, under a conveyance of the land with “all profits & commodities belonging to the same”; (2) where, as far as living memory went, the land & ferry had always been enjoyed by the same person, & there was no evidence to show that they ever had been the subjects of separate conveyances, a compensation jury were justified in concluding that the ferry did pass with the land under the above words.

It is not essential to a ferry that the owner of it should have the land on either side, if he has the right of using that land for the purpose of the ferry (PATTESON, J.).—R. v. GREAT NORTHERN RY. CO. (1849), 14 Q. B. 25; 117 E. R. 10; *sub nom.* Re COOLING & GREAT NORTHERN RY. CO., 6 Ry. & Can. Cas. 246; 19 L. J. Q. B. 25; 14 Jur. 128; *sub nom.* Re POOLING v. GREAT NORTHERN RY. CO., 13 L. T. O. S. 484.

Annotations:—*Generally*, *Mentd.* Re Penny & S. E. Ry. (1857), 26 L. J. Q. B. 225; Chamberlain v. West End of London & Crystal Palace Ry. (1863), 2 New Rep. 182; Ricket v. Met. Ry. (1867), L. R. 2 H. L. 175.

Part III.—Rights, Duties and Liabilities of Ferry Owner.

SECT. 1.—RIGHTS.

SUB-SECT. 1.—IN GENERAL.

61. Right to maintain ferry—In proximity to bridge—Bridge with right of toll.]—A mere right to take tolls of all persons passing over a certain bridge, given by Act of Parliament, does not involve such an exclusive privilege of conveying all persons across the river at or near bridge as to entitle the party possessed of such right to maintain an action for the disturbance of it against one who has erected a ferry near the bridge, & taken persons across the river in boats.—YOUNG v. THANK (1845), 6 L. T. O. S. 146.

62. ——— By statutory authority—While bridge under repair—Unreasonable delay in repairing bridge.]—A local Act, reciting that it was convenient that a bridge should be built across the Thames from the parish of W. in the county of S. to the parish of S. in the county of M., for the ease & commerce of the inhabitants of the said counties, & that D. had proposed to build the bridge, enacted that it should be lawful for D., his heirs & assigns, & he & they were authorised & empowered, at their own costs & charges, to build the said bridge. Power was given to cut the banks of the river, & turn any highways leading to the intended bridge; & in consideration of the great charges & expenses D. his heirs & assigns should be at, not only in building the bridge but also in erecting, repairing & maintaining other matters necessary to be erected, it should be lawful for D. his heirs & assigns, from time to time & at all times thereafter, to take for pontage or toll

for any passage over the bridge, certain sums. A clause reciting that it might happen that the passage of the bridge might for some time become dangerous or impracticable, enacted that it should be lawful for D., his heirs & assigns, to provide & maintain a ferry across the river, & to take the same sums for passage over the river by it as were granted for the toll or pontage; provided that such ferry should not continue longer than should be necessary for repairing or rebuilding the bridge. It was declared that the bridge should be extra-parochial, & not be deemed to be a county bridge. A later Act, reciting that the bridge was in a ruinous condition, & if not effectually repaired or rebuilt, would be manifestly to the inconvenience of the public, & that S. was the sole proprietor of it, & had proposed to effectually repair or rebuild it, but it had been found by experience that the pontage or toll was greatly inadequate to the expense of building & keeping the same in repair; enacted that it should be lawful for S. his heirs & assigns to take the tolls therein specified. This later Act also contained a clause re-enacting all the powers & authorities given by the former Act for the purpose of “rebuilding, repairing, altering & keeping in repair the bridge.” In 1859 the principal arch of the bridge, which had been used by the public on payment of the tolls authorised by the said Acts, fell in, & the passage of it became impracticable. Deft., who had become proprietor of the bridge in 1829, thereupon provided & maintained a ferry across the Thames near to the bridge & for passage over the river by the ferry took the tolls authorised by

Shipping Act.—LLOYD v. EUROPEAN & NORTH AMERICAN RY. CO. (1878), 2 P. & B. 194.—CAN.

c. Sale by public auction—Duty of vendor to put vendee into possession.]—The authority conferred on a municipality to make bye-laws for establishing a ferry, authorises it to provide a boat for operating the same, & where

a ferry so established is sold at public auction by the municipality, they are bound to put the vendee in possession, & are liable for failure to do so.—CURREY v. VICTORIA MUNICIPALITY (1902), 35 N. B. R. 605.—CAN.

d. Sub-lease of ferry—Validity of.]—Where, by the terms of a lease of a

ferry, the renter, should not transfer or sub-rent the ferry, but such a transfer of sub-lease is not prohibited by statute, or by a rule framed under a statute, a transfer of it will be valid as between the renter & his transferee, though it may be invalid as against the Govt.—ABDULLA v. MAMMUD (1902), L. L. R. 26 Mad. 156.—IND.

Sect. 1.—Rights: Sub-sects. 1 & 2. Sects. 2 & 3: Sub-sects. 1 & 2.]

the Acts. A reasonable time for repairing the bridge having elapsed, *pltf.*, who was the proprietor of an estate near the bridge & had sustained special damages as such from the neglect to repair it, brought an action against *S.* for damages, by reason of the bridge being impracticable:—*Held*: the above Act imposed upon *deft.*, as proprietor of the bridge, the duty to repair & maintain it as long as he received the tolls.—*NICHOLL v. ALLEN* (1862), 1 B. & S. 934; 31 L. J. Q. B. 283; 6 L. T. 699; 10 W. R. 741; 121 E. R. 962, Ex. Ch.

Annotations:—*Consd.* *Winch v. Thames Conservators* (1872), L. R. 7 C. P. 458. *Refd.* *Guest v. Poole & Bournemouth Ry.* (1870), L. R. 5 C. P. 553. *Mentd.* *R. v. Maidenhead Corpn.* (1882), 51 L. J. Q. B. 444.

63. Ferry-boats let out—For excursion trip—Beyond ferry limits—Ultra vires.]—A franchise of ferry within certain defined limits was vested by Act of Parliament in a statutory body of harbour trustees who maintained a service of steamers for ferry traffic. When the steamers were not required for ferry traffic the trustees let them out on hire for excursion trips beyond the ferry limits. A firm of shipowners, who let out steamers on excursion trips, & who paid rates to the trustees for the use of the harbour, brought an action of interdict to restrain the trustees from so using their steamers:—*Held*: (1) the acts complained of were *ultra vires*; (2) as harbour ratepayers, the shipowners had a good title & interest to sue.—*DUNDEE HARBOUR TRUSTEES v. NICOL*, [1915] A. C. 550; 84 L. J. P. C. 74; 112 L. T. 697; 31 T. L. R. 118, H. L.

Annotation:—*Mentd.* *Kemp v. Glasgow Corpn.*, [1920] A. C. 836.

SUB-SECT. 2.—RIGHT TO TOLL.

64. Incident to franchise of ferry.]—*WEBB'S CASE* (1608), 8 Co. Rep. 45 b; 77 E. R. 541.

Annotations:—*Mentd.* *Geo v. Freedland* (1626), Cro. Car. 47; *R. & Middleton v. New River Water Corpn.* (1663), 1 Keb. 629; *R. v. Kempe* (1694), 1 Ld. Raym. 49; *Fawcett v. Strickland* (1737), Willes, 57; *Millar v. Taylor* (1769), 4 Burr. 2303; *R. v. Chipping-Norton* (1804), 5 East, 239.

65. —.]—Every ferry ought to be under a public regulation; viz. that it give attendance at due times, keeps a boat in due order, & take but reasonable toll; for if he [the owner] fail in these, he is finable (*STIRLING, L.J.*).—*A.-G. v. SIMPSON*, [1901] 2 Ch. 671; 70 L. J. Ch. 828; 85 L. T. 325; 17 T. L. R. 768, C. A.; *reversd.* on other grounds, *sub nom.* *SIMPSON v. A.-G.*, [1904] A. C. 476, H. L.

Annotations:—*Refd.* *Newcastle v. Worksop U. C.*, [1902] 2 Ch. 145; *Queenborough Corpn. v. Smeed, Dean* (1904), 68 J. P. 244; *Dibden v. Skirrow*, [1908] 1 Ch. 41; *Hammerton v. Dysart*, [1916] 1 A. C. 57. *Mentd.* *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *Robinson v. Smith* (1908), 24 T. L. R. 573; *Re Hatschek's Patents, Ex p. Zerrenner*, [1909] 2 Ch. 68; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Folkestone Corpn. v. Brockman*, [1914] A. C. 338; *Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co. & Donkin* (1920), 90 L. J. Ch. 420.

66. —.]—(1) A franchise of ferry is to be

regarded as a toll franchise & is a grant to the exclusion of others, & is a continuing consideration for a continuing public service. (2) In the case of a point to point ferry the exclusive right is only to ferry persons coming along a public way to a landing place & desiring to cross to a landing place on the opposite bank & continue their journey along another public way. (3) The owner of the ferry has a cause of action against any one who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points. But where a new ferry is set up in proximity to an old ferry to accommodate new traffic the question is whether the new traffic is *de facto* part of the burden & obligation of the old ferry or is really new traffic requiring new facilities, & such as would not naturally use the highways which the old ferry serves. In the latter case the owner of the old ferry has no cause of action. (4) Increased traffic, in consequence of the growth of population or of a change in the character of the district served by an old ferry is not "new traffic" entitling any one to set up a new ferry near the old one.

Where new & different traffic is spoken of in this connection, it must, I think, mean traffic the bulk of which has been created by the erection of the rival ferry, & which, but for such ferry, would not have existed at all, that is, would not have increased either the profits or burdens of the owner of the franchise (*LORD PARKER*).—*HAMMERTON v. DYSART (EARL)*, [1916] 1 A. C. 57; 85 L. J. Ch. 33; 113 L. T. 1032; 80 J. P. 97; 31 T. L. R. 592; 59 Sol. Jo. 665; 13 L. G. R. 1255, H. L.; *sq.* *S. C. sub nom.* *DYSART (EARL) v. HAMMERTON & Co.*, [1914] 1 Ch. 822, C. A.

Annotation:—*As to* (1) & (2) *Refd.* *General Estates Co. v. Beaver*, [1914] 3 K. B. 918.

67. — Unless right excluded by custom.]—*PAYNE v. PARTRIDGE*, No. 87, *post*.

68. May be claimed by prescription.]—If a man hath a common ferry, & prescribes to have an *obolus* for every footman passing over, & a *denarius* for every horseman, & that none shall pass but over this ferry, this is a good prescription (*CROKE, J.*).—*HIX v. GARDINER* (1614), 2 Bulst. 195; 80 E. R. 1062.

Annotations:—*Mentd.* *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Broadbent v. Wilks* (1742), Willes, 360.

69. Amount of toll—Variation in—Franchise not avoided.]—*TROTTER v. HARRIS*, No. 51, *ante*.

70. — Determined by statute—Vehicle with passengers & luggage—Vehicle of itself subject to toll.]—By an Act for establishing a floating bridge over the harbour of Portsmouth, the co. were empowered to demand & take, amongst others, the following tolls: For every horse or other beast drawing any coach, chariot, etc., or other such like carriage with four wheels, if drawn by one horse or other beast, 1s., & if drawn by two or more horses or other beasts 9d. for each horse or other beast beyond the first; for every passenger or person merely using the floor or deck of the

PART III. SECT. 1, SUB-SECT. 2.

a. Recognised in British India.]—The right of establishing a private ferry & levying tolls is recognised in British India.—*PARMESHARI PROSHAD v. IN SINGH v. MAHOMED SYUD*, I. L. R. 6 Calc. 608; 7 C. L. R. 504.—*IND.*

1. Exemption from tolls—Ferry established by corporation—Whether post office officials exempt.]—Although post office officials, as servants of the Crown, are entitled to be carried free over ferries properly so called, such right does not apply to a ferry which a corpn. is empowered by statute to establish & work, but is under no

obligation to maintain.—*A.-G. v. LONDONDERRY BRIDGE COMRS.*, [1903] 1 I. R. 389.—*IR.*

g. — Troops in uniform & on duty.]—*A.* was the owner of a ferry on the Orange River, one terminus being on the colonial side & one on the Griqualand West side of the river.

said bridge, 1d.; for every portmanteau, trunk, or other luggage belonging to any passenger, not exceeding 1 cwt., 1d.:—*Held*: the co. were not thereby authorised to demand toll in respect of passengers, portmanteaus, parcels, etc., passing over on the bridge in & upon an omnibus in respect of the horses drawing which the proper toll had been paid.—*PORTSMOUTH FLOATING BRIDGE CO. v. NANCE* (1843), 6 Scott, N. R. 823; 1 L. T. O. S. 256.

71. — Must be reasonable.]—A.-G. v. SIMPSON, No. 65, *ante*.

72. Where journey not effected—Change of mind by passenger—After contract with ferry owner—Reasonability of toll.]—In an action for damages for assault & false imprisonment it appeared that pltf. had contracted with defts. to enter their wharf & stay there till the boat should start & then be taken by the boat to the other side. No breach of defts.' undertaking was alleged, but pltf. after entry changed his mind & desired to effect an exit from their wharf without payment of the prescribed toll for exit, & was for a time forcibly prevented:—*Held*: he ought to have been nonsuited. The toll imposed was reasonable & defts. were entitled to resist a forcible evasion of it.—*ROBINSON v. BALMAIN NEW FERRY CO., LTD.*, [1910] A. C. 295, P. C.

Annotation:—*Refd.* *Herd v. Weardale Steel, Coal & Coke Co.*, [1915] A. C. 67.

Liability for improper levy of toll.]—*See* Nos. 84, 87, *post*.

SECT. 2.—DUTIES.

73. Maintenance of ferry — Readiness.] — *NEDEPORT (PRIOR) v. WESTON*, No. 104, *post*.

74. — All reasonable hours.]—*R. v. GILES* (1857), 29 L. T. O. S. 126; 5 W. R. 575; 21 J. P. Jo. 324.

75. — At all times.]—*LETON v. GOODDEN*, No. 34, *ante*.

76. — .]—A.-G. v. SIMPSON, No. 65, *ante*.

77. — .]—*HAMMERTON v. DYSART* (*EARL*), No. 66, *ante*.

78. — Good repair.]—*NEDEPORT (PRIOR) v. WESTON*, No. 104, *post*.

79. — Sutable boats.]—*R. v. GILES* (1857), 29 L. T. O. S. 126; 5 W. R. 575; 21 J. P. Jo. 324.

80. — .]—It is the duty of the owner of a ferry to keep his ferry boat reasonably safe & secure. A light cart, drawn by a single horse, was being ferried over a river when the horse went against a bar placed behind to prevent horses from slipping off & broke it & fell into the river & was lost. It being shown that the bar appeared to have become reduced in thickness & weakened at the point of fracture, & that the floor of the boat was convex & sloped backwards:—

Held: there was evidence of negligence to support a verdict in favour of the owner of the horse.—*COOTE v. LEAR* (1886), 2 T. L. R. 806, D. C.

81. — .]—A.-G. v. SIMPSON, No. 65, *ante*.

— Neglect to maintain—Defence to action for disturbance.]—*See* No. 150, *post*.

Liability for.]—*See* Sect. 3, *post*.

82. Owner of ferry for carriages—Bound to convey carriages & contents.]—*WALKER v. JACKSON*, No. 100, *post*.

SECT. 3.—LIABILITIES.

SUB-SECT. 1.—IN GENERAL.

83. Toll improperly levied — Prohibited by custom—Action for improper levy.]—*PAYNE v. PARTRIDGE*, No. 87, *post*.

84. — Excessive amount—Form of information—Single not accumulated general charge.]—An information for extortion, stating that there is a common passage & ferry boat over the river M.; that the usual rates were one penny for a man & horse, & two pence for a score of sheep; & that deft., being the common ferry man, did, between such a day & such a day, extort from divers persons unknown divers sums of money, exceeding the ancient rate & price of passage, viz. for carrying over one man & a horse two pence, & for every score of sheep four pence, etc., is bad; for every extorsive taking is a separate offence, & ought to be precisely & distinctly laid; but here a number of offences are accumulated under a general charge.—*R. v. ROBERTS* (1692), Carth. 226; Comb. 193; Holt, K. B. 363; 4 Mod. Rep. 100; 3 Salk. 198; 1 Show. 389; 87 E. R. 286.

Annotation:—*Consd.* *R. v. Bowen* (1811), 1 Cox, C. C. 88.

SUB-SECT. 2.—FAILURE TO MAINTAIN FERRY.

85. Indictment.] — *NEDEPORT (PRIOR) v. WESTON* (1443), Y. B. 22 Hen. VI. fo. 14, pl. 23; 2 Roll. Abr. 140, pl. 4; 16 Vin. Abr. 26, pl. 4.

Annotations:—*Refd.* *Huzzy v. Field* (1835), 5 Tyr. 855; *Newton v. Cubitt* (1862), 12 C. B. N. S. 32; *Hopkins v. G. N. Ry.* (1877), 2 Q. B. D. 224; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918. *Mentd.* *Godfrey's Case* (1614), 11 Co. Rep. 42 a.; *Churchman v. Tunstal* (1659), Hard. 162; *Palne v. Partridge* (1690), 1 Show. 243; *Cowes U. C. v. Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287; *Hammerton v. Dysart*, [1916] 1 A. C. 57.

86. — .]—*GRAVESEND CASE* (1612), 2 Brownl. 177; 123 E. R. 883.

Annotations:—*Mentd.* *Fazakerley v. Wiltshire* (1721), 1 Stra. 462; *Macclesfield Corpn. v. Podley* (1833), 4 B. & Ad. 397.

— Erection of bridge for greater convenience—No defence.]—(1) A custom that the inhabitants of a particular district have used & have a right to pass a certain ferry toll-free is good; & if toll be extorted from such an inhabitant

This ferry was regulated by Ord. 6 of 1876 of Griqualand West, the sect. 9 of which exempted H.M.'s troops in uniform & on duty & their animals from paying fare:—*Held*: H.M.'s troops in

uniform & on duty, & their animals, crossing by the ferry from the colonial to the Griqualand West side were bound to pay the fare. The sect. must be confined in its operation to

ferries plying only within the limits of Griqualand West.—*WAR DEPARTMENT v. GIBSON BROTHERS* (1885), 4 S. C. 83.—S. AF.

Sect. 3.—Liabilities: Sub-sects. 2 & 3.]

he may have an action on the case; but no action will lie against the ferryman for not keeping a boat for the purpose of the ferry, unless some special damage ensue.

(2) But he may be indicted for this neglect; & it will be no excuse that he has erected a bridge across the river for a common passage, which is more convenient than the ferry. Owner of a ferry cannot suppress it & put up a bridge in its place without licence & *ad quod damnum*.

(3) There being an ancient ferry, all the King's people are entitled to pass of common right (HOLT, C.J.).—PAYNE v. PARTRIDGE (1690), 1 Salk. 12; 1 Show. 255; 91 E. R. 12; *sub nom.* PAINE v. PARTRICH, Carth. 191; Comb. 180; Holt, K. B. 6; 3 Mod. Rep. 289; 1 Show. 243.

Annotations:—*As to* (1) **Consd.** Iveson v. Moore (1698), 1 Ld. Raym. 486; Groasly v. Codling (1824), 2 Bing. 263. **Reid.** Phillibrown v. Ryland (1725), 8 Mod. Rep. 351; Lyme Regis Corp'n. v. Henley (1834), 1 Bing. N. C. 222; Lockwood v. Wood (1844), 13 L. J. Q. B. 365; Newton v. Cubitt (1862), 12 C. B. N. S. 32; Chamberlain v. West End of London & Crystal Palace Ry. (1863), 2 B. & S. 617; Cameron v. Charing Cross Ry., Bourhill v. Charing Cross Ry. (1864), 16 C. B. N. S. 430; Ricket v. Met. Ry. (1865), 5 B. & S. 156; Mercer v. Denne, [1904] 2 Ch. 534. *As to* (2) **Consd.** Hopkins v. G. N. Ry. (1877), 2 Q. B. D. 224; Dibden v. Skirrow, [1907] 1 Ch. 437. **Reid.** Iveson v. Moore (1698), Holt, K. B. 10; Lyme Regis Corp'n. v. Henley (1834), 1 Bing. N. C. 222; Hammerton v. Dysart, [1916] 1 A. C. 57. *As to* (3) **Reid.** Clarke v. West Ham Corp'n., [1909] 2 K. B. 858. **Generally, Mentd.** R. v. Ward (1836), 4 Ad. & El. 384.

88. —.]—LETTON v. GOODDEN, No. 34, *ante*.

89. **Action—Only if special damage caused.]—**PAYNE v. PARTRIDGE, No. 87, *ante*.

90. —.]—BLISSETT v. HART, No. 33, *ante*.

91. **Information or presentment—At suit of Crown.]—**BLISSETT v. HART, No. 33, *ante*.

92. **Fine.]—**NEDEPORT (PRIOR) v. WESTON, No. 104, *post*.

93. —.]—LETTON v. GOODDEN, No. 34, *ante*.

94. —.]—A.-G. v. SIMPSON, No. 65, *ante*.

SUB-SECT. 3.—LOSS OR INJURY TO PROPERTY OR PERSONS.

95. **Property—Theft.]—**A ferryman, common innkeeper, or carrier, shall not be discharged if the goods are stolen; otherwise of a factor.—SOUTH-

COTE'S CASE (1601), 4 Co. Rep. 83 b; 76 E. R. 1061; *sub nom.* SOUTHCOT v. BENNET, Cro. Eliz. 815.

Annotations:—**Reid.** Lane v. Cotton (1701), 12 Mod. Rep. 472; Coggs v. Barnard (1703), 1 Com. 133; Kettle v. Bromsall (1738), Willes, 118. **Mentd.** Symons v. Darknoll (1628), Palm. 523; Paradine v. Jane (1647), Aleyn, 26; Nicholls v. More (1661), 1 Sid. 36; Boson v. Sandford (1689), 1 Show. 101; Hartop v. Hoare (1743), 3 Atk. 44; Austin v. M. S. & L. Ry. (1850), 10 C. B. 454; Peek v. North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Donald v. Suckling (1866), L. R. 1 Q. B. 585; Harris v. Perry, [1903] 2 K. B. 219; Shrimpton v. Hertfordshire County Council (1910), 74 J. P. 305; Coldman v. Hill, [1919] 1 K. B. 443; G. N. Ry. & L. E. P. Transport & Depository, [1922] 2 K. B. 742; Pratt v. Patrick, [1924] 1 K. B. 488.

96. — **Thrown overboard—Ferry overloaded.]—**DE B. v. DE F. (1848), 22 Lib. Ass. fo. 94, pl. 41; cited in 2 Ld. Raym. at p. 911; 92 E. R. 108; *sub nom.* FERRYMAN'S CASE, Palm. at p. 551.

Annotations:—**Consd.** Forward v. Pittard (1785), 1 Term Rep. 27; Taylor v. Caldwell (1863), 3 B. & S. 826. **Reid.** Southcote's Case (1601), 4 Co. Rep. 83 b; Williams v. Lloyd (1628), W. Jo. 179.

97. —.]—If a ferryman surcharge a barge, any passenger may cast the things out of the barge, in case of necessity, for the safety of the lives of the passengers; & the owners shall have their remedy against the ferryman. If there be no surcharge, & the danger accrued only by the act of God, no default being in the ferryman, every one ought to bear his own loss.

If a tempest arise at sea, *levandi navis causâ*, & for the salvation of the lives of the men, passengers may cast over the merchandises, etc.—MOUSE'S CASE (1608), 12 Co. Rep. 63; cited in 2 Bulst. at p. 280; 77 E. R. 1341; *sub nom.* GRAVESEND BARGE CASE, 1 Roll. Rep. 79.

Annotations:—**Expld.** Bird v. Astcock (1614), 2 Bulst. 280. **Consd.** Cope v. Sharpe (No. 2), [1912] 1 K. B. 496. **Reid.** Leuw v. Dudgeon (1867), 16 W. R. 80; Scaramanga v. Stamp (1880), 5 C. P. D. 295; Kirby v. Chessum (1913), 30 T. L. R. 15. **Mentd.** Holmes v. Mather (1875), L. R. 10 Exch. 261.

98. —.]—During tempest.]—MOUSE'S CASE, No. 97, *ante*.

99. —.]—BARCROFT'S CASE (prior to 1648), cited in Aleyn, at p. 93; 82 E. R. 932.

Annotations:—**Reid.** Kenrig v. Eggleston (1648), Aleyn, 93; Lane v. Cotton (1698), 5 Mod. Rep. 455.

100. — **Goods contained in vehicle—Damage by water during landing—Whether contract included carriage & landing.]—**Pltf. having arrived at defts.' ferry with a phaeton, containing a large quantity of jewellery of great weight, paid 5s. for the passage of himself & his carriage, which was accordingly put on board the boat. On his arrival at the other side the carriage was placed

PART III. SECT. 3, SUB-SECT. 3.

h. Property—Unfitness of boat.]—GAUVIN v. LEGAULT (1917), 24 R. L. N. S. 32.—CAN.

k. — Breaking of defective link—In gear of ferry.]—A county council was liable for loss of cattle sustained through an accident caused by the breaking of a defective link in an untested chain which formed part of the gear of a ferry under its control, it being its duty to have had a tested chain supplied.—WHAKATANE COUNTY COUNCIL v. NEWSHAM (1913), 32 N. Z. L. R. 746.—N.Z.

l. — Working of ferry delegated to independent contractor—Whether contractor liable for negligence.]—Where a county council in pursuance of a resolution to establish a ferry, enters into a contract with an independent

contractor for its construction & working, it is nevertheless liable for any accident or loss that occurs to a person using the ferry through any defect in the gear supplied, which defect, whether latent or otherwise, could be discovered by the exertion of reasonable skill & diligence or by ordinary & reasonable means of inquiry & examination.—WHAKATANE COUNTY COUNCIL v. NEWSHAM (1913), 32 N. Z. L. R. 746.—N.Z.

m. — Trespass by passenger over private land.]—Trustees obtained from a riparian proprietor a strip of ground on the bank of the river to be used solely for the purposes of widening the river, & having thereafter obtained by statute an existing right of ferry over part of the river extending above & below the strip of ground, established a ferry service, & embarked & dis-

charged passengers at a part of the bank so acquired, which was separated from any public place by the proprietor's lands. The proprietor sought to have the trustees interdicted from embarking & discharging passengers at the point in question.—**Held:** the proprietor's proper remedy was an interdict against persons actually trespassing on his lands.—STIRLING CRAWFURD v. CLYDE NAVIGATION TRUSTEES (1881), 8 R. (Ct. of Sess.) 826; 18 Sc. L. R. 588.—SCOT.

n. Persons—Want of guard rails—Wharf insufficiently lighted.]—B. alleged that her husband was drowned at the Grand Trunk wharf through the negligence of the co. By reason of the want of light, & the absence of guards or gates at the co.'s wharf the husband fell over the wharf & was drowned.—**Held:** there was culpable

on an inclined plane, extending from the boat to the shore, & two of deft.'s men commenced drawing it up towards the quay, but owing to its great weight, it ran back & fell into the water, whereby the jewellery was damaged. The practice was for the owners of carriages to give a small gratuity to the persons who embarked or landed their carriages, whether these persons were defts.' servants or not. Pltf. had not disclosed to defts. the weight or value of the contents of the phaeton. The judge having directed the jury to consider whether there had been any negligence on the part of defts. or their servants:—*Held*: the mere fact of defts. being ferrymen would not create an obligation on them to put the carriage on board, or to discharge it; & the questions for the jury were, whether there was any usage to that effect, or if not, whether the carriage had been delivered to defts., & they had contracted to receive & land it safely; & if they had, whether their placing it at the bottom of the inclined plane was a complete & safe landing, or whether the subsequent attempt to drag it up amounted to negligence.

The owner of a ferry for carriages is bound to convey carriages & their contents.—*WALKER v. JACKSON* (1843), 10 M. & W. 161; 11 L. J. Ex. 346; 12 L. J. Ex. 165; 152 E. R. 424.

Annotations:—*Consd.* *Bamfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94; *Long v. District Messenger & Theatre Ticket Co.* (1916), 32 T. L. R. 596. *Refd.* *G. N. Ry. v. Shepherd* (1852), 8 Exch. 30; *Phillips v. Clark* (1857), 2 C. B. N. S. 156; *Cahill v. L. & N. W. Ry.* (1862), 8 Jur. N. S. 1063; *Chiesman v. S.S. Modena, The Modena* (1911), 16 Com. Cas. 292. *Mentd.* *Lebeau v. General Steam Navigation Co.* (1872), L. R. 8 C. P. 88; *Shaw v. G. W. Ry.*, [1894] 1 Q. B. 373; *Price v. Union Lighterage Co.*, [1903] 1 K. B. 750.

101. — Animal—Injury whilst in owner's control—Defective landing slip.—The lessees of a ferry provided steam boats for the conveyance of passengers, goods, & cattle from A. to B., & also slips for landing & embarking, which were, generally, sufficient for the purpose:—*Held*: they were liable for an injury sustained by the horse of a passenger, in consequence of the side

negligence on the part of the co. in not having sufficient lights & a gate or chain to guard against accidents.—*GRAND TRUNK RY. CO. v. BOULANGER*, Cass. Dig. 2nd ed. 733.—CAN.

o. — Negligence of passenger—Jumping on boat after gangways withdrawn.—A passenger, arriving on the pontoon wharf as a ferry boat was swinging out & was a few feet away from the wharf with the gangways withdrawn, attempted to jump aboard over the stern bulwarks & was drowned. In an action by her representatives to recover damages from the ferry co.:—*Held*: as there was no proof of any negligence on the part of the co. which contributed to the accident but, on the contrary, it appeared that the sole cause of the accident was the

rash act of deceased in attempting to jump aboard the ferry boat over the bulwarks, after the gangways had been withdrawn & the boat had got under way, the co. could not be held responsible in damages.—*QUEBEC & LEVIS FERRY CO. v. JESS* (1905), 35 S. C. R. 693.—CAN.

p. — Negligence of crew.—The ticket issued to M., a traveller by rail from Boston, Mass., to St. John, N.B., entitled him to cross the St. John harbour by ferry, & a coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control & management of the corpn. of St. John:—*Held*: an action would lie against the corpn. for injuries to M. caused by the negligence of the officers of the boat

rail of the landing slip, of the dangerous state of which they had been forewarned, giving way, although the horse was at the time under the control & management of its owner.—*WILLOUGHBY v. HORRIDGE* (1852), 12 C. B. 742; 22 L. J. C. P. 90; 16 J. P. 761; 17 Jur. 323; 138 E. R. 1096; *sub nom.* *HORRIDGE v. WILLOUGHBY*, Saund. & M. 53; 20 L. T. O. S. 97.

—*See, generally*, *ANIMALS*, Vol. II., pp. 275 *et seq.*; *CARRIERS*, Vol. VIII., pp. 130 *et seq.*

102. — Collision.—A steam ferry boat started in a dense fog to cross a navigable river, those in charge of her having been informed that vessels were anchored in or near her track. The ferry boat, although navigated with all ordinary care, ran into & damaged a ship at anchor:—*Held*: the ferry boat was to blame.—*THE LANCASHIRE* (1874), L. R. 4 A. & E. 198; 29 L. T. 927; 2 Asp. M. L. C. 202.

Annotation:—*Consd.* *The Tranmere*, [1920] P. 454.

—*See, generally*, *CARRIERS*, Vol. VIII., pp. 5 *et seq.*

103. Persons—Broken tackle—Negligence of crew.—H., the lessee of a ferry hired of defts. for the day a steamer, with a crew, to carry his passengers across. Pltf., having paid his fare to H., passed across on the steamer, & while on board, was injured by the breaking of a rope, owing to the negligence of the crew in the manner of mooring:—*Held*: the crew remained the servants of defts., who were, therefore, liable for their negligence; & as the negligence was such as would have made defts. liable to a mere stranger, & pltf. was on board with their consent, it was immaterial that he was a passenger under a contract with H.—*DALYELL v. TYRER* (1858), E. B. & E. 899; 28 L. J. Q. B. 52; 31 L. T. O. S. 214; 5 Jur. N. S. 335; 0 W. R. 684; 120 E. R. 744.

Annotations:—*Refd.* *Farrant v. Barnes* (1862), 11 C. B. N. S. 553; *Foulkes v. Met. Dist. Ry.* (1880), 5 C. P. D. 157.

—*See, generally*, *CARRIERS*, Vol. VIII., pp. 70 *et seq.*

during passage.—*ST. JOHN CORPN. v. McDONALD* (1886), 14 S. C. R. 1.—CAN.

q. — Steamer improperly secured to landing stage.—*DRAKE v. DARTMOUTH TOWN* (1893), 25 N. S. R. 177.—CAN.

r. — Unfitness of boat.—The lessee of a Govt. ferry having the exclusive right of conveying passengers across a certain river at a particular spot allowed an unsound boat to be used at the ferry. In consequence of its unsoundness, the boat sank while crossing the river, & some of the persons in it were drowned:—*Held*: the lessee of the ferry was properly convicted of the offence provided for by Penal Code, s. 304A.—*R. v. BHUTAN* (1894), 1 L. R. 16 All. 472.—IND.

Part IV.—Disturbance of Ferries and Remedies Therefor.

SECT. 1.—DISTURBANCE.

104. What amounts to—Erection of new ferry close to old.]—So if I have a ferry by prescription, if another erects another ferry upon the same river near to it, by which my ferry is impaired, this is a nuisance to me; for I am bound to sustain & repair the ferry for the ease of the lieges, otherwise I shall be grievously amerced.—**NEDEPORT (PRIOR) v. WESTON** (1443), Y. B. 22 Hen. VI. fo. 14, pl. 23; 2 Roll. Abr. 140, pl. 4; 16 Vin. Abr. 26, pl. 4.

Annotations:—**Consd.** *Hopkins v. G. N. Ry.* (1877), 2 Q. B. D. 224; *Cowes U. C. v. Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287. **Refd.** *Churchman v. Tunstal* (1659), Hard. 162; *Huzzey v. Field* (1835), 5 Tyr. 855; *Newton v. Cubitt* (1862), 12 C. B. N. S. 32; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918; *Hammerton v. Dysart*, [1916] 1 A. C. 57. **Mentd.** *Godfrey's Case* (1614), 11 Co. Rep. 42 a; *Paine v. Partridge* (1690), 1 Show. 243.

105. ———.]—**BLISSETT v. HART**, No. 33, *ante*.

106. ———.]—**BLACKETER v. GILLET**, No. 147, *post*.

107. ———.]—**LETON v. GOODDEN**, No. 34, *ante*.

108. ——— What amounts to proximity—Three quarters of a mile.]—**CHURCHMAN v. TUNSTAL** (1659), Hard. 162; 145 E. R. 432, Ex. Ch.; *subsequent proceedings* (1662), cited in 2 Anst. at p. 608.

Annotations:—**Consd.** *Huzzey v. Field* (1835), 2 Cr. M. & R. 432; *Newton v. Cubitt* (1862), 12 C. B. N. S. 32. **Refd.** *A. G. v. Richards* (1795), 2 Anst. 603; *Lyme Regis Corp'n. v. Henley* (1834), 1 Bing. N. C. 222; *Pim v. Curell* (1840), 6 M. & W. 234; *Hammerton v. Dysart*, [1916] 1 A. C. 57.

109. ——— Four hundred yards.]—(1) A declaration in case for the infringement of a ferry, described the ferry as being across the river M., from "the township, parish, chapelry, or place of B., in the county of C., to the parish township, or place of L., in the county of L.":—**Held**: pltf. might recover under this declaration, although he proved a ferry both ways, as well from L. to B., as from B. to L., & this description did not import a ferry from the whole township, etc., of B., to the whole parish, etc., of L., but

pltf. might recover on proof of a ferry from any point within B. to L.

(2) Under a lease of a ferry, describing it as a ferry across a river both ways, a ferry across a river one way only will pass.

(3) *Seemle*: the establishment of a ferry across the river M., having its terminus in B., within 400 yards of pltf.'s ferry, & upon which defts. carried passengers & goods for hire in boats from B. to L., in itself imported an infringement of pltf.'s ferry, for which they might maintain an action.

(4) A right of ferry is a matter in which the public are interested, & as to which, therefore, reputation is evidence, & so also is a verdict or judgment of a ct. of competent jurisdiction touching the same right, although between other parties.

The opinion of this ct. is, that in cases where reputation is evidence, that is, cases involving a general right, in which all the Queen's subjects are concerned, a verdict or a judgment, upon the matter directly in issue between the parties, although between other parties, is also evidence; not however that it is evidence of any specific fact existing at the time, but that it is evidence of the most solemn kind, of an adjudication of a competent tribunal upon the state of facts, & the question of usage at that time. But we shall greatly extend the rule of law & most probably introduce great uncertainty in the mode of receiving or rejecting testimony of this sort if we apply it to an interlocutory order of this nature, not involving any judgment upon the rights of the parties (**LORD ABINGER, C.B.**).

(5) In a suit where a party seeks to establish a right of ferry against a party claiming a hostile right, *a fortiori*, he establishes it against the public (**LORD ABINGER, C.B.**).—**PIM v. CURELL** (1840), 6 M. & W. 234; 151 E. R. 395.

Annotations:—**As to** (1) **Consd.** *General Estates Co. v. Beaver*, [1914] 3 K. B. 918. **Refd.** *North & South Shields Ferry Co. v. Barker* (1848), 2 Exch. 136; *Cowes U. C. v. Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287; *Hammerton v. Dysart*, [1916] 1 A. C. 57. **As to** (2) **Refd.** *General Estates*

PART IV. SECT. 1.

104i. What amounts to—Erection of new ferry close to old.]—The Crown granted a ferry across a river, between the parishes of C. & N., opposite the ct. house of the country & communicating with the highway on each side of the river; the landing used on one side of the river was about two hundred yards above the ct. house:—**Held**: it was an infringement of the grantee's right to establish another ferry landing at the same place.—**FRASER v. DRYNAN** (1858), 4 All. 74.—**CAN.**

104ii. ———.]—**It. v. DAVENPORT** (1858), 16 U. C. R. 411.—**CAN.**

104iii. ———.]—Under a Crown licence the town of B. executed a lease to pltf. granting the franchise "to ferry to & from the town of B. to A.," a township having a water frontage of about ten or twelve miles, directly opposite to B., such lease providing only for one landing place on each side, & a ferry was established within

the limits of B. on the one side, to a point across the bay of Q., in the township of A., within an extension of the east & west limits of B. Defts. established another ferry across another part of the bay of Q., between the township of A. & a place in the township of S. which adjoins B., the termini being on the one side two miles from the western limits of B. & on the A. shore, about two miles from the landing place of pltf.'s ferry:—**Held**: the establishment & use of pltf.'s ferry within the limits aforesaid for many years had fixed the termini of the ferry, & defts.' ferry was no infringement of pltf.'s right.—**ANDERSON v. JELLET** (1883), 9 S. C. R. 1.—**CAN.**

104iv. ———.]—A., the owner of a ferry granted him under a Govt. settlement, brought a suit to restrain B. from running another ferry over the same spot where A.'s ferry plied for hire. B. levied no tolls on his ferry, but it was not used only for the conveyance of his own servants:—**Held**:

such suit was maintainable.—**LUCH-MESSUR SINGH v. LEELANUND SINGH** (1878), 1 L. R. 4 Calc. 599; 3 C. L. R. 427.—**IND.**

104v. ———.]—A corpn. empowered by statute to establish & work a steam ferry, but on whom no obligation to maintain the ferry has been imposed, has not the right to maintain an action for an injunction to restrain a person, who, without any title, has established a ferry which interferes with the profits of the ferry worked by the corpn.—**LONDONDERRY BRIDGE COMRS. v. M'KEEVER** (1890), 27 L. R. Ir. 86, 464.—**IR.**

104vi. ———.]—The managers or proprietors of a public ferry are entitled to complain of any person who establishes another ferry, without an express grant to that effect, either within, or so near the old one, as to injure them in any respect.—**FERGUSON v. DOWELL** (1815), 18 Fac. Coll. 15.—**SCOT.**

Co. v. Beaver, [1914] 3 K. B. 918. *As to (3) Reidd. Hamerton v. Dysart*, [1916] 1 A. C. 57. *As to (4) Consd. Dunraven v. Llewellyn* (1850), 14 Jur. 1089. *Reidd. Neill v. Devonshire* (1882), 8 App. Cas. 135; *Mercer v. Denne*, [1905] 2 Ch. 538; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918. *As to (5) Reidd. Neill v. Devonshire* (1882), 8 App. Cas. 135. *Generally, Mentd. Allen v. Hayward* (1845), 7 Q. B. 960.

110. ———— **New passage required for public conveyance.**—*NEWTON v. CUBITT*, No. 13, *ante*.

111. ———— **New terminus erected near to old—New terminus must serve different area.**—If there be an exclusive ferry from A. & B. it does not prevent persons from going by any other boat from A. directly to C. though it lie near to B. provided it be not done fraudulently, & as a pretence for avoiding the regular ferry.—*TRIPP v. FRANK* (1792), 4 Term Rep. 686; 100 E. R. 1234.

Annotations:—*Consd. Huzzey v. Field* (1835), 2 Cr. M. & R. 432; *Newton v. Cubitt* (1862), 12 C. B. N. S. 32; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918; *Hamerton v. Dysart*, [1916] 1 A. C. 57. *Reidd. Pim v. Curell* (1840), 6 M. & W. 234; *Blacketer v. Gillett* (1850), 9 C. B. 26; *Matthews v. Peache* (1855), 20 J. P. 244; *Letton v. Gooden* (1866), 35 L. J. Ch. 427.

112. ———— **—**—(1) A public ferry is a public highway of a special description & its termini must be in places where the public have rights, as towns or villis, or highways leading to towns or villis. It would therefore be actionable to construct a new landing place at a short distance from one terminus of an ancient ferry, & to make a practice of ferrying passengers from the other terminus & landing them at the new place, from whence they pass to the same town or vill in which the ancient ferry is, or to the same public highway in which it is so established before it reaches any town or vill, & by which highway they go immediately to the first vill or town, & to all the other villis & towns to which it leads. But where there is a river or body of water passing by several towns or places, the existence of a franchise of an ancient ferry over it from point A. on one side to point B. on the other, does not preclude the King's subjects from using the water as a public highway from or to all the other towns or places on its banks, or oblige them on all occasions to pass from one terminus of the ferry to the other.

(2) A person who kept a boat to ply for hire & ferry persons across M. H., employed a servant to row the boat. This servant was proved to have taken a passenger on board in the usual manner, & to have carried him at his request from one terminus of an ancient ferry to a place within half a mile of the other terminus:—*Held*: as the servant acted at the time in his ordinary course of employ by his master, the master would be answerable for his act, had it amounted to an infringement of the ancient ferry.

(3) It is quite clear that a ferry is a franchise which none can set up without a licence from the Crown (*LORD ABINGER, C.B.*).

A public ferry . . . is a public highway, of a special description, & its termini must be in places where the public have rights, as towns or villis, or highways leading to towns or villis. The right of the grantee is, in the one case, an exclusive right

of carrying from one point to the other all who are going to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers, must be injurious (*LORD ABINGER, C.B.*).—*HUZZEY v. FIELD* (1835), 2 Cr. M. & R. 432; 5 Tyr. 855; 4 L. J. Ex. 239; 150 E. R. 186; *sub nom. HUSSEY v. FIELD*, 1 Gale, 165.

Annotations:—*As to (1) Consd. Cory v. Yarmouth & Norwich Ry.* (1844), 3 Hare, 593; *Newton v. Cubitt* (1862), 12 C. B. N. S. 32; *Hamerton v. Dysart*, [1916] 1 A. C. 57. *Reidd. Pim v. Curell* (1840), 6 M. & W. 234; *North & South Shields Ferry Co. v. Barker* (1848), 2 Exch. 136; *Blacketer v. Gillett* (1850), 14 L. T. O. S. 351; *Matthews v. Peache* (1855), 20 J. P. 244; *Hopkins v. G. N. Ry.* (1877), 2 Q. B. D. 224. *As to (2) Reidd. Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526; *Lloyd v. Grace, Smith*, [1911] 2 K. B. 489. *As to (3) Consd. Cowes U. C. v. Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918; *Hamerton v. Dysart*, [1916] 1 A. C. 57. *Reidd. A.-G. v. Simpson*, [1901] 2 Ch. 671.

113. ———— **—**—*DIXON v. CURWEN*, [1877] W. N. 4.

114. ———— **Carriage of any person—Otherwise likely to use ferry.**—*NORTH & SOUTH SHIELDS FERRY CO. v. BARKER*, No. 6, *ante*.

115. ———— **Construction of railway—Close to ferry.**—Declaration that before & at the passing of "An Act for making a railway from the city of Chester to Birkenhead," pltf. was & thence hitherto had been owner of a ferry across the Mersey, from Tranmere to Liverpool; that by the said Act defts. were empowered to make a railway, with all necessary stations, etc., commencing at, etc., in Chester, & terminating at or near G., in Birkenhead. The declaration then stated a sect. of the Act whereby the co. were prohibited making a railway from the station at or near G. to, or to communicate with Woodside ferry until a branch railway should have been made from the main line to Birkenhead & Tranmere ferries; & alleged that defts. wrongfully, & for the purpose of evading the Act opened a railway from G. station to & to communicate with the shore of the Mersey between Woodside ferry & Birkenhead ferry & near Woodside ferry, & conveyed passengers, etc., along the same to the G. station, although no branch railway had been made from the main line to Tranmere ferry, in contempt of the Act, & to pltf.'s damage, etc.:—*Held*: on general demurrer, (1) the declaration was bad, inasmuch as it did not contain any averment that defts. had made a railway to, or to communicate with Woodside ferry, or anything which amounted in terms to an infringement of the Act.

(2) Had the declaration contained such an averment, the action might have been maintained without any allegation of special damage, the prohibition being obviously for the special protection of a particular person.—*CHAMBERLAINE v. CHESTER & BIRKENHEAD RY. CO.* (1848), 1 Exch. 870; 18 L. J. Ex. 494; 11 L. T. O. S. 270; 154 E. R. 371.

116. ———— **Access to ferry obstructed.**—*R. v. GREAT NORTHERN RY. CO.*, No. 60, *ante*.

115 i. ———— **Construction of railway—Close to ferry.**—Certain cos. were appointed by 26 Geo. 3, c. 58 (Ir.), for building & maintaining a bridge over a river & they had power to charge tolls & erect a ferry. A railway co. constructed their terminus at a place within the limits of

the ferry, & carried passengers & goods which came by their railway, over the river, within the ferry limits, but did not charge any extra fare for so doing:—*Held*: this was a disturbance of the right of ferry, & of the tolls.—*LEAMY v. WATERFORD & LIMERICK RY. CO.* (1856), 7 I. C. L. R. 27.—*IR.*

116 i. ———— **Access to ferry obstructed.**—On the facts:—*Held*: deft., being the lessee of the ordnance department, had no right to obstruct the road leading to the Niagara Falls ferry, & he was guilty of a nuisance in so doing.—*R. v. DAVIS, R. v. FRALICK* (1854), 11 U. C. R. 340.—*CAN.*

Sect. 1.—Disturbance. Sect. 2: Sub-sects. 1, 2 &

117. ————Erection of bridge—Close to ferry.]—R. v. CAMBRIAN RY. CO., No. 11, *ante*.

118. ————.]—The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic. *Qu.*: whether the exclusive right of the owner of a ferry extends beyond the carriage of passengers by boat.

A railway co., under the authority of their Act, constructed across a river, half a mile above an ancient ferry, a railway bridge & a foot bridge, the foot bridge being used by persons going to the railway station & also to other places. The traffic across the ferry fell off, & the ferry was given up. The owners of the ferry claimed compensation under Lands & Railways Clauses Acts:—*Held*: no compensation could be recovered: (1) on the ground that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot bridge, if they had been erected without the authority of an Act; (2) on the ground that, the injury to the ferry being occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within Lands Clauses Act or Railways Clauses Act.

(3) He [the owner of a ferry] is the owner of a particular description of monopoly, which the law allows to be created from its being presumed to be for the public advantage (*per* CUR.).

(4) We apprehend that the owner of a ferry has not a grant of an exclusive right of carrying passengers & goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry (*per* CUR.).—HOPKINS v. GREAT NORTHERN RY. CO. (1877), 2 Q. B. D. 224; 46 L. J. Q. B. 265; 36 L. T. 898; 42 J. P. 229, C. A.

Annotations:—As to (1) *Consd.* Cowes U. C. v. Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co., [1905] 2 K. B. 287. *Follid.* Dibden v. Skirrow, [1908] 1 Ch. 41. *Consd.* Hammerton v. Dysart, [1916] 1 A. C. 57. *Reid.* General Estates Co. v. Beaver, [1914] 3 K. B. 918. As to (2) *Reid.* G. W. Ry. v. Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787. As to (3) *Reid.* Hammerton v. Dysart, [1916] 1 A. C. 57. As to (4) *Consd.* Dibden v. Skirrow, [1908] 1 Ch. 41. *Generally.* *Mentd.* Parkdale Corp'n. v. West (1887), 12 App. Cas. 602; North Shore Ry. v. Pion (1889), 61 L. T. 525; A.-G. v. Met. Ry., [1894] 1 Q. B. 384.

117 i. ————Erection of bridge.]—Nominal damages & costs awarded against deft. for infringing the rights of pltf.'s ferriage, by building a temporary bridge across the river, deft. having removed the bridge.—GALARNEAU v. GUILBAULT (1889), 16 S. C. R. 579.—CAN.

117 ii. ————.]—The Crown, having granted to suppliant certain ferry rights over a river between two cities, subsequently leased certain property to two railway cos. to be used for the construction of a bridge across the river between the cities, & also gave permission or license to a railway co. to extend its track over certain property belonging to the Dominion Govt. on one side of the river, to enable the co. to make closer connection with an electric co.:—*Held*: the granting of the leases & licence did not constitute a breach of any contract arising out of the grant of the ferry; & the Crown was not liable to suppliant in damages.—BRIGHAM v. R. (1900), 20 C. L. T. 423; 6 Exch. C. R. 414; 30 S. C. R. 620.—CAN.

117 iii. ————.]—The mere construction of a railway bridge across a river, whereby the profits of the ferry are reduced, does not entitle the owner to claim damages.—RAMESWAR SINGH v. SECRETARY OF STATE FOR INDIA (1907), 1 L. R. 34 Calc. 470.—IND.

s. ————Interference with ferry granted by Crown.]—The charter of Fredericton which gives the corp'n. power to establish & regulate ferries within the limits of the city, does not take away the right to a ferry previously granted by the Crown, nor authorise interference with such pre-existing ferry.—UNIVERSITY OF NEW BRUNSWICK v. MCCLUSKEY (1864), 6 All. 136.—CAN.

t. ————Using boats within ferry limits.]—9 Vict. c. 9, s. 1, as well as the common law, authorises a person to use his own boat within the limits of a ferry for business or pleasure, freely & without showing his motives or occasion for allowing any person to pass in his boat, provided such person be not a traveller, & nothing be

119. ————.]—DIBDEN v. SKIRROW, No. 43, *ante*.

120. ————Provision of transit to meet new traffic—Large additional population.]—NEWTON v. CUBITT, No. 13, *ante*.

121. ————.]—HOPKINS v. GREAT NORTHERN RY. CO., No. 118, *ante*.

122. ————Different from that of ferry owner.]—COWES URBAN COUNCIL v. SOUTHAMPTON, ISLE OF WIGHT, & SOUTH OF ENGLAND ROYAL MAIL STEAM PACKET CO., No. 41, *ante*.

123. ————Neither increasing profits or burdens of owner.]—HAMMERTON v. DYSART (EARL), No. 66, *ante*.

124. ————.]—GENERAL ESTATES CO. v. BEAVER, No. 44, *ante*.

125. By servant of disturber—Liability of disturber.]—HUZZEY v. FIELD, No. 112, *ante*.

SECT. 2.—REMEDIES.

SUB-SECT. 1.—IN GENERAL.

126. Right established against disturber—Thereby established against public.]—PIM v. CURELL, No. 109, *ante*.

127. No obligation to maintain ferry—Deprives owner of right of remedy.]—LETON v. GOODDEN, No. 34, *ante*.

SUB-SECT. 2.—NATURE OF REMEDY.

128. Action for quiet possession—Whether action lies.]—CHURCHMAN v. TUNSTAL (1662), cited in 2 Anst. at p. 608; 145 E. R. 981; *previous proceedings* (1659), Hard. 162, Ex. Ch.

Annotations:—*Consd.* Huzzey v. Field (1835), 2 Cr. M. & R. 432; Hammerton v. Dysart, [1916] 1 A. C. 57. *Reid.* A.-G. v. Richards (1795), 2 Anst. 603; Lyme Regis Corp'n v. Henley (1834), 1 Bing. N. C. 222; Plin v. Curell (1840), 6 M. & W. 234; Newton v. Cubitt (1862), 12 C. B. N. S. 32.

129. ————.]—HILTON v. SCARBOROUGH (LORD), No. 2, *ante*.

charged for carrying.—IVES v. CALVIN (1847), 3 U. C. R. 464.—CAN.

a. ————Running of opposition ferry.]—Where a right of ferry was claimed as appurtenant to certain villages:—*Held*: the grant of such right by the Crown would not be destroyed by mere non-user without waiver, nor by the running of a opposition ferry.—NITYAHARI RO v. DUNNE (1891), 1 L. R. 18 Cal. 652.—IND.

PART IV. SECT. 2, SUB-SECT. 1.

b. Who may sue—Grantor of lease not under seal.]—The Crown granted a right of ferry to A., who leased by writing not under seal to B. C. disturbed the right of ferry:—*Held* the right to sue was in A., & not in B.—HIGGINS v. HOGAN (1850), 7 U. C. 401.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.

c. Injunction.]—FIFE FERRY TRUSTS v. DYSART MAGISTRATES (1821) 6 Sh. (Ct. of Sess.) 265.—SCOT.

d. Action for damages—Nomini

130. ——— Exaction of penalties the alternative remedy—Multiplicity of proceedings.]—LETTON v. GOODDEN, No. 34, *ante*.

131. Quo warranto.]—Quo warranto lies for a ferry.—R. v. REYNELL (1742), 2 Stra. 1161; 93 E. R. 1100.

Annotation:—*Refd.* R. v. Marsden (1765), 3 Burr. 1812.

132. ——— At suit of Crown.]—BLISSETT v. HART, No. 33, *ante*.

——— *See, generally*, CROWN PRACTICE, Vol. XVI., pp. 353 *et seq.*

133. Injunction—Before defendants' answer.]—Injunction before answer to restrain other ferry-boats, denied.

As it was not shown that pl'tfs. kept up sufficient ferry boats to carry passengers, etc., I denied the motion (LORD HARDWICKE, C.).—ANON. (1750), 1 Ves. Sen. 476; 27 E. R. 1152, L. C.

134. ——— Interim injunction.]—PERCY v. THOMAS (1881), 28 Sol. Jo. 533, D. C.

INJUNCTIONS.

135. Action.]—BLISSETT v. HART, No. 33, *ante*.

136. ———.]—HUZZEY v. FIELD, No. 112, *ante*.

137. ———.]—PIM v. CURELL, No. 109, *ante*.

138. ———.]—HAMMERTON v. DYSART No. 66, *ante*.

139. Proceedings to recover penalty—Under statutory authority—Statutory right of ferry.]—NORTH & SOUTH SHIELDS FERRY CO. v. BARKER, No. 6, *ante*.

140. ——— ———.]—LETTON v. GOODDEN, No. 34, *ante*.

141. Appointment of receiver—Of earnings of alleged disturber—Pending trial of action.]—PERCY v. THOMAS (1881), 28 Sol. Jo. 533, D. C.

Compensation.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 144, 147, Nos. 280–281, 310.

SUB-SECT. 3.—EVIDENCE.

A. In General.

See, generally, EVIDENCE, Vol. XXII., pp. 1 *et seq.*

142. Maintenance of ferry by plaintiff—Whether necessary.]—GRAVESEND CASE (1612), 2 Brownl. 177; 123 E. R. 883.

Annotations:—*Mentd.* Fazakerley v. Wiltshire (1721), 1 Stra. 462; Macclesfield Corpn. v. Pedley (1833), 4 B. & Ad. 397.

143. ———.]—BLISSETT v. HART, No. 33, *ante*.

144. Payment of toll.]—PETER v. KENDAL, No. 150, *post*.

145. Reputation.]—PIM v. CURELL, No. 109, *ante*.

—.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 123 *et seq.*

146. Judgment or order of court—Only if final—Not interlocutory.]—PIM v. CURELL, No. 109, *ante*.

—.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 283–285, 296–300, 304–307, 309–311.

147. Fraudulent intent of defendant.]—A count alleged that def't., contriving to disturb pl'tfs. in the enjoyment of their ferry, injuriously & against their wills carried passengers across the river near pl'tfs.' ferry, *per quod*, they had been deprived of profits of their ferry, & disturbed in the possession of it:—*Held*: upon motion in arrest of judgment, the count disclosed a good cause of action, & was not bad for omitting to aver that def't., in carrying near pl'tfs.' ferry, either intended to defraud pl'tfs. or to set up a new ferry.—BLACKETER v. GILLET (1850), 9 C. B. 26; 1 L. M. & P. 88; 19 L. J. C. P. 307; 14 L. T. O. S. 351; 14 Jur. 814; 137 E. R. 800.

Annotations:—*Refd.* Matthews v. Peache (1855), 20 J. P. 211; Newton v. Cubitt (1859), 5 C. B. N. S. 627; Hammerton v. Dysart, [1916] 1 A. C. 57.

B. What Proof of Right Required.

148. Proof of possession.]—GRAVESEND CASE (1612), 2 Brownl. 177; 123 E. R. 883.

Annotations:—*Mentd.* Fazakerley v. Wiltshire (1721), 1 Stra. 462; Macclesfield Corpn. v. Pedley (1833), 4 B. & Ad. 397.

149. ——— Sufficient.]—BLISSETT v. HART, No. 33, *ante*.

150. ———.]—(1) The owner of a ferry demised it to A. by parol at a certain annual rent. The latter, at the end of a few weeks, finding it unprofitable, proposed to become the servant of the former as boatman, & to account to him for all money received from passengers, upon being allowed fixed daily wages. This was assented to by the owner of the ferry, & A. became his servant, & received the stipulated wages:—*Held*: there was a surrender of A.'s interest in the ferry by act & operation of law.

(2) In an action on the case for the disturbance of a ferry, it is sufficient for pl'tf. to prove that he was in possession of the ferry at the time when the cause of action arose. It is not necessary for pl'tf. to allege in his declaration, or to prove at the trial, the payment of any specified sum for passage money. (3) Neglect of duty on the part of the owner of the ferry is no answer to the action, although the Crown may, on that ground, repeal the grant by *scire facias* or *quo warranto*. (4) The owner of a ferry must have a right to use the land on both sides of the water for the purpose of embarking & disembarking his passengers, but he need not have any property in the soil on either side.

Qu.: whether a ferry can be demised without deed.—PETER v. KENDAL (1827), 6 B. & C. 703; 5 L. J. O. S. K. B. 282; 108 E. R. 610.

Annotations:—*As to* (3) *Refd.* Hammerton v. Dysart, [1916] 1 A. C. 37. *As to* (4) *Refd.* R. v. G. N. Ry. (1849), 14 Q. B. 25; R. v. North & South Shields Ferry Co. (1852), 22 L. J. M. C. 9; Matthews v. Peache (1855), 20 J. P. 244; Royal v. Yaxley (1872), 20 W. R. 903; A.-G. v. Simpson, [1901] 2 Ch. 671.

151. ———.]—TROTTER v. HARRIS, No. 51, *ante*.

damages awarded—Disturbance abated.]—Nominal damages & costs awarded against def't. for infringing the rights of the pl'tf.'s forriage, by building a temporary bridge across the river, def't. having removed the bridge.—

GALARNEAU v. GUILBAULT (1889), 16 S. C. R. 579.—CAN.

PART IV. SECT. 2, SUB-SECT. 3.—B.

c. That defendant received pay-

ment.]—In an action for disturbing pl'tf.'s ferry, it is not necessary to prove that def't. received payment.—BURFORD v. OLIVER (1829), Dra. 9.—CAN.

Sect. 2.—Remedies: Sub-sect. 3, B.; sub-sect. 4, Parts V. & VI.]

152. Claim of ferry both ways—Only one way proved—Judgment as to right proved.]—In case for disturbing the enjoyment of an ancient ferry, the declaration stated that plffs. were possessed of an ancient ferry across the Thames, to & from A. from & to B. The only pleas were, not possessed, & that there was not such an ancient ferry. The only right proved was an ancient right of ferry from A. to B.:—*Held*: the right alleged was divisible & plffs. were entitled to have the verdict entered for so much of the right as was proved.—*GILES v. GROVES* (1848), 12 Q. B. 721; 6 Dow. & L. 146; 3 New Pract. Cas. 202; 17 L. J. Q. B. 323; 11 L. T. O. S. 433; 12 Jur. 1084; 116 E. R. 1041.

Annotations:—Mentd. Rochdale Canal Co. v. Radcliffe

(1852), 18 Q. B. 287; *Withers v. Parker* (1860), 6 Jur. N. S. 1033.

Ownership of land.]—See Part I., Sect. 2, sub-sect. 2, *ante*.

SUB-SECT. 4.—DEFENCES TO ACTION FOR DISTURBANCE.

153. Neglect of duty by ferry owner—No defence.]—*PETER v. KENDAL*, No. 150, *ante*.

Passengers carried to new terminus—Such terminus serving different area.]—See Nos. 111, 113, *ante*.

New & different traffic.]—See Nos. 13, 41, 44, 66, 118, *ante*.

Part V.—Extinguishment or Relinquishment of Ferries.

154. By licence.]—*PAYNE v. PARTRIDGE*, No. 87, *ante*.

155. Operation of law—Surrender of lease of ferry.]—*PETER v. KENDAL*, No. 150, *ante*.

156. By statute—Extinction of ancient ferry—By establishment of statutory ferry.]—*NORTH & SOUTH SHIELDS FERRY CO. v. BARKER*, No. 6, *ante*.

157. — Substitution of bridge for ferry.]—The owner of a ferry obtained an Act of Parliament enabling him to build a bridge, instead of the ferry, & to take tolls thereon; & enacting that any person who should evade the payment of the tolls by conveying, or assisting to convey, passengers, etc., across the river, within the limits of the ferry, otherwise than by the bridge, should forfeit & pay 40s. for every such offence, to be recovered in a summary way before a justice of the peace, & levied under a warrant to be issued by such justice; & that one moiety of such penalty should be paid to the informer & the other to the owner of the bridge; & that, where no sufficient distress was found, the offender might be committed for non-payment of such penalty; & that any party aggrieved might appeal from any order of a justice, under the Act, to quarter sessions, but no order or proceedings in the execution of the Act should be removed by *certiorari* or any other suit or process to any ct. of record at Westminster. On a motion to restrain a railway co., whose terminus was within the limits of the ferry, from conveying railway passengers

across the river in steamboats:—*Held*: although the Act which substituted the bridge for the ferry gave the owner of the bridge no right of action against persons evading the tolls, yet, if he were entitled to recover penalties against offenders under the Act, *de die in diem*, the ct. would protect him by injunction from the infringement of his right.—*CORY v. YARMOUTH & NORWICH RY. CO.* (1844), 3 Hare, 593; 3 Ry. & Can. Cas. 524; 67 E. R. 516.

Annotations:—Reid. Hammerton v. Dysart, [1916] 1 A. C. 57. *Mentd. Perkins v. L. & N. W. Ry.* (1874), 1 Ry. & Can. Tr. Cas. 327.

158. — —.]—*WADMORE v. DEAR, WADMORE v. ARIES* (1871), L. R. 7 C. P. 212; 1 Hop. & Colt. 687; 41 L. J. C. P. 49; 26 L. T. 28; 36 J. P. 328; 20 W. R. 239.

Annotation:—Mentd. Nesbitt v. Mablethorpe U. C., [1918] 2 K. B. 1.

159. — —.]—By a local Act, the owner of a ferry was empowered to substitute a bridge for the ferry, & to set up toll gates or turnpikes & toll houses "in, upon, across, or near to the said bridge, or at or upon any of the approaches or communications therewith; & from time to time to remove the same & set up others in lieu thereof, at the same place or at any other place upon any part of the said bridge or approaches, & to demand & take tolls or pontage thereat." The toll gates were, some time after the erection at a point near the bridge, removed, & others erected at a spot distant 902 yards from the bridge:—*Held*: the new toll gates were not placed within a reasonable

PART IV. SECT. 2, SUB-SECT. 4.

1. Omission to furnish accommodation—To persons using ferry.]—The omission to furnish full accommodation to any number of persons offering themselves to be ferried over is no defence to an action for a disturbance of an admitted right.

g. Ferry monopoly given by statute—No allegation in claim—Of injury to plaintiffs—By acts of defendant.]—*EAST LONDON CORPN. v. WILLIAMS* (1882), 2 E. D. C. 179.—S. AF.

PART V.

157 i. By statute—Substitution of bridge for ferry.]—An Act of Parliament was passed authorising the road trustees of a county to erect a bridge over a river where there had formerly been a ferry, on condition either that the trustees should compensate the proprietor of the ferry. The trustees did not avail themselves of this power; but the proprietor of the ferry built a bridge at his own cost, & levied thereupon the rates formerly charged for the use of the ferry boat. Several years afterwards certain fowars &

residents in a neighbouring village brought an action for count & reckoning:—*Held*: as the bridge had been erected at the proprietor's private cost as a substitute for the ferry, pursuers were not entitled to insist against him for count & reckoning, or to have the bridge declared toll free, whenever it was shown that the proprietor had received the compensation provided by the statute in the case of the trustees resolving to build the bridge.—*CUMMING v. SMOLLETT* (1852), 14 Dunl. (Ct. of Sess.) 885; 24 Sc. Jur. 529; 1 Stuart, 875.—SCOT.

distance from the bridge under the statute, & that toll could not be legally demanded thereat.—*ROYAL v. YAXLEY* (1872), 36 J. P. 680 ; 20 W. R. 903.

160. — Compensation to ferry workers —For loss of employment.]—Under a local Act of 1905, empowering defts. to construct a bridge over a river in substitution for a ferry, the powers, rights, & duties of the trustees constituted under a previous local Act for establishing the ferry were taken over by & vested in defts. At the time of the coming into operation of the Act of 1905 pltfs. were in the employ of the trustees as ferry-men. The Act of 1905 provided (*inter alia*) that defts. should pay compensation to any officers & servants in the regular employment of the trustees who should not be retained by defts. in the same or similar office or employment & at the salary & on the terms & conditions in, at, & on which they respectively were employed by the trustees at the date of the signing & sealing of

the contract for the construction of the bridge in respect of any loss of office or loss or diminution of salary or income by reason of the transfer of the undertaking by the trustees to defts., the amount of such compensation, in default of agreement, to be determined by arbitration. During the time that the bridge was being built pltfs. were retained in the employment of defts. as ferrymen at the same wages & remuneration as they had previously received. When the bridge was completed & the services of pltfs. were consequently no longer required, defts. determined the employment of pltfs. as ferrymen. Pltfs. claimed a declaration under the sect. that each of them was entitled to compensation for the loss of his employment as ferryman, & consequential relief:—*Held*: in these circumstances all that pltfs. were entitled to was a week's wages in lieu of the week's notice which they had the right to receive from defts.—*LATTER v. LITTLEHAMPTON URBAN DISTRICT COUNCIL* (1909), 101 L. T. 172 ; 73 J. P. 426 ; 8 L. G. R. 211, C. A.

Part VI.—Taxation and Rating of Ferries.

, generally, INCOME TAX ; RATES & RATING.

161. Ratability of tolls — Owner not resident within area of termini.]—The owner of the ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants & agents, is not ratable for such tolls in the parish where they were so collected, & where one of the termini of the ferry was situated, & on which shore the ferry boats were secured by means of a post in the ground ; the soil itself at the landing places being the King's common highway ; & the owner of the ferry having no property in, or exclusive possession of it.—*WILLIAMS v. JONES* (1810), 12 East, 346 ; 104 E. R. 136.

Annotations:—*Appld.* *R. v. Nicholson* (1810), 12 East, 330. *Refd.* *R. v. Mersey & Irwell Navigation Co.* (1829), 9 B. & C. 95. *Mentd.* *R. v. Baptist Mill Co.* (1813), 1 M. & S. 612 ; *R. v. North Curry* (1825), 4 B. & C. 953 ; *R. v. Bristol Dock Co.* (1841), 1 Q. B. 535 ; *Electric Telegraph Co. v. Salford Overseers* (1855), 11 Exch. 181.

162. — — —.]—The lessee & occupier of an ancient & exclusive ferry, not being an inhabitant resident within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry : for supposing a ferry to be real property, it is not such real property as is mentioned in Poor Relief Act, 1601 (c. 2), the occupancy of which subjects the party to the relief of the poor of the place ; & all the cases where parties have been held ratable in respect of the occupancy or receipt of tolls, apart from the question of inhabitancy, have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated.

The owner of the ferry may be said, perhaps, to have a right to make a special use of the highway ; but he cannot be said to have the occupation

of the highway (*LORD ELLENBOROUGH, C.J.*).—*R. v. NICHOLSON* (1810), 12 East, 330 ; 1 Bott, 6th ed. 80 ; 104 E. R. 129.

Annotations:—*Folld.* *R. v. St. Mary, Pembroke* (1851), 15 J. P. Jo. 336. *Consd.* *R. v. North & South Shields Ferry Co.* (1852), 1 E. & B. 140. *Refd.* *R. v. Milton* (1819), 3 B. & Ald. 112. *Mentd.* *R. v. Bath Corp.* (1811), 14 East, 609 ; *R. v. Baptist Mill Co.* (1813), 1 M. & S. 612 ; *R. v. Palmer* (1823), 1 B. & C. 546 ; *R. v. North Curry* (1825), 4 B. & C. 953 ; *R. v. Bristol Dock Co.* (1841), 1 Q. B. 535.

163. — Owner not occupying local realty.]—*R. v. NICHOLSON*, No. 162, *ante*.

164. — — —.]—*R. v. ST. MARY, PEMBROKE* (1851), 15 J. P. Jo. 336.

165. — Owner possessing property in termini —Rate in respect of profits of land.]—By a local Act, a co. was authorised to maintain a ferry by boats between N. & S., towns on opposite sides of the Tyne, which is there a navigable tide river, to erect ferry houses & offices on each side of the river for the habitation & use of the ferrymen managing the ferry, & the convenience of persons using it, to make & repair causeways at the landing places, & to make roads from the ferry on each side of the river, & purchase lands necessary for the purposes of the Act ; & to receive tolls for the passing to & over the ferry. The co. were rated to the poor of the township on the north side, as occupiers of a "ferry, landing & tolls" in a sum including half the net value of the tolls:—*Held*: (1) the tolls could not be rated, either directly as being connected with real property occupied in the township & as thus ceasing to be incorporeal, or indirectly by taking them into account as profit of the lands ; (2) the land should be rated on an estimate of the rent which might be obtainable for it in consideration of its being

PART VI.

h. Right of Montreal City—To tax or control ferries—Within its limits.]—The jurisdiction of the Montreal Har-

bour Comrs. does not exclude the right of the City of Montreal to tax or control ferries, within its limits.—*LONGUEUIL NAVIGATION Co. v. MONTREAL CITY* (1858), 15 S. C. R. 566.—CAN.

k. Landing places of ferry in separate parishes—What parish may assess.]—*ANDERSON v. PILLANDERS* (1853), 1 W. R. 375.—SCOT.

available for the purpose of earning the tolls; (3) the ratable value of the land in question could not be ascertained by dividing the profits in the proportion of the land occupied in the two townships & the length of the transit.—*R. v. NORTH & SOUTH SHIELDS FERRY CO.* (1852), 1 E. & B. 140; 7 Ry. & Can. Cas. 849; 22 L. J. M. C. 9; 20 L. T. O. S. 89; 17 J. P. 21; 17 Jur. 181; 118 E. R. 390.

Annotations :—As to (2) *Reid. R. v. Bedminster Union Assmt. Com.* (1876), 45 L. J. M. C. 117. *Generally, Mentd. S. E. Ity. v. Dorking, Churchwardens* (1854), 7 Ry. & Can. Cas. 877.

166. Ratability of termini—Ratable value—How ascertained.—*R. v. NORTH & SOUTH SHIELDS FERRY CO.*, No. 6, *ante*.

167. Assessment of income tax—Exemption from all taxes by statute—Tax imposed subsequent

to statute.—A ferry was established by & maintained under a local Act of 1790, which was to be deemed to be a public Act, & contained a provision that the then proprietors, or their respective heirs or assigns, "shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry . . .":—*Held*: the exemption granted by the statute extended to parliamentary taxes whether in existence at the date of the Act or not, & therefore included income tax, although that tax was first imposed subsequently to the passing of the Act of 1790.—*POLE-CAREW v. CRADDOCK*, [1920] 3 K. B. 109; 89 L. J. K. B. 507; 123 L. T. 309; 36 T. L. R. 447; 7 Tax. Cas. 488, C. A.

Annotations :—*Mentd. Harper v. Hodges*, [1923] 2 K. B. 1; *Shrewsbury v. Shrewsbury* (1923), 40 T. L. R. 16.

Part VII.—Merchant Shipping Act, 1894, and Ferries.

See Merchant Shipping Act, 1894 (c. 60), ss. 1, 2 (1), 3 (1), 267, 271, 742, 743; Merchant Shipping

Acts Amendment Act, 1906 (c. 48), s. 13; SHIPPING.

FERTILISERS AND FEEDING STUFFS.

See AGRICULTURE.

FIDELITY BONDS.

See GUARANTEE.

FIDUCIARY RELATIONS.

See AGENCY ; COMPANIES ; FRAUDULENT AND VOIDABLE CONVEYANCES ; MISREPRESENTATION AND FRAUD ; TRUSTS AND TRUSTEES.

FIELD GARDENS.

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FIERI FACIAS.

See EXECUTION ; PRACTICE AND PROCEDURE ; SHERIFFS AND BAILIFFS.

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FIRE, INQUEST ON.

See CORONERS.

FIRE INSURANCE.

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FIRE, LIABILITY FOR.

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